REPORTS OF CASES

DECIDED BETWEEN

FEBRUARY 19, 1972 and AUGUST 3, 1972

IN THE

Supreme Court of Nebraska

JANUARY TERM 1972

VOLUME CLXXXVIII

H. EMERSON KOKJER

OFFICIAL REPORTER

GANT PUBLISHING COMPANY
LINCOLN, NEBRASKA
1973

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

PAUL W. WHITE, Chief Justice
HARRY A. SPENCER, Associate Justice
LESLIE BOSLAUGH, Associate Justice
ROBERT L. SMITH, Associate Justice
HALE MCCOWN, Associate Justice
JOHN E. NEWTON, Associate Justice
LAWRENCE M. CLINTON, Associate Justice

H. EMERSON KOKJER ..... Reporter
JACQUELYN M. LEACH ..... Assistant Reporter
GEORGE H. TURNER ..... Clerk
WALTER G. PURTZER ..... Deputy Clerk
ELIZABETH M. YOUNG ..... Opinion Clerk
CLARENCE A. H. MEYER ..... Attorney General
GERALD S. VITAMVAS ..... Deputy Attorney General
HAROLD S. SALTER ..... Deputy Attorney General for Claims
BERNARD L. PACKETT ..... Assistant Attorney General
MELVIN K. KAMMERLOHR ..... Assistant Attorney General
ROBERT R. CAMP ..... Assistant Attorney General
HAROLD MOSHER ..... Assistant Attorney General
CHAUNCEY C. SHELDON ..... Assistant Attorney General
CALVIN E. ROBINSON ..... Assistant Attorney General
RALPH H. GILLAN ..... Assistant Attorney General
JAMES J. DUGGAN ..... Assistant Attorney General
WARREN D. LICHTY, JR. ..... Assistant Attorney General
BETSY G. BERGER ..... Assistant Attorney General
E. D. WARNSHOLZ ..... Assistant Attorney General

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Pawnee, Nemaha, and Richardson.	William F. Colwell	Pawnee City
Second	Sarpy, Cass, and Otoe.	Victor H. Schmidt Walter H. Smith	Papillion Plattsmouth
Third	Lancaster.	Herbert A. Ronin Elmer M. Scheele Bartlett E. Boyles William C. Hastings	Lincoln Lincoln Lincoln Lincoln
Fourth	Douglas.	Patrick W. Lynch Lawrence C. Krell James P. O'Brien Donald Brodkey John C. Burke John E. Murphy Rudolph Tesar Donald Hamilton James A. Buckley Theodore L. Richling Samuel Caniglia	Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha
Fifth	Hamilton, Polk, York, Butler, Seward, and Saunders.	Howard W. Kanouff John D. Zeilinger	Wahoo York
Sixth	Dodge and Washington.	Robert L. Flory	Fremont
Seventh	Fillmore, Saline, Thayer, and Nuckolls.	Orville L. Coady	Hebron
Eighth	Thurston, Dakota, Dixon, and Cedar.	Joseph E. Marsh	South Sioux City
Ninth	Knox, Antelope, Cuming, Pierce, Madison, Stanton, Wayne, and Burt.	George W. Dittrick Merritt C. Warren	Norfolk Creighton
Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster.	Norris Chadderdon Fredric R. Irons	Holdrege Hastings
Eleventh	Hall.	Donald H. Weaver	Grand Island
Twelfth	Sherman and Buffalo.	S. S. Sidner	Kearney
Thirteenth	McPherson, Logan, Lincoln, and Dawson.	Hugh Stuart	North Platte
Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy.	Jack Hendrix	Trenton
Fifteenth	Brown, Keya Paha, Boyd, Rock, Holt, and Wheeler.	William C. Smith, Jr.	Ainsworth
Sixteenth	Cherry, Sheridan, Dawes, Box Butte, and Sioux.	Robert R. Moran	Alliance
Seventeenth	Scotts Bluff.	Ted R. Feidler	Scottsbluff
Eighteenth	Jefferson and Gage.	William B. Rist	Beatrice
Nineteenth	Banner, Kimball, Morrill, Cheyenne, Garden, Deuel, Arthur, and Keith.	John H. Kuns	Kimball
Twentieth	Grant, Hooker, Thomas, Blaine, Loup, Garfield, Greeley, Howard, Valley, and Custer.	William F. Manasil	Burwell
Twenty-first	Boone, Platte, Colfax, Nance, and Merrick.	C. Thomas White	Columbus

ATTORNEYS

Admitted Since the Publication of Volume 187

WILLIAM F. ABELL
JOHN FREDERICK AKIN
WILLIAM M. ALEXANDER
GEORGE D. ANDERSON
JACK B. ANDERSON
JAMES D. ARUNDEL
CHARLES WESLEY BALSIGER
DOUGLAS M. BARTOW
GERALD M. BATLINER
BRIAN F. BECKNER
JAMES RAY BLINN, JR.
STEPHEN F. BOGUCHWAL
PHILLIP JOHN BOWEN
DANIEL J. BRETTHAUER
BRUCE HARRISON BRODKEY
JOHN R. BROWNELL
GEORGE E. BRUGH
JOSEPH J. BURES
GARY D. BYRNE
JAMES ALDEN CADA
CHARLES M. CALDWELL
JOHN M. CANN
JAMES M. CARNEY
VINCENT LAURENCE CARNEY
CAROL WAYNE CASE
JOHN J. CAVANAUGH, III
DAVID GEORGE CHALLED
BERTRAM LINCOLN CHARLES
GEORGE EDWARD CLOUGH
CARL DAVID COHEN
CHARLES KINGSTON COLE
THOM K. COPE
SHANLER D. CRONK
ALAN HERBERT CURTISS
JEFFREY EUGENE CURTISS
BRUCE A. CUTSHALL
RUSSELL S. DAUB
FRANCIS XAVIER DAVIS
RAYMOND N. DAVIS
RAYMOND RALPH DECKERT
LARRY R. DEMERATH
SPENCER W. DILLON
WILLIAM J. DITTMEIER
HARRY D. DIXON, JR.
GARY L. DOLAN
MARY LUCILLE DORWART
LARRY ALBERT DUFF
LAWRENCE EDWARD DUGAN
GENE E. DUNCAN
GERRY A. DUNLAP
JON A. ELLIOTT
ALBERT M. ENGLES
JOHN L. ERICKSON
JOHN C. EVANS
JEROLD V. FENNELL
THOMAS EDGAR FERNEAU
DENNIS P. FITZGERALD
BRUCE D. FLEMING
STEVEN J. FLODMAN
JAY R. FRIEDLY
STEVEN ROBERT FUCHSER
REX L. FULLER, III
JAMES ALAN GALLANT
DOUGLAS KELLY GERMAN
EVELYN GHOLSTON
THOMAS JOSEPH GIST
JOHN L. GIULIETTI
RICHARD L. GORDON
KENNETH DEAN GOSKINS
DENNIS J. GREEN
CONRAD J. GREICAR
JOHN M. GUTHERY
J. ANTHONY HAEFER
ROBERT J. HAMER
FREDERICK HANDELMAN
WILLIAM JOHN HANLON
DONALD LOUIS HANSEN
JON ARLIN HANSON

PAUL HARVEY HANSON
LEONARD F. HARPER
JAMES C. HART, JR.
GARY FRED HATFIELD
DAVID L. HEFFLINGER
WAYNE B. HENRY
JOHN W. HERDZINA
STEVEN HOWARD HINMAN
BERTRAM E. HIRSCH
GEORGE L. HIRSCHBACH
ROGER R. HOLTHAUS
RICHARD JOSEPH HOUGH
MICHAEL M. HROCH
STEVEN R. HUTCHINS
ROBERT A. IDE
ERNEST MELVIN JACKSON
HARVEY RAY JACKSON
RICHARD NEIL JANNEY
JOHN MARTIN JETTER, IV
JOHN PAUL JOHNSON
MICHAEL R. JOHNSON
JOHN JOSEPH KASTL
ROGER L. KEETLE
MICHAEL A. KELLEY
JOHN W. KING
WILLIAM J. KLEINKAUF
DOUGLAS L. KLUENDER
LYLE JOSEPH KOENIG
ROBERT F. KOKRDA
RICHARD G. KOPF
STEPHEN J. KRAVIEC
GARY EUGENE LACEY
LARRY DEAN LAMSON
DAVID MORRISON LANDIS
DAVID J. LANPHIER
PAUL J. LAPUZZA
MILTON R. LARSON
RALPH E. LARSON
CHARLES STANTON LASHELLE
EDWARD J. LASKOWSKI
LEE BROWN LIGGETT
EUGENE LIPSCOMB
THOMAS J. LUND
STEVEN M. LUTTBEG
JOHN P. MCARDLE
RAYMOND L. MCCLORY
MAC H. MCCONNELL
RICHARD LEE MCCOY
JERRY J. MCDALE
BRIAN BORU MCGOVERN
JOHN J. MCGRATH
TIMOTHY J. MCREYNOLDS
ARLEN DUANE MAGNUSON
THOMAS C. MARFISI
WAYNE J. MARK
WARREN GREY MARTIN
DOUGLAS P. MISTEREK
THOMAS JUSTIN MONAGHAN
CRAIG W. MONSON
DENNIS C. MORAN
THOMAS G. MORGAN
RICHARD P. MORI
JAMES W. MORIARTY
JOHN H. MOSEMAN
JAMES D. MOSER
JOSEPH T. MOUNTER
WESLEY C. MUES
DONALD J. MUETING
FREDRICK F. NEID
KENNETH LOUIS NOHA
WILLIAM HENRY NOLLKAMPER, III
GERALD P. NOONAN
GARY C. NORTON
MICHAEL WOOD NYE
PATRICK T. O'BRIEN
JOHN REED O'HANLON
THOMAS M. OLSON
RICHARD HAROLD OSBORNE
THOMAS A. OTEPKA
JACK ROBERT OTT
MICHAEL J. OWENS
TIMOTHY C. PACE
JAMES D. PACKWOOD, JR.
DONALD PAILEN
JAMES PAINE
PATRICK A. PARENTEAU
JAMES C. PASSOLT
MICHAEL J. PATTERSON
RICHARD J. PEDERSON
WILLIAM F. PETER
EUGENE LOCKE PIEPER

ROBERT A. PLANANSKY
CHARLES PLANTZ
JANET B. PORTER
ROBERT W. PRATT
JAMES HENRY QUIGLEY
WALTER H. RADCLIFFE
TONEY JAMES REDMAN
RANDALL L. REHMEIER
WILLIAM JAY REILEY
RICHARD S. REISER
JAMES E. REMBOLT
MICHAEL E. ROCK
LESLIE HAMILTON ROWE
DANIEL W. RYBERG
JASPER C. SALVO
TERRY D. SATTLER
GREGORY M. SCHATZ
STEVEN LEWIS SCHOONOVER
HARLEY DEAN SCHRAGER
RICHARD E. SCOTT
WINFIELD JOSEPHUS SCOTT
JOHN O. SENNETT
LEROY PAUL SHUSTER
RICHARD D. SIEVERS
JAMES SILHASEK
BRIAN C. SILVERMAN
JAMES S. SILVERMAN
JOHN F. SIMMONS
VITA ANN SIMON
RAYMOND LOUIS SLAUGHTER
ELVIN SLOAN
JACK C. SLOAN
DALE B. SMITH
DANIEL ARTHUR SMITH
ROBERT W. SMITH
WALTER J. SMITH
JAMES A. SNOWDEN
MARK T. STARR
RONALD HUBERT STAVE
JOHN F. STEINHEIDER
MARVIN R. STEINKE
ROBERT B. STEWART
ROBERT D. STOWELL
STEVEN OTHO STUMPFF
CLIFFORD J. STUREK
CANDACE T. SUTER
GEORGE A. SUTERA
ARVID J. SWANSON
MICHAEL A. SWANSON
RICHARD L. SWENSON
STEVEN TAYLOR SWIHART
DENNIS C. TEGTMEIER
J. BRUCE TEICHMAN
CHARLES L. TITUS
THOMAS H. TREINEN
ANTHONY SAMUEL TROIA
RICHARD A. TRUDELL
GALEN F. ULLSTROM
WILLIAM MICHAEL VILMONT
JUDITH ANNE WAGONER
J. MICHAEL WALKER
THOMAS M. WALSH
MICHAEL S. WARGO
BRIAN ROBERT WATKINS
LOUISE C. WEST
ROBERT D. WESTADT
STEPHEN CARL WILLETT
ROBERT P. WINTZ
WILLIAM JAMES WOCHNER, JR.
ALAN M. WOOD
WILLIS G. YOESEL
THOMAS J. YOUNG
WILLIAM BLAHOSLAV ZASTERA
JAMES L. ZIMMERMAN

TABLE OF CASES REPORTED

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1972

STATE OF NEBRASKA EX REL. SCHOOL DISTRICT OF HARTINGTON, ALSO KNOWN AS SCHOOL DISTRICT NO. 8, CEDAR COUNTY, NEBRASKA, APPELLEE, V. NEBRASKA STATE BOARD OF EDUCATION ET AL., APPELLANTS.

195 N. W. 2d 161

Filed February 25, 1972. No. 37942.

Schools and School Districts: Constitutional Law: Property: Contracts. It is not unconstitutional for a public school district to use or lease classrooms in a church or other sectarian building for public school purposes if the property used or leased is under the control of the public school authorities and the instruction offered is secular and nonsectarian.

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

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

Robert B. Crosby of Crosby, Pansing, Guenzel & Binning, for appellee.

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

BOSLAUGH, J.

This is an action by the School District of Hartington, Nebraska, to compel the Nebraska State Board of Education, and the Nebraska Department of Education, to approve its application for a grant of federal funds to

provide instructional activities and services to meet the special educational needs of educationally deprived children. The application, dated September 8, 1969, was made pursuant to the Federal Elementary and Secondary Education Act of 1965.

Because of a shortage of space in the buildings owned by the Hartington School District, the district entered into a lease with the Hartington Cedar Catholic High School for the use of one classroom full time and a second classroom half time. The lease provided that the classrooms would be used only for carrying on the project under the Federal Elementary and Secondary Education Act of 1965; that the Hartington School District would have full control over the classrooms and the educational program; and that no objects, pictures, or other articles having a religious meaning or connotation would be in the classrooms.

The defendants refused to approve the application because the project included the use of leased classrooms in the Hartington Cedar Catholic High School Building. This action followed.

The trial court found generally for the plaintiff and ordered the defendants to approve the application. The defendants appeal. The sole issue presented is whether the lease between the plaintiff and the Hartington Cedar Catholic High School is in violation of the Constitution of the United States and the Constitution of Nebraska. The particular provisions involved are the establishment clause of the First Amendment to the Constitution of the United States, and the prohibition against public aid to any sectarian or denominational school contained in Article VII, section 11, of the Constitution of Nebraska.

The First Amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

The Constitution of Nebraska provides: "Neither the State Legislature nor any county, city or other pub-

lic corporation, shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof." Art. VII, § 11, Constitution of Nebraska.

The right of a public school district to use or lease all or a part of a church or other sectarian building for public school purposes has been upheld in a number of cases. As stated by the Supreme Court of Michigan in In re Proposal C, 384 Mich. 390, 185 N. W. 2d 9: "Premises occupied by lease or otherwise for public school purposes under the authority, control and operation of the public school system by public school personnel as a public school open to all eligible to attend a public school are public schools. This is true even though the lessor or grantor is a nonpublic school and even though such premises are contiguous or adjacent to a nonpublic school." See, also, State ex rel. Conway v. District Board, 162 Wis. 482, 156 N. W. 477; Dorner v. School Dist., 137 Wis. 147, 118 N. W. 353; Millard v. Board of Education, 121 Ill. 297, 10 N. E. 669; Scripture v. Burns, 59 Iowa 70, 12 N. W. 760; Swadley v. Haynes (Tenn.), 41 S. W. 1066; Rawlings v. Butler (Ky.), 290 S. W. 2d 801, 60 A. L. R. 2d 285; Crain v. Walker, 222 Ky. 828, 2 S. W. 2d 654; City of New Haven v. Town of Torrington, 132 Conn. 194, 43 A. 2d 455; State ex rel. Johnson v. Boyd, 217 Ind. 348, 28 N. E. 2d 256.

If the property used or leased is under the control of the public school authorities and the instruction offered is secular and nonsectarian, there is no constitutional violation. The lease in this case meets these requirements. We find no "excessive entanglement" between government and religion in the lease involved in this case. See Walz v. Tax Commission, 397 U. S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697.

The defendants concede that it is not ipso facto un-

lawful for a public school district to lease property from a church-affiliated organization or institution for public school purposes. They attempt to raise a broader issue and challenge the "general constitutionality of the total educational program here involved." The defendants assert that it is unconstitutional for parochial school children to participate in an educational program under the federal act.

The federal act requires that educationally deprived children within the public school district who are enrolled in private schools be allowed to participate in the program. 20 U. S. C. A., § 241e (a) (2). Section 116.19 (b) of the federal regulations provides that the private school students' participation in the program shall be on a basis comparable to that of the children enrolled in the public schools. The defendants actually seek a declaration that the federal act itself is unconstitutional. See Barrera v. Wheeler, 441 F. 2d 795 (8th Cir.). Although that issue is not presented in this case, we believe it appropriate to make the following observations concerning the contention advanced by the defendants:

The Constitution of Nebraska specifically provides that no religious test or qualification shall be required of any student for admission to any public school. Art. VII, § 11, Constitution of Nebraska. It would seem that an attempt to prohibit a student enrolled in a parochial school from participating in a program conducted by the public schools, solely because the student was enrolled in a parochial school, would violate this provision of the Constitution of Nebraska.

The United States Supreme Court has, in the past, recognized a distinction between aid provided to parochial school students or their parents and aid provided to the school itself. In Everson v. Board of Education, 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711, 168 A. L. R. 1392, public transportation of nonpublic students was held constitutional. In Board of Education v. Allen, 392 U. S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060, the loan of school-

books for parochial school students was approved. In Earley v. DiCenso, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745, and Robinson v. DiCenso, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745, payment of a salary supplement to teachers of secular subjects in nonpublic schools was held invalid. In Lemon v. Kurtzman, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745, reimbursement for teachers' salaries, textbooks, and instructional materials for secular subjects in nonpublic schools was held invalid. In Tilton v. Richardson, decided June 28, 1971, 403 U. S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790, Chief Justice Burger stated: "Our cases from Everson to Allen have permitted church-related schools to receive government aid in the form of secular, neutral, or nonideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school which they attend." See, also, P.O.A.U. v. Essex, 28 Ohio St. 2d 79, 275 N. E. 2d 603.

The record shows that the classes which would be conducted by the Hartington School District in the leased classrooms would include both students enrolled in the public schools and students enrolled in nonpublic schools. It would seem that to deny a student the right to participate in a program offered by a public school district solely because that student is enrolled in a parochial school would violate that student's right to a free exercise of religion and to equal protection of the law. In re Proposal C, *supra*.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, C. J., dissenting.

Article VII, section 11, of the Constitution of the State of Nebraska provides: *"Neither the State Legislature nor any county, city or other public corporation, shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the*

State or a governmental subdivision thereof." (Emphasis supplied.)

We have before us in this case the issue of whether federal aid extended under Title I of the Elementary and Secondary Education Act (hereinafter referred to as ESEA), Pub. L. 89-10, 79 Stat. 27 (1965), 20 U. S. C. 884 (Supp., 1965), is an impermissible violation in contravention of the above provisions of the Constitution of the State of Nebraska and the First Amendment to the Constitution of the United States. Broadly stated, the issue involved here centers around the historic constitutional requirement that government and religion remain separate, and in particular, whether the Constitution of the United States and the Constitution of the State of Nebraska permit public aid to sectarian schools.

At the outset, it should be made clear that what we are dealing with here is not simply a lease or an arrangement between a public and private school for the use of space or physical equipment in any building. The attempt to diminish or evade the issue before us in this case can be clearly exposed by a recital of how this case arose: Section 205(a), 79 Stat. 30, 31 (1965) states: "A local educational agency may receive a basic grant under this title for any fiscal year only upon application therefor approved by the appropriate State educational agency * * *." In hopes of securing a federal grant, the School District of Hartington, Nebraska, made application to the Director of Title I, ESEA, Nebraska State Department of Education, in the fall of 1969 for a Title I project to instruct qualifying students in remedial reading and remedial mathematics. The application's cover letter begins by stating, "Within our ESEA Title I project for fiscal year 1970, there has been included a Lease Agreement Contract between the Hartington Public School and Cedar Catholic High School of Hartington for facilities in which to conduct our Title I project * * *." The proposed project would have had the qualifying public and private school students attend remedial

reading and mathematics classes in two classrooms located in Cedar Catholic High School. Qualifying public and private school students would attend health and industrial arts classes in the public high school classrooms. Due to a shortage of classrooms in the public schools and the absence of any other practical location for the Title I programs, the School District "incorporated" the lease agreement into their Title I project for 1970.

Upon the appellants' refusal to approve the Hartington project, the School District of Hartington brought a mandamus action in the district court for Lancaster County. The School District sought to compel the appellants to approve the Hartington Title I project. The district court found that "the program for courses in remedial reading and remedial mathematics * * * including the use of leased classroom space for part of said program * * * does not violate the Constitutions of Nebraska, or the United States, and should be approved * * *."

One further word about the precise issue presented in this case. The weakness of appellee's position upon the state-church issue is apparent from the strenuous attempt throughout this litigation to constrict the issue to whether the lease of the physical classroom space from a parochial school is unconstitutional. We do not even need to peer through the form to see the substance of this scheme. It is apparent on the face of it. The lease does not stand alone at any time. It is included, it is true, in the overall Title I project application submitted by the School District, and although the lease was not directly related to the health and industrial arts classes that were to be held within the public school, the lease obviously is an integral part of the entire project. If nothing else, the lease was essential to the operation of the remedial reading and mathematics aspect of the project, and without the need to conduct remedial reading and mathematics classes there was no reason for the lease agreement. The only purpose of the application,

and the only purpose of the scheme, is to channel federal and state appropriated funds into the assistance of the education program of nonpublic schools, hopefully without getting involved in church-state questions. It is enough to say that the drafters of the ESEA in 1965, in attempting to weave their way through the United States Supreme Court's decisions dealing with the church-state issue, have set up a vaguely defined corridor through which funds may be channeled to assist nonpublic schools. For an analysis of this aspect of the act, see, Senate Rep. No. 146, 89th Cong., 1st Sess. (1965); Drinan, Reflections on the Implications of Title I of the Elementary and Secondary Education Act of 1965, 15 Cath. Law 179 (1969); Comment, the Elementary and Secondary Education Act of 1965 and the First Amendment, 41 Ind. L. J. 302 (1966); Feikens, The Elementary and Secondary Education Act - The Implications of the Trust-Fund Theory for the Church-State Questions Raised by Title I, 65 Mich. L. Rev. 1184 (1965).

Federal constitutional questions aside, I do not think it is an over-simplification to simply state that the answer to our problem in this case lies in the clear, unequivocal, unambiguous, and forceful language of our state Constitution. I repeat, it says: "Neither the State Legislature nor any county, city or other public corporation, *shall ever* make *any* appropriation from *any* public fund, or grant any public land *in aid of* any sectarian or denominational *school* or college, or any educational institution which is *not* exclusively owned and controlled by the state or a governmental subdivision thereof." (Emphasis supplied.) These words in our Constitution say what they mean and they mean what they say. They do not draw any distinction between sectarian or secular instruction, they do not permit any shadowy distinctions as to type of instruction, personnel of teachers, or any of the other distinctions and principles sought to be applied in the numerous cases under the First Amendment to the United States Constitution. Unde-

niably the grant of these funds requires state action. The application was to the state agency. ESEA requires specific authorization by the state. The State Board of Education is an arm of the State Legislature. Certainly nobody could argue that the proposed application and grant did not come squarely within the language of the "the State Legislature nor any county, city or other public corporation, *shall ever* make *any* appropriation from *any* public fund, or grant any public land *in aid of any sectarian,* * * *." The crucial fact in this case is the ESEA program, and the application filed herein by the Hartington School District requires a state agency to act and to make an appropriation, regardless of whether the funds are considered state or federal in nature. It is inconceivable to me, that, according to the dictates of Article VII, section 11, of the Constitution of the State of Nebraska, that this act of appropriation directly "in aid of" a sectarian school could be declared constitutional.

The State of Idaho has a constitutional provision almost identical to ours. In Epeldi v. Engelking, 94 Idaho 390, 488 P. 2d 860, the Supreme Court of Idaho, in striking down a provision for bussing parochial students, *under its state constitutional provision,* said as follows: "This section in explicit terms prohibits any appropriation by the legislature or others (county, city, etc.) or payment from any public fund, *anything in aid* of any church or to help support or sustain any sectarian school, etc. By the phraseology and diction of this provision it is our conclusion that the framers of our constitution intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution. Had that not been their intention there would have been no need for this particular provision, because under Idaho Const. art 1, § 3, the exercise and enjoyment of religious faith was guaranteed (comparable to the free exercise of religion guaranteed by the First Amendment of the United States Constitution) and it further provides no person could

be required to *attend* religious services or *support* any particular religion, or pay tithes against his consent (comparable to the establishment clause of the First Amendment).

"The Idaho Const. art. 9, § 5, requires this court to focus its attention on the legislation involved to determine whether it is in 'aid of any church' and whether it is 'to help support or sustain' any church affiliated school. The requirements of this constitutional provision thus eliminate as a test for determination of the constitutionality of the statute, both the 'child benefit' theory discussed in Everson v. Board, supra, and the standard of Board of Education v. Allen, supra, i. e., whether the legislation has a 'secular legislative purpose and a primary effect that neither advances nor inhibits religion.' In this context, while we recognize that even though this legislation does assist the students to attend parochial schools, it also aids those schools by bringing to them those very students for whom the parochial schools were established. Thus, it is our conclusion that this legislation, the effect of which would be to aid the school, is prohibited under the provisions of Idaho Const. Art. 9, § 5."

We need inquire no further. It is clear that the scheme and plan involved in this case goes much further than mere bussing, because it provides for direct payments of money to assist the education of secular or private school students. The overwhelming authority from states with similar state constitutional provisions is to the same effect. See, Matthews v. Quinton, 362 P. 2d 932 (Alaska, 1961); Epeldi v. Engelking, *supra;* Spears v. Honda, 51 Hawaii 1, 449 P. 2d 130 (1969); Opinion of the Justices, 216 A. 2d 668 (Del., 1966); State ex rel. Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N. W. 2d 761 (1962); Judd v. Board of Education, 278 N. Y. 200, 15 N. E. 2d 576, 118 A. L. R. 789 (1938).

We turn now to the issue, which is before us, under

the First Amendment to the United States Constitution. First, it seems to me that the United States Supreme Court in Lemon v. Kurtzman, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), had held that the Everson case, permitting school bussing, was the trail's end with regard to what is not aiding in the establishment of religion. In that case, the court pointed out that the "verge" reached in Everson had "become the platform for yet further steps," leading to dangerous developments of federal constitutional theory. In my opinion, the principles and rationale of Lemon v. Kurtzman, *supra,* is decisive of the issue here in the present case. Lemon was a grouping of three state school aid cases, and the Supreme Court applied the "entanglement" test which it had formulated in Walz v. Tax Commission, 397 U. S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). The court said: "* * * the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." The court held two statutory school aid plans unconstitutional under the religion clauses of the First Amendment since both plans involved excessive entanglement of church and state even though both promoted secular legislative purposes. The opinion of Chief Justice Burger stressed the divisive political potential of both state programs, "one of the principal evils against which the First Amendment was intented to protect."

I can see no difference, in principle, between the Lemon case and the case we have before us. Although the Lemon case deals with state statutory aid programs to nonpublic schools, it seems clear that the present case is directly analogous and that the ESEA program with state required action, has the same "self-perpetuating and self-expanding propensities which provide a warning signal against entanglement between government and religion." See Lemon v. Kurtzman, *supra.*

We must remember that the prohibition of religious entanglement under the First Amendment is a two-edged sword. The Supreme Court of the United States spelled this principle out clearly in School District of Abington Township v. Schempp, 374 U. S. 203, 259, 83 S. Ct. 1560, 1591, 10 L. Ed. 2d 844 (1963). What it said is as follows: "* * * government and religion have discreet interests which are mutually best served when each avoids too close a proximity to the other. It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil policy, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government."

It would seem that the question under the federal Constitution involved in this case has been resolved in Sanders v. Johnson, 403 U. S. 955, 91 S. Ct. 2292, 29 L. Ed. 2d 865, where the Supreme Court of the United States, subsequent to the opinion in Lemon, affirmed a lower federal court decision involving a Connecticut state statute authorizing the state to contract with parochial schools for the purchase by the state of secular educational services for the parochial schools. The Supreme Court affirmed the holding of the lower court that such a statute was unconstitutional. The lower federal court, in Johnson v. Sanders, 319 F. Supp. 421 (1970), prior to the decision in Lemon, and apparently anticipating it, said as follows: "The State could not itself maintain an educational establishment providing secular classes closely integrated with religious instruction, symbols, and observances—even if the latter were the sole responsibility of private groups—in the same buildings during regular school hours. * * * even if a state does not itself formally maintain a school which teaches religion or applies sectarian admission standards, a law may specify types of public identification and involvement with such a school which cause an 'excessive government entanglement' with the religious

aspects of the institution, thereby advancing or inhibiting religion. * * * A constitutional funding measure requires not just artful legislative language, but also the creation of an administrative mechanism through which government may restrict its spending to a readily identifiable secular educational function without 'continuing surveillance leading to an impermissible degree of entanglement.' "

In summary, it seems to me, over and beyond the other reasons touched on in this dissent, that this act, this scheme, this procedure requires that the state will be amidst the daily affairs of a religious school. It must be remembered that we are not dealing with something as simple as a bus ride, or a textbook, or a mere lease agreement; we have here an innovative program of noble purpose and it carries with it those highly feared risks of conflict and divisiveness which history has shown follow any close proximity between government and religion.

If this statute, and the state action asked to be taken under it, is constitutionally permissible, then I see no obstruction or impediment to the state and the federal government taking complete and literal control of the contracting schools and making their entire secular curricula part of its public system for all purposes, including the hiring of teachers, the renting of the physical facilities, and perhaps the admission of students. Such action plainly runs afoul of the state and federal Constitutions. We must remember that the real test of constitutionality is not what is actually done under the act but what the act authorizes.

The act and the scheme here, in my opinion, are the beginning of the possible creation of state financed, and therefore extensively state regulated, entanglement in sectarian school affairs. The state, in order to comply with the federal act, is required to set up a "partition" between the secular and religious activities of parochial schools and to take substantial responsibility for

the secular portion of parochial school students' education. I am firmly of the opinion that this runs afoul of the basic principle of the establishment clause test in the federal Constitution that neither the federal government nor the state can engage in legislation or action which advances or inhibits religion.

SPENCER, J., joins in this dissent.

McCOWN, J., concurring.

I concur in the majority opinion. This is not the case in which to belabor unconstitutional church-state bogeymen. This case involves the lease of two classrooms in a parochial school by a public school district for the purpose of conducting classes under a federally funded special education services program for all public or private school pupils having need of it. The dissenting opinion misconceives the law and the facts. The dissent states: "The only purpose of the application, and the only purpose of the scheme, is to channel federal and state appropriated funds into the assistance of the education program of non-public schools * * *." That is simply not so. The special education services provided under the Act involved here are available to pupils of public schools and also to pupils of parochial and other non-profit private schools, and the entire program is under the direct supervision and control of the public school.

The dissent relies heavily upon Sanders v. Johnson, 403 U. S. 955, 91 S. Ct. 2292, 29 L. Ed. 2d 865, in which the Supreme Court of the United States affirmed a federal court decision involving a Connecticut statute. The dissent quotes extensively from the lower federal court case reported at 319 F. Supp. 421. The dissent, however, fails to note that the Johnson case quite clearly approved special education services of the kind involved here. In discussing the previous state policies and programs which the court approved, the court in that case stated: "The State made bus transportation, health and welfare services, and special education services available

to students attending parochial and other non-profit private schools; * * * it was never supposed that these limited state activities constituted public control, endorsement, or 'promotion' of the secular education provided independently by parochial schools. Cf. Board of Education v. Allen, supra; Everson v. Board of Education, supra. The State gave aid to parochial school students and even extended some funds through a program for driver instruction and highway safety administered by their schools; but the only secular education 'promoted' with governmental endorsement was offered by the public schools." The court then stated that the state act it held unconstitutional had "sharply altered" that former relationship between the State of Connecticut and its parochial schools and their students.

The dissent also relies heavily upon the case of Epeldi v. Engelking, 94 Idaho 390, 488 P. 2d 860. It need only be noted that in that case a direct state appropriation under a state statute was involved, and even in that connotation, the case represents a definite minority viewpoint.

The dissent here flatly asserts that the constitutional language of "any appropriation from any public fund * * * in aid of any sectarian or denominational school * * *" neither requires nor permits any interpretation whatever. It then proceeds to interpret it to mean that regardless of the primary public purpose, any appropriation from any public fund which results in or produces a direct or indirect benefit for any non-public educational institution or for its pupils is automatically unconstitutional. This is a distortion of the language and the underlying broad assumption is flatly contradicted by every Supreme Court case to date. If the dissent be correct, the State of Nebraska could not even appropriate funds to purchase or lease equipment or a building from a non-public educational institution for the exclusive use of the public school.

It is interesting to note that the federal act involved

here became law in 1965 by act of Congress. Seven years have now passed, and we are unable to find a single court decision, state or federal, which has yet held that act unconstitutional under the federal or any state constitution. If the opinion expressed in the dissent were to become the opinion of this court, it would be the first time in history for a state court to declare a federal act unconstitutional because the federal funds were channeled through a state controlled distibution agency.

The constitutional issues posed by church-state relationships are complicated and difficult of resolution. Nevertheless, the leasing of classrooms by a public school district from a parochial school for furnishing special education services for both public and parochial school pupils with funds provided by the United States government does not raise those issues.

CLINTON, J., joins in this concurrence.

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

I concur in part, and dissent in part, with the majority opinion.

The Elementary and Secondary Education Act of 1965 is an Act of Congress which provides public funds for certain educational purposes. See United States Statutes at Large, Vol. 79, p. 27. The Act, as subsequently amended, will be found in Title 20, U. S. C. A., § 241a et seq. A reading of the Act makes it clear that the funds provided may be allotted *only* to *free public* elementary or secondary schools. This necessarily bars, as recipients, all private and parochial schools. See Title 20, U. S. C. A., § 244 (6B). See, also, § 241e (a) (3), which provides: "* * * that the local educational agency has provided satisfactory assurance that the control of funds provided under this part, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this part, and that a public agency will administer such funds and property; * * *."

Section 244 (6) (B), provides: "For purposes of subchapter II of this chapter, the term 'local educational

agency' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools."

It is clear that the intent of the Act is not to provide funds for private schools but to permit students in private schools to benefit by enrolling in classes conducted by, and under the auspices of, public schools.

There is nothing in the Act which can raise a constitutional question in regard to the appropriation of funds for private or parochial schools.

The only remaining question is in regard to the manner in which it is proposed to use the federal funds in this instance. Insofar as the expenditure of public funds, even though derived from federal sources, by the State, or a governmental subdivision of the State, is concerned, the State Constitution must be complied with. In such case, the manner in which the funds are to be used is pertinent. Services educational in nature, rendered to a sectarian school, are forbidden. On the other hand, services dealing basically with the public health and safety would appear to be legitimate. See In re Proposal C, 384 Mich. 390, 185 N. W. 2d 9.

The entanglement of church and state is, in this instance, minimal in nature. The leasing of property from a sectarian school is not necessarily forbidden. However, if the underlying theory advanced in the majority opinion is pursued to its logical conclusion, the school district could dispose of its public school building and lease sufficient space in the sectarian school to teach *all* secular school subjects. It could then teach these subjects to both public and parochial students, notwithstanding a portion of the building was retained for religious educational purposes. This appears to be di-

rectly violative of the principles enunciated in Johnson v. Sanders, 319 F. Supp. 421, affirmed without opinion in 403 U. S. 955, 91 S. Ct. 2292, 29 L. Ed. 2d 865.

WHITE, C. J., and SPENCER, J., responding to concurrence.

The concurring opinion makes the broad statement that the dissenting opinion misconceives the law and the facts. This position is buttressed by nothing more than a broad statement of the purpose of the act and its availability to all students. Whether or not this statement of purpose would save the act from being declared unconstitutional on its face is not the question before us. The problem is what the act actually authorizes and what the application in fact seeks to do. We reiterate, rhetoric aside, that the application seeks State approval and consent to the funding and spending of public tax money to furnish secular educational facilities and instruction to parochial school students within their own parochial school building. It is quite inconceivable to us that such an application, requiring public school teachers to teach parochial school students secular subjects in the confines of a parochial school building, does not raise constitutional questions of the most serious nature. The point is that the constitutionality of any "special educational" program will necessarily depend upon the nature of the particular application and what it seeks to accomplish. In our opinion, the authorization of "pocket schools" as this application and this act envision is contrary to the basic provisions of the Constitution of the State of Nebraska and the federal Constitution with reference to the separation of church and state. The concurring opinion utterly fails to answer the questions of entanglement involved in this scheme and its execution, questions that exist no matter how efficient it may be claimed this program is in promoting the secular education of parochial school children. It utterly fails to answer the argument that the execution of this program in this application under the broad language

of the federal program results in an aid to religion, because it is obvious that the provision for funding and providing instruction and education in secular subjects reduces the education cost and necessarily frees money and benefits for use for the particular religious purposes of the parochial school. We also reiterate our previous position that the law of separation of church and state, erected by our Constitution makers as one of the most fundamental principles of our government, was directed not only at religious penetration or intrusion into public education and the expenditure of public funds, but thrusts equally strong to prevent governmental or state penetration or intrusion into the freedom of parochial schools to conduct their religious program of education free of any restraints, inhibitions, or controls by the state or the federal government.

The concurring opinion also states the Epeldi v. Engelking, 94 Idaho 390, 488 P. 2d 860, "represents a definite minority viewpoint." We feel that this statement simply cannot be supported. Even with respect to the issue of bussing, following the Everson case, the majority of states have rejected Everson and have barred transportation at public expense of children attending nonpublic schools. In Reutter and Hamilton, The Law of Public Education, p. 15 (Foundation Press, 1970), the following statement is made with reference to state court interpretation of state constitutions after Everson: "In subsequent years the highest courts of several states have considered the issue in light of their respective state constitutions. As of the end of 1969, more had rejected than accepted the reasoning of the majority in Everson and had barred transportation at public expense of children attending non-public schools."

It hardly needs repetition that the issue involved in the physical transportation of students is far different than the issue we have before us here, namely, the intrusion of public funds into the actual teaching and instruction of parochial and public school students.

We further call attention to our previous decision in State ex rel. Public School District v. Taylor, 122 Neb. 454, 240 N. W. 573 (1932), where this court was asked to command that public funds be paid over to a parochial high school in Cedar County, Nebraska, which is precisely what is being asked in the case at bar. After finding that the school was obviously parochial and therefore without the definition of a public or common school, this court concluded that our state Constitution, citing Article VII, sections 3 to 9, Article VII, section 11, and Article I, section 4, would not allow the court to "require the state superintendent of public instruction to apportion part of the interest and income from the state common school trust funds to a school *in part* sectarian - a school which is not a common or public school within the meaning of the Constitution." (Italics supplied.) In other words, the court rejected the notion that the use of public funds to teach secular subjects in a sectarian school was constitutional. To sum it up, it seems to us that the opinion of the majority in this case is authorizing the creation of an unconstitutional dual school system. There is no reason to believe that public support of the parochial school in Cedar County will end with one and one-half rooms and the teaching, by public school teachers, of a limited group of "secular" subjects.

It is stated that we have made an incorrect analysis of Johnson v. Sanders, the latest pronouncement on the subject. We note that the dissent mentioned the Johnson case only as it aided in the dissent's analysis of the entanglement issue presented in this case. The criticism from the concurrence does not deal in any nature whatsoever with the entanglement issue and the issue of political divisiveness, issues which we think are fundamental to the disposition of this case. However, in going further, the concurrence does state that the Johnson case "clearly approved special education services of the kind involved here." This statement is simply wrong. The reading of the Johnson opinion shows that the State

of Connecticut did finance "secular education provided independently by parochial schools." Unlike our situation here, there were only a minimum of state regulations as to the operation of the secular courses, and it was not the situation as it is here where there is to be a "pocket" public school within the physical confines of a private school. The defect in the new program which Johnson declared unconstitutional was *exactly* that which we have here, namely, governmental promotion and complete control of secular educational activities *within* private institutions; "The State itself assumes responsibility for providing instruction in certain courses at parochial as well as at public schools." The Johnson opinion, as we have pointed out, exhaustively exposes the entanglement and the political divisiveness of this intermingled situation.

In the Johnson case, the court compared the prior form of state aid to the newly enacted statutory plan, thus presenting the same issue we have here. The distinction between the Johnson case and the case we have here is a hairline at the most. It is this very type of hairline distinction which the thrust of Lemon v. Kurtzman, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), and the other cases seek to forbid. In the Johnson case, it is stated: "The primary effect of the type of 'promotion' prescribed would be much more extensive, transforming a unitary public school system into a dual one which partially incorporates participating private schools as its administrative *appendages*." The divisiveness and the entanglement may be stated as follows: Will a Cedar County Catholic High School become a common school or will we have a dual system, public and "pocket" public?

There is another aspect of the Johnson case which was not previously mentioned in the dissent. The Connecticut statute in question in Johnson provided for the support of "any or all secular instruction at contracting schools." Because of the potential of having the state

administering the entire secular portion of the private school's instructional program, the court recognized the problem of government's influence being so great that "state action" is created; i.e., the private school becomes an arm of the state and the state can be charged *with the private school's traditional discriminatory practices in admissions.* Apart from that the court in Johnson noted that "it would infringe all taxpayer's First Amendment rights to be assured that their money is not used to sponsor an institution which simultaneously teaches religion or applies selective religious standards." In the case at hand, only a portion of secular instruction is controlled by the state, but coupled with the fact that the state is to have a leasehold interest in the property, the parochial school may become an arm of the state. See Burton v. Wilmington Parking Authority, 365 U. S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45.

In closing this response, we call attention to the recent case of State ex rel. Chambers v. School Dist. No. 10 of Deer Lodge County, 472 P. 2d 1013, a Montana case. This case is almost directly in point with the case at bar. In that case the court held that their state Constitution prohibited public school boards from making levy for, or expending funds for the employment of teachers to teach in a parochial school, following the authority contained in a specific state statute. The state constitutional provision in Montana is almost in haec verba with the one in Nebraska. It states as follows: "Neither the legislative assembly, nor any county, city, town, or school district, or other public corporations, shall ever make directly or indirectly, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose, or to aid in the support of any school, academy, seminary, college, university, or other literary, scientific institution, controlled in whole or in part by any church, sect or denomination whatever."

In striking down the school board levy for the employment of teachers to teach secular subjects in a parochial school, the court said: "The Chief Justice proceeded to point out (Walz v. Tax Commission, 397 U. S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697) the dangers of such a course in these words: 'The hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation. We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid.' " The Montana court, in rejecting the argument that is made in the concurrence here, that our State Constitution is open to interpretation, said as follows: "Returning to Section 8 of Art. XI, it cannot be asserted that this section is ambiguous or indefinite and thereby open to interpretation since it clearly states in no uncertain terms that no school district can directly or indirectly appropriate or pay from public funds to aid the support of any school controlled in whole or in part by any church, sect or denomination. While it was argued to the contrary by the appellants, that such section could be interpreted to support their theory of this case, we cannot accept such argument."

STATE OF NEBRASKA, APPELLEE, V. FREDDIE MINOR, APPELLANT.
195 N. W. 2d 155

Filed February 25, 1972. No. 38204.

1. **Criminal Law: Trial: Evidence: Drugs and Narcotics: Controlled Substances.** The burden of proof of exceptions within the ambit of the Depressant and Stimulant Drugs Act is on the party attempting to bring himself within the exceptions.
2. **Criminal Law: Witnesses: Husband and Wife: Evidence.** A wife's incompetency in criminal proceedings against her husband is

to be limited to testimonial utterances. She is competent to supply information for a presentence report.

3. **Criminal Law: Sentences: Evidence: Reports.** A sentencing judge has a broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. He may consider reports of probation officers, police reports, affidavits, and other information, including his own observations of the defendant.

4. ———: ———: ———: ———. Modern concepts individualizing punishment have made it necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

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

J. William Gallup of Schrempp & Bruckner, 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.

SPENCER, J.

This appeal by defendant, Freddie Minor, from his conviction on a charge of possession of a depressant drug, presents only questions of law. As phrased by the defendant, they are as follows: "1. Whether the prosecution has the burden of proving the defendant does not come within the exceptions in a criminal statute. * * * 2. Whether a judge at the time of sentencing can consider hearsay statements of the defendant's wife which are in the pre-sentence report." We affirm.

Defendant, relying on United States v. Vuitch, 402 U. S. 62, 91 S. Ct. 1294, 28 L. Ed. 2d 601 (1971), contends that in a criminal prosecution based on a statute which contains exceptions, the burden is on the prosecution to plead and prove that the defendant is not within an exception. The alleged offense was committed on

November 28, 1970. Prosecution was commenced under the Depressant and Stimulant Drugs Act, which provided, so far as material herein, the following exceptions: "No person, other than a person described in section 28-497 or 28-498 shall possess any depressant or stimulant drug unless (1) such drug was obtained upon a valid precription and is held in the original container in which such drug was delivered; or (2) such drug was delivered by a practitioner in the course of his professional practice and the drug is held in the immediate container in which such drug was delivered." § 28-499, R. S. Supp., 1969.

The defendant was found to be in possession of 75 red capsules commonly identified as "red devils," which contained secobarbital. The trade name of the drug is "seconal," which contains secobarbital as a salt of barbituric acid. These capsules were found in a plain 2 inch by 3 inch manila envelope. It strains credulity to believe this would be an original container in which such drugs were legally dispensed. As to whether the drugs were delivered on a legal prescription, this fact would be peculiarly within the defendant's knowledge. If they were within the original container, that container would undoubtedly have a number identifying the prescription. It is not illogical to observe that 75 capsules would be an unusually large number for a legal prescription of a depressant or stimulant drug.

United States v. Vuitch, *supra,* involved an abortion statute. The issue there was which party had the burden to prove the abortion was or was not necessary to preserve the life or health of the mother. The court held placing the burden on the doctor who performed the abortion was inconsistent with the social idea of the responsibility of the medical profession. Doctors by their own professional standards are expected to give such treatment as is necessary to preserve a patient's health. Therefore, the burden was on the prosecution to plead and prove the abortion was not necessary for the preser-

vation either of the mother's life or health. The Vuitch case patently is not persuasive in those instances where the necessary facts are peculiarly within the knowledge of the defendant.

It is impossible to state a comprehensive general rule on the burden of proving exceptions for all cases. As suggested in 9 Wigmore on Evidence (3d Ed.), Burden of Proof, § 2486, p. 275: "* * * the burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false. This principle has received frequent application in modern statutes making it an offense to pursue a certain occupation without a State license or forbidding a certain act unless in personal circumstances justifying an exception."

The rule has long been settled in Nebraska. In State v. Krasne, 103 Neb. 11, 170 N. W. 494, we held: "In a criminal prosecution, if a negative is an essential element of the crime, and is 'peculiarly within the knowledge of the defendant,' it devolves upon him to produce the evidence, and upon his failure to do so, the jury may properly infer that such evidence cannot be produced."

When the facts relating to an exception in a criminal statute are difficult for the State to obtain and are at the same time peculiarly within the knowledge of the defendant, the question should be considered as a defense or justification and not as a part of the description of the offense itself, so as to impose upon the State the burden of proof to establish the fact that the defendant is not within the exception. We find the burden of proof on exceptions within the ambit of the Depressant and Stimulant Drugs Act is on the party attempting to bring himself within the exceptions.

Defendant's second point is premised on the contention that his wife's incompetency to testify against him at the trial extends to supplying information for a presentence report, and inferentially attacks the hearsay

character of such reports. Defendant cites no authority for his contention.

The modern trend is to restrict or to abolish the privilege, as some courts have done. As noted in 8 Wigmore on Evidence (McNaughton Rev. Ed., 1961), Anti-marital Facts, § 2235, p. 234: "* * * no court ought today to lend its sanction to any expansion of the limits of this undesirable rule of privilege, and there is at least ample authority for the most rigid restriction."

We construe a wife's incompetency in criminal proceedings against her husband to be limited to testimonial utterances. She is competent to supply information for a presentence report.

In State v. Rose, 183 Neb. 809, 164 N. W. 2d 646, we said: "It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and previous conduct. In gaining this information, the trial court may consider reports of probation officers, police reports, affidavits, and other information including his own observations of the defendant. A presentence investigation has nothing to do with the issue of guilt. The rules governing due process with respect to the admissibility of evidence are not the same in a presentence hearing as in a trial in which guilt or innocence is the issue. The latitude allowing a sentencing judge at a presentence hearing to determine the nature and length of punishment, other than in recidivist cases, is almost without limitation as long as it is relevant to the issue."

Due process is not violated by the Nebraska procedure. This is definitely a universal practice, as evidenced by the following from Williams v. New York, 337

U. S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949): "* * * both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. * * * A sentencing judge * * * is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."

There is no merit to defendant's assignments of error. Judgment affirmed.

AFFIRMED.

McCOWN, J., concurring.

I concur in the opinion here on the facts of this case. It should be emphasized that the "burden of proof" of exceptions does not fall on a defendant until the State has first established a prima facie case. The cases following the rule of placing the "burden of proof" of exceptions on the defendant almost without exception reveal facts which demonstrate that the State had first established a prima facie case of unlawfulness. Here the evidence as to the defendant's possession clearly and almost overwhelmingly established the fact that the defendant's possession was presumptively unlawful.

The opinion here was not intended to remove the State's burden of proving a defendant guilty and instead place the burden upon a defendant to establish his inno-

cence. At the same time, in the absence of any explanatory statement, it might well be interpreted to mean that all the State was required to do was to prove possession of a controlled substance, without any reference to whether the evidence and circumstances did or did not indicate that the possession was pursuant to a valid prescription. If possesion alone were enough, then proof that a defendant had a controlled substance in a bottle on his person with his name and that of a pharmacy on the label would be sufficient to convict him if the defendant could not or did not produce any evidence. The number of citizens who have knowing possession of a controlled substance under a lawful prescription is many times greater than the number who hold such substances unlawfully without a valid prescription. Under such circumstances, it would be wholly unrealistic to place on every citizen the burden of proving that he has a valid prescription until the State has produced at least enough evidence as to the circumstances of the possession to raise a presumption that the possession was unlawful.

As long ago as 1934, Mr. Justice Cardozo said: "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." Morrison v. California, 291 U. S. 82, 54 S. Ct. 281, 78 L. Ed. 664.

The Nebraska Jury Instructions, NJI No. 14.05, approved by this Court, states in part: "The burden of proof is always on the state to prove beyond a reasonable doubt all of the material elements of the crime

charged, and this burden never shifts."

Once the State has met its initial burden of establishing a prima facie case, the defendant must then bear the burden of coming forward with the evidence to establish that he comes within an exception provided for by the drug control statutes.

BOSLAUGH and CLINTON, JJ., join in this concurrence.

SUZANNE N. DWYER, APPELLEE AND CROSS-APPELLANT, V. OMAHA-DOUGLAS PUBLIC BUILDING COMMISSION ET AL., APPELLANTS AND CROSS-APPELLEES, DANIEL C. LYNCH, INDIVIDUALLY, INTERVENER-APPELLEE.

195 N. W. 2d 236

Filed February 25, 1972. No. 38299.

1. **Constitutional Law: Legislature.** The Legislature has plenary legislative authority limited only by the state and federal Constitutions.
2. **Constitutional Law.** The language of the Constitution is to be interpreted with reference to the established laws, usages, and customs of the country at the time of its adoption.
3. ———. The Constitution must be read in connection with the facts of history and the development of a representative form of government.
4. ———. The Constitution as amended must be construed as a whole.
5. **Constitutional Law: Legislature: Courts.** Legislative construction of a statutory or constitutional provision, although not conclusive on the courts, when deliberately made is entitled to great weight.
6. **Legislature: Municipal Corporations: Public Building Commissions.** The Legislature may create political corporations or quasi-municipal corporations to deal with matters of general public concern and utility.
7. **Constitutional Law: Taxation.** The power to tax being a sovereign power, constitutional provisions relating thereto do not operate as grants of power of taxation to the government, but are merely limitations on a power which would otherwise be unrestricted.
8. ———: ———. Constitutional limitations on the power to tax must be strictly construed.

9. **Constitutional Law: Legislature: Statutes.** In construing an act of the Legislature all reasonable doubts must be resolved in favor of its constitutionality.
10. **Constitutional Law: Taxation: Counties: Public Building Commissions.** The one-half mill levy made by the Omaha-Douglas Public Building Commission under the authority of L.B. 1003, Eighty-second Session of the Nebraska Legislature, is not a county tax subject to the provisions of Article VIII, section 5, Constitution of Nebraska.
11. **Constitutional Law: Taxation: Municipal Corporations: Public Building Commissions.** The one-half mill levy authorized to be made by cities of the metropolitan class for the purposes of L.B. 1003, Eighty-second Session of the Nebraska Legislature, does not contravene the Omaha city charter adopted under the provisions of Article XI, section 5, Constitution of Nebraska.
12. **Constitutional Law: Counties: Municipal Corporations: Public Building Commissions.** L.B. 1003, Eighty-second Session of the Nebraska Legislature, which enabled cities of the metropolitan class and the county in which such city is located to create a public building commission authorized to furnish facilities for the joint use of the city and county pertains to a matter which is of state concern and not just to a strictly municipal affair.
13. **Constitutional Law: Statutes.** L.B. 1003, Eighty-second Session of the Nebraska Legislature, does not amend either section 23-119, R. R. S. 1943, or section 23-120, R. S. Supp., 1971, and therefore does not violate Article III, section 14, Constitution of Nebraska.
14. **Constitutional Law: Statutes: Legislature: Courts.** The power of classification rests with the Legislature, and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation.
15. **Constitutional Law: Statutes.** L.B. 1003, Eighty-second Session of the Nebraska Legislature, does not contravene the provisions of Article III, section 18, Constitution of Nebraska.
16. ———: ———. L.B. 1003, Eighty-second Session of the Nebraska Legislature, does not contravene the provisions of Article IX, sections 2, 4, or 5, Constitution of Nebraska.
17. **Constitutional Law: Public Building Commissions.** A building for governmental purposes is not a work of internal improvement under the provisions of Article XIII, section 2, Constitution of Nebraska.
18. **Constitutional Law: Municipal Corporations: Taxation: Public**

Building Commissions. The tax authorized to be levied by a city of the metropolitan class under the provisions of L.B. 1003, Eighty-second Session of the Nebraska Legislature, is not a tax for corporate purposes and is one levied by local authority and does not contravene Article VIII, section 7, Constitution of Nebraska.

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

Donald L. Knowles, James M. Murphy, Harold M. Zabin, Herbert M. Fitle, Frederick A. Brown, and Verne W. Vance, for appellants.

McGrath, North, Nelson, Shkolnick & Dwyer, for appellee.

August Ross, for intervener-appellee.

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

CLINTON, J.

Plaintiff, a taxpayer in Douglas County, Nebraska, and in the City of Omaha, brings this action on behalf of herself and others similarly situated to challenge the constitutionality of L.B. 1003 enacted by the Eighty-second Legislature, sections 23-2601 to 23-2612, R. S. Supp., 1971. L.B. 1003, hereafter referred to as the act, pertains to cities of the metropolitan class, the population of which is more than half the population of the county in which the city is located, and likewise pertains to such counties. It authorizes the county and city to initiate proceedings for the establishment of a building commission which is a "body politic and corporate and an instrumentality of the state." The act provides that the commission shall have a governing body of five appointed as provided therein and authorizes the commission to acquire in the "name of the city and county, by gift, grant, bequest, purchase or condemnation real property"; to annually levy a tax "for the pur-

poses of the commission not to exceed one half mill on the dollar upon the assessed valuation of all the taxable property in the county"; and to issue bonds which are the general obligation of the commission but not of the state, city, or county. The underlying purpose of the act is expressed in the following language: "The purpose of sections 23-2601 to 23-2612 is to provide a means whereby buildings, structures and facilities can be acquired, constructed, remodeled or renovated and financed for use jointly by such cities of the metropolitan class and the respective counties in which they are located." § 23-2601, R. S. Supp., 1971.

The act grants the commission certain corporate powers, for example, to sue and to be sued; to acquire, hold, and dispose of property; and to make by-laws and regulations for the management of its affairs and the use of its projects. It authorizes, with the consent of the city and county, use of their facilities, agents, and employees, and authorizes the commission to reimburse the city and county for such use. It authorizes agreements with the city or county or both as to the operation, maintenance, repair, and use of the property; it authorizes with the consent of the city and county agreements with various governmental entities state and federal for use of the projects; and it grants to the commission power of eminent domain. The authority of the commission to issue bonds requires prior approval of the city and county. The act also provides: "The full faith and credit of the commission shall be pledged to the payment and security of the bonds and notes issued by it, whether or not such pledge shall be set forth in the bonds or notes. So long as any of its bonds or notes are outstanding, the commission shall have the power and be obligated to levy taxes within the limitation as provided in section 23-2604 to the extent required, together with any other money available to the commission therefor to pay the principal of and interest and premium, if any, on such bonds and notes as the same

become due and payable. . . . The bonds, notes, obligations or liabilities of a commission shall not be a debt of the State of Nebraska or of the city or county for which the commission is established and neither the state, city, nor the county shall be liable thereon or therefor, nor shall such bonds, notes, obligations or liabilities be payable out of any money other than the money of the commission issuing or incurring the same." The act contains many other provisions, some of which will be noted as this opinion proceeds.

Pursuant to the provisions of the act the county board of Douglas County enacted a resolution activating the Omaha-Douglas Public Building Commission and appointed two members of the commission. The mayor of Omaha, with the approval of the city council, appointed two members and the four members appointed the fifth. On July 8, 1971, the commission levied, pursuant to the provisions of the act, a one-half mill tax on all taxable property in the county.

The case was tried on stipulation of facts, reference to which will be made as necessary. It was stipulated that for the 1971-72 fiscal year the mill levy for Douglas County is at the constitutional limit and if the levy made by the commission is includable in the county levy then the total county levy is in excess of the limitation provided by Article VIII, section 5, Constitution of Nebraska, which is as follows: "County authorities shall never assess taxes the aggregate of which shall exceed fifty cents per one hundred dollars actual valuation as determined by the assessment rolls, except for the payment of indebtedness existing at the adoption hereof, unless authorized by the vote of the people of the county."

The district court determined the levy by the commission was in effect a levy for county purposes and therefore in excess of the constitutional limit and void. It enjoined the commission from expending, pending final disposition of the case, any funds which may be

raised by the one-half mill levy. The trial court found in all other respects the act was constitutional. The defendants appealed. The plaintiff cross-appeals and claims the act is unconstitutional in toto contending, as she did in the trial court, the act is in violation of the following constitutional provisions, to wit, Article I, section 26; Article III, sections 14 and 18; Article VIII, sections 5 and 7; Article IX, sections 2, 4, and 5; and Article XIII, section 2, Constitution of Nebraska.

The necessity or wisdom of the legislation is not for this court to determine. We only determine whether it contravenes some constitutional provision which renders it invalid in whole or in part. We first determine the correctness of the trial court's decision on the issue raised on the main appeal and then we will examine the questions raised in the cross-appeal.

The briefs of counsel are able and exhaustive. Counsel for all parties cite authorities which seem directly applicable or applicable in principle and, in our judgment, support their respective contentions on the issues raised on the main appeal and on which the trial court rested its decision. We, however, examine these authorities and make our decision in the light of what we deem the pertinent provisions of the Nebraska Constitution and certain pertinent general principles of constitutional interpretation previously announced by this court.

The Appeal

Article VIII, section 5

The constitutional provisions which must be considered are Article III, section 1; and Article VIII, sections 1 and 5. Article III, section 1, vests the complete legislative authority of the state in the Legislature subject only to the rights of initiative and referendum reserved by the Constitution to the people, and, of course, subject to any specific restrictions on the legislative authority found in the Constitution itself. The appellee contends that as applied to the facts of this case Article VIII, section 5, which we have previously quoted, is such a spe-

cific restriction. Article VIII, section 1, provides in part as follows: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct."

There can be no doubt, of course, that the Legislature cannot authorize the counties to levy taxes in excess of the constitutional maximum set by Article VIII, section 5. The appellee argues the act does exactly that by indirect means and that the commission is merely the " 'alter ego' of the city and the county," a legistive creation established "solely to circumvent the county's constitutional tax limitation."

The decision we reach is arrived at in the light of the following principles and the three constitutional provisions hereinbefore cited. The Legislature has plenary legislative authority limited only by the state and federal Constitutions. Swanson v. State, 132 Neb. 82, 271 N. W. 264; Albuquerque Met. Arroyo Flood Con. A. v. Swinburne, 74 N. M. 487, 394 P. 2d 998. The language of the Constitution is to be interpreted with reference to the established laws, usages, and customs of the country at the time of its adoption. The Constitution must be read in connection with the facts of history and the development of a representative form of government. The Constitution as amended must be construed as a whole. Legislative construction of a statutory or constitutional provision, although not conclusive on the courts, when deliberately made is entitled to great weight. State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N. W. 2d 1. The Legislature may create political corporations or quasi-municipal corporations to deal with matters of general public concern and utility. Neal v. Vansickle, 72 Neb. 105, 100 N. W. 200. The power to tax being a sovereign power, constitutional provisions relating thereto do not operate as grants of power of taxation to the government, but are merely limitations on a power which would otherwise be unrestricted. Constitutional limitations on the power to tax must be

strictly construed. Ryder v. Livingston, 145 Neb. 862, 18 N. W. 2d 507, 159 A. L. R. 458.

In the Constitution of 1866 the legislative authority of the state was vested in the Legislature without any reservation to the people of either initiative or referendum. It contained no provision whatever with reference to the counties. It mentioned no municipal or quasi-municipal corporations save cities and incorporated villages, and with reference thereto directed the Legislature to make provision for their organization by general law and to restrict the power of taxation "to prevent the abuse of such power." Counties were apparently already in existence pursuant to territorial law. In 1873, the Legislature confirmed the boundaries of these and created others. It likewise made provision for the government of counties and made provision defining the powers and duties of counties and their officers. The powers granted were minimal corporate powers. It also made provision for courts and law enforcement, taxation and collection of taxes, laying out of roads, and the keeping of real estate records. It authorized the counties upon a vote of the people to issue bonds to aid in boring for coal in their respective counties. Among the specific powers was the following: ". . . and in case there are no county buildings, to provide suitable rooms for county purposes." G.S. 1873, p. 234.

A constitutional limitation on the power of county authorities to tax first appeared in the Constitution of 1875. Art. IX, § 5. Previous limitations were statutory only. At that time also appeared limitations on the power of the Legislature to change county boundaries and to create counties. Prior to the 1920 revision of the Constitution the inhibition on the county tax read: ". . . shall never assess taxes . . . which shall exceed one and a half dollars per one hundred dollars valuation . . . ." Questions arose as to whether the valuation referred to was actual value or assessed value. See

Constitutional Convention 1919-1920, Proposed Amend. to Art. 9, § 5, p. 32. This was clarified and defined in the 1920 constitutional revision in its present form.

In all the years intervening between 1866 and the present, the Legislature has at will added to the powers and duties of the counties and from time to time taken away certain powers, but mostly it has added functions or duties. A comparison of the pertinent statutory provisions in the General Statutes of 1873, Compiled Statutes of 1922, and Revised Statutes of 1943, readily illustrates these points. Counties could also exercise under statutory provisions some of the same functions as other subdivisions and within the same territory. For example, the laws of 1873 authorized the commissioners at their discretion to build or repair bridges within the limits of any town or city in the county. The county at times could improve city streets. G.S. 1873, p. 954. See, also, § 1045, Comp. St. 1922; § 23-339, R. R. S. 1943.

The Legislature has from time to time entrusted like functions to different governmental subdivisions and agencies and created new governmental subdivisions to exercise these same functions. Flood control and drainage have been entrusted both to counties, §§ 1025, 1026, 1033, Comp. St. 1922; § 23-320.05, R. R. S. 1943; and to drainage districts, Ch. 17, art. IV and V, Comp. St. 1922. Counties may maintain hospitals, § 23-343.08, R. R. S. 1943; and this also may be done by hospital districts, §§ 23-343.21 to 23-343.47, R. R. S. 1943.

The legislative authority to create subdivisions of government to perform special governmental functions to meet the exigencies of changing situations and special needs has been exercised through the years, especially during the last 40, without constitutional restriction. Sanitary districts, Whedon v. Wells, 95 Neb 517, 145 N. W. 1007; rural fire protection districts, Seward County Rural Fire Protection Dist. v. County of Seward, 156 Neb. 516, 56 N. W. 2d 700; airport authorities, hous-

ing authorities, weed control districts, and later county-wide weed control authorities. Numerous other examples could be cited. The power of the Legislature in this respect has been stated in broad and all-inclusive language in several cases. See, Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566; Seward County Rural Fire Protection Dist. v. County of Seward, *supra;* Kaup v. Sweet, 187 Neb. 226, 188 N. W. 2d 891. In Seward County Rural Fire Protection Dist. v. County of Seward, *supra,* this court cited with approval the following language of Hunter v. City of Pittsburgh, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151: "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer in-

convenience, 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 power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

The question then becomes precisely this. Does Article VIII, section 5, operate to prevent the Legislature from taking from the counties, or a class thereof, some of their functions and entrusting them to another subdivision of government, giving to that new subdivision of government a power of taxation which may result in the people in the county paying total taxes in excess of the maximum set by Article VIII, section 5. The appellee argues that it does. Her argument and that of the intervener are highlighted in the memorandum opinion of the trial judge where he points out that section 23-120, R. S. Supp., 1971, requires the county to "erect or otherwise provide" courthouse, jail, and other necessary county buildings and therefore to have this function performed by another subdivision of government having taxing authority is simply an evasion of the constitutional limitation of counties to tax.

The briefs of the appellee and intervener and the trial judge's memorandum opinion make special reference to certain provisions of the act, section 23-2611, R. S. Supp., 1971, which provide that the city and county may each "(5) . . . enter into an agreement with the commission" determining "the method or formula for determining the payments to be made by the city to the commission as being applicable to the principal of and interest and premium on the bonds of the commission issued to finance the project. The city shall have the power to levy a tax on all the taxable property in the city, except intangible property, sufficient to make

the payments to the commission applicable to the principal of and interest and premium on the bonds of the commission issued for the project, which tax shall be in addition to all other taxes now or hereafter authorized by statute or charter . . .," but limits the maximum tax to one-half mill. They further point out that no specific mention is made in the act of the county making payments to the commission applicable to the bonds, nor is any added taxing authority given to the county by the act.

It is evident that whatever obligation the county assumes with reference to the commission it must be made within the limits of its existing levy for county purposes, which as already noted is for the fiscal year 1971-72 at the constitutional maximum. The appellee and intervener therefore reason and conclude, as did the trial court, that the one-half mill tax authorized to be made by the commission is to be used to pay what they term "the county's share" of the bonded debt and that the act must contemplate an agreement to this effect. There is in the record, however, no evidence of any agreement between the commission and either the county or the city. The act itself, as we have earlier noted, provides for the payment of the bonds from the funds of the commission.

The appellee's and intervener's position and argument are not implausible and are supported by cases cited by them, but we are not, in the light of the pertinent constitutional provisions, the history which we have recited, and the provisions of the act itself, persuaded that the act is beyond a reasonable doubt unconstitutional on the point in question. State v. Standard Oil Co., 61 Neb. 28, 84 N. W. 413; Smith v. Chicago, St. P., M. & O. Ry. Co., 99 Neb. 719, 157 N. W. 622.

The position of the appellee and intervener as noted in the memorandum opinion of the trial court really seems to be that Article VIII, section 5, is not only a limitation on the power of the counties to tax, but also

freezes the power of the Legislature to make changes in county functions. Their argument would in effect imbed part of section 23-120, R. S. Supp., 1971, in the Constitution. We find that in the light of history and the provisions of Article III, section 1, and Article VIII, section 1, we cannot accept this argument. Throughout our history as a state, the Legislature has, as we have already noted, added to and taken away the functions of counties. It has created governmental subdivisions to accomplish special public purposes, which purposes it could have entrusted to existing governmental subdivisions. It has entrusted the same general functions to different subdivisions of government whose territories could overlap or coincide.

Under the facts of this case, the commission does not take over a function exclusively that of the county. It serves the public purpose of providing facilities for two governmental units or more. It relates not just to a courthouse, jail, and governmental offices, but "any building, structure or facility for public purposes" for joint use of the city and county. We point out the act authorizes the leasing of space not needed by the county and city to other agencies of government. Section 23-120, R. S. Supp., 1971, entrusts to the county the duty of furnishing facilities to agencies which do not serve exclusively county functions. That section of the statute reads in part: ". . . and provide suitable rooms and offices for the accommodation of the several courts of record, compensation court or any member thereof, the Commissioner of Labor for the conduct and operation of the state free employment service . . . ." It would be completely unrealistic to say that the Legislature may add county functions but never take them away and entrust them to some other governmental subdivision or even to the state itself.

With specific reference to the question of whether the levy the commission has authorized to make is in reality a county tax, we think the opinion of the court

in Obitz v. Airport Authority of the City of Red Cloud, 181 Neb. 410, 149 N. W. 2d 105, is pertinent. The Airport Authority Act provided that bonds issued by the authority would not (just as in the act we are here considering) constitute a debt of the State of Nebraska or the city in which the authority was established. In the bonds which it proposed to issue the authority covenanted to, so long as the bonds were unpaid, certify annually to the city the maximum tax and to assess charges for airport use. It was argued that the bond covenants violated the statute. In effect the argument was that the tax was a city tax. In the Obitz case Judge Carter, speaking for the court, said: "The amount to be certified to the city to be levied on the tangible property of the city is for the purpose of carrying on the airport facility. It is not levied for the primary purpose of providing for the funding of bonds. The money derived from this tax is a part of the money provided for the construction, operation, and maintenance of the airfort facility. It is a part of the funds of the authority and is not at any time funds of the city although the city performs the ministerial duty of levying, collecting, and paying the tax to the authority. The tax can be levied whether or not the bonds are issued. The tax is in effect that of the authority, a separate entity, a public corporation, and an agency of the city. It is in no sense of the term a city tax, and when the city performs its ministerial functions with reference to its levy, collection, and payment over, the city's responsibility ceases, and no obligation remains. The bonds are general obligations of the authority and not the city. The provision of section 3-509, R. R. S. 1943, that the bonds of the authority shall not be a debt of the city has not been violated for the reason that the city is under no obligation to pay the bonds." The above is applicable here. The one-half mill levy is the levy of the commission and not of the county.

It does appear that counties as subdivisions of

government did and do occupy a unique place in the eyes of the drafters and the people, the ratifiers, of the Constitution. See Article IX. It would appear the Legislature probably cannot substantially destroy the counties by removing all or substantially all of their functions while merely respecting their territorial integrity as required by Article IX. The act does not even remotely approach the point of such substantial destruction, nor do the statutes evidence the slightest tendency on the part of the Legislature to so do. Quite the contrary is evident.

We have already noted the parties each cite several cases supporting their respective contentions. We want to take specific note of some of these. The appellants cite Albuquerque Met. Arroyo Flood Con. A. v. Swinburne, *supra*. In that case the Legislature of New Mexico had created the plaintiff flood control authority which was apparently empowered to deal with flood control in and around the city of Albuquerque. As far as is pertinent to our problem here a two-pronged attack was made on the constitutionality of the act. The constitutional provisions were: "No county, city, town or village shall ever become indebted to an amount . . ., exceeding four per centum on the value of the taxable property within such county, city, town or village . . .," and "The legislature is authorized to provide by law for the organization and operation of drainage districts and systems . . . ." With reference to the first prong, the court said: "It is clear that the indebtedness proposed by the Flood Control Authority is not one contracted by either a county, city, town or village or school district, but is one imposed by a special quasi-municipal corporation under legislative authority. The legislature has plenary legislative authority limited only by the state and federal constitutions. Legislation may be validly enacted if not inhibited by one or the other of these documents." With reference to the second, the court said simply that such provision in

no way restricted the authority of the Legislature to create a flood control authority and that there was no requirement of the constitutional provision mentioned that a flood control authority had to be called a drainage district.

Appellants also cite Walinske v. Detroit-Wayne Joint Bldg. Authority, 325 Mich. 562, 39 N. W. 2d 73. There a majority of the voters of Wayne County had approved an $8,000,000 bond issue, the proceeds of which were to be used to construct a joint city-county building. A companion question authorizing an increase in the mill levy failed to get the required two-thirds voter approval. At the session of the Legislature following the election that body enacted enabling legislation authorizing the City of Detroit and the County of Wayne to incorporate a joint building commission authority. The enabling legislation authorized the authority to issue self-liquidating revenue bonds. The enabling act contained other provisions similar in some respects to L.B. 1003, but did not give the authority power to levy a tax. The enabling act provided that when the bonded debt was paid the facilities were to be turned over to the city and county. The authority had an authorized life span of 50 years. This legislation was challenged in a declaratory judgment and injunction action. The principal contention was that the city and county by entering into a long term lease sufficient to pay bonds of the authority as they became due was a circumvention of the constitutional and statutory provisions requiring a vote of the people to issue bonds. The court dealt with this contention by stating the bonded debt was the debt of the authority and not of the city and county and it was clearly within the authority of the city and county to provide the necessary facilities by lease arrangements with the authority. Other cases supporting appellants' position are Book v. State Office Bldg. Comm., 238 Ind. 120, 149 N. E. 2d 273; City of

Aurora v. Aurora Sanitation Dist., 112 Colo. 406, 149 P. 2d 662.

One of the several cases cited by the appellee is War Memorial Hospital v. Board of County Commissioners, 73 Wyo. 371, 279 P. 2d 472. That case involved a proceeding to determine the validity of taxes levied by a hospital district, a cemetery district, and a fire protection district. All the districts embraced the same territory and included the town of Powell. The constitutional provision in question was: "No incorporated city or town shall levy a tax to exceed eight mills on the dollar in any one year, except for the payment of its public debt and the interest thereon." The court held the provision in question was a restraint upon the authority of the fire protection district to levy a tax on property in the city of Powell, but not a restraint upon the authority of the hospital and cemetery districts. The court rested its decision primarily on the ground that fire protection was a municipal function but the operation of a cemetery and hospital was not, or at least the court had doubts as to these. We do not distinguish the case or others of similar tenor. We reject them for reasons already stated. Other cases of the same general purport are Lowery v. County of Jefferson (Ky. App.), 458 S. W. 2d 168; Bacon v. Kent-Ottawa Metropolitan Water Auth., 354 Mich. 159, 92 N. W. 2d 492; Rappaport v. Department of Public Health, 227 Ind. 508, 87 N. E. 2d 77.

Cross-Appeal

Appellee Dwyer on her cross-appeal raises the issues previously noted.

Article XI, section 5

Appellee contends the act, insofar as it authorizes the City to levy a tax to meet its obligations to the commission, is unconstitutional in that it violates Article XI, section 5, because the act authorized a levy in excess of and in addition to the maximum all-purpose levy provided for in the home rule charter of the city of

Omaha which was adopted under the above constitutional provision. Appellee cites Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 104, 77 N. W. 2d 862: ". . . a provision of a home rule charter takes precedence over a conflicting state statute in instances of local municipal concern, but when the Legislature enacts a law affecting municipal affairs which is of state-wide concern, the state law takes precedence over any municipal action taken under the home rule charter."

The term state-wide as correctly quoted from the above opinion is somewhat misleading when examined in the light of the genesis of the rule and the language of other cases which discuss the issue. These other cases have distinguished "between matters of *strictly* municipal concern and those of state concern." In Carlberg v. Metcalfe, 120 Neb. 481, 234 N. W. 87, the court said: "The Constitution does not define which laws relate to matters of strictly municipal concern and which to state affairs. There is no sure test which will enable us to distinguish between matters of strictly municipal concern and those of state concern. The court must consider each case as it arises and draw the line of demarcation. . . . It is the well-established law of this state that, in matters of strictly municipal concern, cities which have adopted a 'home rule' charter under article XI of the Constitution are not subject to state legislation. But, in such cities, state legislation is not excluded upon such subjects as pertain to state affairs as distinguished from strictly municipal affairs."

One of the first cases to discuss the issue of when a general law of the state takes precedence over a conflicting city charter provision was Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643. That case pointed to the language of the constitutional provision providing that the charter shall be "consistent with and subject to the Constitution and Laws of this state," and further noted the purpose of the constitutional amendment was to render the charter cities inde-

pendent of state legislation in matters which are strictly of municipal concern. It pointed out the city was independent only in those matters "for its own government" and where powers are entrusted to a city which are not strictly for its own government then general state law takes precedence. In this case it seems clear the act pertains to much more than just the government of the charter city. It encompasses and pertains to county affairs also and to the extent it authorizes the furnishing of facilities for other state and federal agencies it is even broader yet. L.B. 1003 does not violate either Article XI, section 5, or the Omaha charter.

Article III, section 14

Appellee contends the act is unconstitutional because it amends sections 23-119, R. R. S. 1943, and 23-120, R. S. Supp., 1971, without repealing those sections, and therefore it violates Article III, section 14.

Insofar as this contention pertains to section 23-119, R. R. S. 1943, we have decided that point by what has been said on the main appeal. If, as we hold here, the one-half mill levy is not a county levy, then section 23-119, R. R. S. 1943, has not been amended and Article III, section 14, does not apply.

The same may be said of section 23-120, R. S. Supp., 1971, which provides: "The county board shall erect or *otherwise provide* suitable courthouse, . . ." etc. (Emphasis supplied.) Section 23-120, R. S. Supp., 1971, is not amended by L.B. 1003. The provisions of L.B. 1003 are not mandatory. The county may act under section 23-120, R. S. Supp., 1971, or it may "otherwise provide" by availing itself of the provisions of the act which is a complete and independent act in itself. The act does not amend section 23-120, R. S. Supp., 1971. In any event, Article III, section 14, does not apply. See Omaha Parking Authority v. City of Omaha, *supra*.

Article III, section 18

Appellee contends the act violates Article III, section 18, because it is a "local or special" law "granting . . .

special or exclusive privileges" and that a general law "can be made applicable." She asserts the classification limiting the application of the act to cities of the metropolitan class and the counties in which they are located, where the population of the city is more than one-half the population of the county, is arbitrary and relies upon the opinion of this court in City of Scottsbluff v. Tiemann, 185 Neb. 256, 175 N. W. 2d 74. In that case this court held unconstitutional a statute which provided for a mandatory municipal court in cities of the first class having a population in excess of 13,000 and located in counties having a population of 33,000 all as determined by the 1960 census. Only one city of the first class fits this description and because the population figures were tied to the 1960 census no other city could ever enter the class. This court held since the class was closed the limitation was arbitrary and the statute was unconstitutional. In this case the class is an open one so City of Scottsbluff v. Tiemann, *supra,* does not apply on that point.

In City of Scottsbluff v. Tiemann, *supra,* the court went on to say that the classification itself was arbitrary, pointing out that five other cities of the first class exceeded Scottsbluff in population and were not included within the class established by the statute, and further pointed out that tieing the class to county population was arbitrary since the court would serve only the city and the county population had no reasonable relationship. This court could discern, properly so, no reason for such classification. Does the present case come within the ambit of the second point in Tiemann? In Tiemann, this court said: "The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation." Appellee calls our attention to the fact

that in section 1 of the act the Legislature recites that the need for joint facilities exists in cities located in counties where the city constitutes more than half the population of the county, but the act in the enabling portions thereof limits its application to only those cases where the city is of the metropolitan class. There are in fact nine cities and counties within the "class" mentioned in section 1.

Limiting application of the act to cities of the metropolitan class and the county in which located would seem clearly to be a proper classification. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W. 451; Omaha Parking Authority v. City of Omaha, *supra*. Appellee's position seems in effect to be that the recital of need in section 1 is a sort of admission against interest by the Legislature which somehow binds that body and this court to the position that the only reasonable classification is the one referred to in section 1. Appellee cites no pertinent authority. We must view the act on the basis of the class to which it in fact applies. Cities of the metropolitan class are those cities of population of 300,000 or more. The Legislature can certainly take cognizance of the fact that the actual population of the only city presently in the next class is approximately 154,000 and in the next class below that approximately 31,000. The need for joint facilities certainly may vary according to population. We cannot say the classification used by the Legislature here is clearly arbitrary and without any substantial basis founded upon real differences.

Article IX, section 4

Article IX, section 4, provides: "The Legislature shall provide by law for the election of such county and township officers as may be necessary." Appellee asserts the provision of the act providing for appointment of members of the commission violates the above section. The answer is the members of the commission are not county officers. This is implicit in the light of

our holding on the main appeal and we so hold.

Article IX, sections 5 and 2

Article IX, section 5, provides: "The Legislature shall provide by general law for township organization, under which any county may organize whenever a majority of the legal voters of such county voting at any general election shall so determine; and in any county that shall have adopted a township organization the question of continuing the same may be submitted to a vote of the electors of such county at a general election in the manner that shall be provided by law." We cannot see how the act impairs the right of the people of any county to avail themselves of the provisions of Article IX, section 5. The contention is without merit.

Article IX, section 2, contains prohibitions against territorial division of counties without a vote of the electors of each county affected. The act did not violate this section.

Article XIII, section 2

Appellee contends that the act violates Article XIII, section 2, because it authorizes a donation by the city and county to a work of internal improvement. She points to sections 4(6) and (13), and 11(3) of the act and relies upon Lewis v. Board of County Commissioners of Sherman County, 5 F. 269, quoting from this case as follows: "It may be conceded as a general proposition, that a 'courthouse' is a work of internal improvement." She omits, however, the balance of the sentence: "but it may very well be questioned whether our internal-improvement law of the fifteenth of February, 1869, has any application to such a work of internal improvement." In short the court was talking about the definition of the term under a statute enacted by the Legislature. The court then pointed out that other statutes covered the building of courthouses. What we are here concerned with is the meaning of the term under the constitutional provision. The term was defined and the question here involved was pre-

cisely decided in State v. Bone Creek Township, 109 Neb. 202, 190 N. W. 586. There this court said: "In forbidding subdivisions of the state to 'make donations' to any railroad, or other 'works of internal improvement,' without submitting to the electors a proposition to do so, the framers of the Nebraska Constitution of 1875 and the people who adopted it had in mind the evils arising from excessive donations of public funds to enterprises performing public services for private gain. Public buildings used exclusively for governmental purposes, without direct pecuniary profit to any corporation, or individual, are, in the popular sense, internal improvements, but they are obviously not within this constitutional inhibition." Other courts have arrived at similar conclusions. State ex rel. Thomson v. Giessel, 267 Wis. 331, 65 N. W. 2d 529; Rippe v. Becker, 56 Minn. 100, 57 N. W. 2d 331, 22 L. R. A. 857; Attorney General ex rel. Brotherton v. Common Council of City of Detroit, 148 Mich. 71, 111 N. W. 860.

Article VIII, section 7

Appellee asserts that the act insofar as it authorizes a city to levy a tax violates Article VIII, section 7, which provides in part as follows: "The Legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes." Obitz v. Airport Authority of the City of Red Cloud, *supra*, offers a complete answer to this contention. That case says the constitutional provision in question applies only where (1) the levy is for corporate or proprietary purposes, and (2) where it is not levied by local authority. We hold the act pertains to a governmental purpose and the tax is levied by local authority within the meaning of Obitz.

The judgment of the district court that the levy by the commission is in effect a levy for county purposes and enjoining the commission from expending any funds which may be raised by the one-half mill levy is reversed. The judgment that in all other respects the

act is constitutional is affirmed. The judgment is affirmed in part and in part reversed, and the cause is remanded to the district court to enter judgment in conformity with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

BOSLAUGH, J., dissenting.

The purpose of the act in question is to provide a means whereby buildings, structures, and facilities may be acquired and constructed for joint use by metropolitan cities and the counties in which they are located. § 23-2601, R. S. Supp., 1971. To help finance the plan, the building commission established pursuant to the statute is empowered to levy up to one-half mill upon all the property in the county. § 23-2604, R. S. Supp., 1971.

This tax appears to be the only source of funds provided by the county to defray its share of the expense of the project. In effect, it is a county tax to pay for a county courthouse. The district court correctly held this levy subject to the limitation contained in Article VIII, section 5, of the Constitution of Nebraska.

If the constitutional limitation upon taxes for county purposes has become burdensome and unwise, as suggested recently by the Nebraska Constitutional Revision Commission, the remedy lies in a repeal of the limitation.

NEWTON, J., joins in this dissent.

NEWTON, J., dissenting.

The question at issue is whether sections 23-2601 to 23-2612, R. S. Supp., 1971, comprising L.B. 1003, Eighty-second Session of the Nebraska Legislature, and the construction of a courthouse thereunder, comprise an unconstitutional effort to evade the provisions of Article VIII, section 5, Constitution of Nebraska. That section of the Constitution is as follows: "County authorities shall never assess taxes the aggregate of which shall exceed fifty cents per one hundred dollars actual valua-

tion as determined by the assessment rolls, except for the payment of indebtedness existing at the adoption hereof, unless authorized by a vote of the people of the county."

The legislative bill mentioned will hereinafter be referred to as "the act." Its declared purpose is to provide a means "whereby buildings, structures and facilities can be acquired, constructed, remodeled or renovated and financed for use jointly" by metropolitan cities and the counties in which they are located. It creates a public building commission but provides it can *only be activated by resolution of the county board.* The commission shall be governed by a board of five members, two appointed by the county board, two by the mayor of the city, and the fifth by the other four members. They serve without compensation. The life span of the commission is 20 years or until all liabilities and bonds have been discharged, after which its properties vest in the county and the city. The commission may acquire personal property and also real property, the latter either by gift, purchase, or condemnation. It may also levy a tax not exceeding one-half mill "upon the assessed valuation of all the taxable property *in the county,*" and issue bonds subject to authorization by the city and *the county.* (Emphasis supplied.) The commission books are to be audited by the *county auditor.* The city and county may each *operate and maintain* any project of the commission, *appropriate funds therefor,* convey property to it, *acquire real property for its use,* and contract for the use of commission projects. The city may levy a tax sufficient to make payments accruing on bonds issued: "* * * *Provided,* that if the city shall be subject to a limitation by statute or charter on the amount of taxes which may be imposed by the city for its operating expenses, the maximum which may be levied in excess of such limitation pursuant to the authorization of this subdivision, shall not exceed one half mill on the dollar of assessed valuation of all

taxable property except intangible property; * * *." § 23-2611, R. S. Supp., 1971.

A county is a governmental or political subdivision of the State and has only such powers as are conferred by legislative act. See Lindburg v. Bennett, 117 Neb. 66, 219 N. W. 851. As far back as 1856, when Nebraska was still a territory, counties were authorized and required to provide "courthouses." Laws 1856, p. 71. Counties are still *required* to perform this traditional function. See § 23-120, R. S. Supp., 1971. Notwithstanding the act in question, the construction of courthouses remains a primary county function, just as does the building and maintenance of highways and bridges and the operation and financing of county offices. In fact, without a courthouse, a county could not function at all. If the duty to build a courthouse, jail, etc., primarily county functions to be provided for by a county tax levy, can be abdicated by legislative fiat and financed by some other governmental unit specially created for that purpose, then the same can be done with *all other* county financed activities. The constitutional limitation on levies for county purposes becomes absolutely meaningless as it can be evaded at will. That the act was conceived for purposes of evasion is readily apparent on examination of legislative committee proceedings which reveal the following statements:

"SENATOR SNYDER: (Introducer of the Bill.) * * * The city is not included in this bill. The city says it has the money it needs to build the city-county building. But, the county has had its mill limit, and if it is going to partake in a city-county building, it is going to have to find an additional means of revenue. * * *

"SENATOR CARPENTER: You are tryng to bring out that the county board is going to be the landlord, right?

"MR. CAVANAUGH: No, Sir. They are going to build the building; the commission is going to be the landlord.

"SENATOR CARPENTER: Well, it is about the same

thing. You are going to guarantee it—the county is.
"MR. CAVANAUGH: The county and the city, through our agreements. * * *
"MR. JOHNSON: Senator Carpenter and members of the Committee, I'm Warren Johnson from the Omaha Chamber of Commerce, Staff Manager of the Chamber. The Omaha Chamber has consistently supported the building of a city-county civic center. We feel that LB 1003 provides a means for the county to finance its particular share as you've heard it explained, * * *. * * *
"SENATOR CARPENTER: One other question. On this bill, for example, it says in this language, 'to a project of partly for such purposes and partly for other city or county purposes, by purchase or condemnation in the manner prescribed by law and acquisition.' Are we talking about the acquiring of existing roads, streets, parkways, etc.? Why do you have to have the (inaudible) for a project or partly for such purposes and partly for other city or county purposes?
"MR. HASSETT: (Member of Douglas County Board) The only purpose that is in there is that the bond attorneys have tried to write this so that if it is attacked at court, it would hold up in the Supreme Court. * * * As far as we're concerned, we would be just as happy with that out, because we have just one thing in mind, and that is to build the city-county building in a block immediately west of the courthouse. * * *
"MR. HASSETT: And if we can amend that and take those provisions out, and still have this a constitutional bill, we would support it, because we have no other projects in mind. * * *
"SENATOR GOODRICH: Mr. President, Members of the Body, I'd like to call your attention to the fact that this is a building which will be a joint-use building between the city council and the county commissioners. Consequently the county only has to come up with half of the cost of this building or less. * * *
"SENATOR SNYDER: * * * So it is imperative that

the Legislature pass LB 1003 if the county is going to be able to fulfill its part of the financing."

These quotations have no direct bearing on the issues of constitutionality, but they do indicate the legislative purpose and intention.

The act itself makes it clear that it is a patent attempt to evade the constitutional provision. It will be noted that the commission can only be activated by the county board; commission members are appointed by the city and county officials; it can levy a tax only on the assessed valuation *of the county,* but *the city may and must levy its own tax* for its contribution. The books are audited by the county and both the county and city may transfer real and personal property to the commission without consideration. Both the city and the county may operate and maintain commission projects and appropriate funds therefor. On the demise of the commission, its properties revert to the city and county. It is contemplated that the county may occupy the combination courthouse and city hall free of charge.

It is a well-settled rule that a county can exceed the constitutional limitation on county levies only when authorized by a vote of the people of the county. See Chase County v. Chicago, B. & Q. R.R. Co., 58 Neb. 274, 78 N. W. 502. Also, avoidance of the constitutional limit cannot be accomplished by indirection. Grand Island & W. C. R.R. Co. v. County of Dawes, 62 Neb. 44, 86 N. W. 934. In a similar case, the court commented: "If constitutional and statutory prohibitions could be evaded in this manner, they would in effect be completely nullified and constitute no restraint against the evils they were intended to correct." Warren v. County of Stanton, 145 Neb. 220, 15 N. W. 2d 757.

The trial judge aptly and ably analyzed the situation as follows: "In appraising the validity of the Statute before it and the action taken to proceed thereunder, the Court must consider the purpose of the debt limita-

tion section of the Constitution and must look through the form of the Statute to the true inwardness of the situation and to the substance of what it does.

"It seems that the clear purpose of Section 5, Article VIII of the Nebraska Constitution was to prevent the creation of an excessive debt (tax) by a *real* limitation upon the powers of the Legislature and the Counties to authorize (taxation) indebtedness beyond a certain amount unless authorized by a vote of the people.

"If the Constitution may be circumvented by the simple device of creating new and additional political subdivisions in the same territory to perform a function assigned by statute to another political subdivision, each with separate and independent taxing power, for the purpose of evading the Constitutional prohibition, no real limitation upon the Legislature and the Counties to levy taxes is provided and the object of the Constitutional provision is defeated.

"If one unit of government after another may be imposed upon the same territory for substantially the same purpose, or if every purpose may be subdivided and new debt limits created for each subdivision, there will be, in effect, no Constitutional debt (tax) limitation at all."

In a similar situation, the court in Lowery v. County of Jefferson (Ky. App.), 458 S. W. 2d 168, stated: "The purpose of creating any kind of separate taxing district would seem to be to provide financing for the accomplishment of a public purpose which for some reason or another cannot effectively be accomplished through the facilities and resources of a traditional municipality such as a county or city. Examples are fire protection districts, drainage districts, library districts, health districts, road districts, flood-control districts, hospital districts, etc. But if such a district is to have the power to impose taxes separate and apart from county or city taxes, and not chargeable to the rate limit of any county or city, it is plain that the ultimate power to decide whether the tax shall be levied cannot be vested in

the governing body of a county or city, for then the purported district is in reality nothing but a subterfuge to evade limits on tax rates. For illustration, if the fiscal court of a county has sole voice as to whether or not a particular tax shall be levied upon the taxpayers of the county, it would be pure sophistry to say that the tax is not a *county* tax."

In the case before us, the county alone can activate the commission which is tantamount to invoking the tax levy provided for in the act.

In War Memorial Hospital v. Board of County Commissioners, 73 Wyo. 371, 279 P. 2d 472, it was held: "The establishment of public cemetery and public hospital not being a distinctive governmental function of city, and not having been made essential governmental function pursuant to distinct statute, taxing powers of hospital district and cemetery district were not affected by constitutional prohibition against any incorporated town or city levying tax in excess of eight mills on dollar, and tax authorized by statute for upkeep of such districts could be levied by county board notwithstanding that total levy already requested by municipality affected might be eight mills. * * *

"Under provision of constitution prohibiting any incorporated town or city from levying tax in excess of eight mills on a dollar, imposition of additional three mill tax levied by fire protection district to which municipal corporation belonged was forbidden in view of fact that fire protection was a necessary municipal and governmental function which municipality was required to perform."

The providing of a courthouse is certainly a governmental function specifically required of a county by statute.

In Bacon v. Kent-Ottawa Metropolitan Water Auth., 354 Mich. 159, 92 N. W. 2d 492, the court dealt with a similar constitutional tax limitation and in denying the taxing power of the authority reasoned as follows:

" 'Careful study of the amendment leads to these conclusions: Clearly the intent was to provide by the fundamental law of the State, which had not theretofore contained such provision, a general limitation upon the exercise of the taxing power of the State. The evil or abuse sought to be remedied was excessive taxation imposed by governmental agencies without the consent of those upon whom the burden was placed.'

"Of such economic conditions the 15-mill amendment of 1932 was conceived, initiated, supported and adopted. But what about the *existing law* defining 'a municipal corporation,' with respect to which the people presumptively determined to apply such final exception? Was it intended to include an 'authority' which—a quarter century later—has been authorized or created by legislative act and dubbed, by legislative fiat, 'a municipal corporation'? To speak plainly, an affirmative answer to this last question—if given—will automatically grant to the legislature the power of outright repeal of a duly-voted constitutional provision.

"* * * Did the people will that the expression 'a municipal corporation' should be construed as meaning or referring to some entity or agency other than those already commonly known or recognized by 'existing laws' as municipal corporations? Did they bother to resolve a statewide constitutional limitation upon the power of property taxation and, by the same instrument of resolution, mean to provide the legislature with power to nullify the limitation as applied to legislatively manufactured new types of 'municipal corporations'? Are we to say that the electors of 1932 planned to hand the existing or any future legislature the power and authority to undo, at will, that which became the essence of their resoundingly successful initiatory effort?"

The cited cases make it clear that the majority opinion, by judicial and legislative fiat, has nullified the constitutional limitation on levies for county purposes. It deprives the electorate of that portion of their right of

suffrage guaranteed by the Constitution as it relates to excess county levies. In the creation of new governmental subdivisions empowered to levy taxes, a line can logically and should be drawn between essentially state, county, or municipal governmental powers and others.

ARTHUR J. ABBOTT, APPELLEE AND CROSS-APPELLANT, V. ETHEL S. ABBOTT, APPELLANT AND CROSS-APPELLEE.
195 N. W. 2d 204

Filed March 3, 1972. No. 38010.

1. **Trial: Evidence: Fraud.** The parol evidence rule does not prevent reception or consideration of evidence to prove promissory fraud.
2. **Contracts: Fraud.** A disclaimer clause in a bargain is relevant to the issue whether the claimant in fact relied on the false representation disclaimed in the clause.
3. **Interest: Judgments.** Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right.
4. **Interest: Evidence.** A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount, without reliance upon opinion or discretion.

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

Finlayson, McKie & Fisk and Lester A. Danielson, for appellant.

Wright & Simmons, for appellee.

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

SMITH, J.

Damages for promissory fraud in settlement of objections to probate of a will were sought by Arthur J. Abbott from Ethel Abbott, his stepmother. On remand after Abbott v. Abbott, 185 Neb. 177, 174 N. W. 2d 335 (1970), a jury found for Arthur. The district court

awarded him prejudgment interest on the amount of the verdict from February 9, 1960, the date of final distribution of the assets of the estate.

Ethel appeals. She assigns for error (1) the denial of her motion for judgment notwithstanding the verdict and (2) the award of interest. Arthur cross-appeals. He asserts error in the court's denying him prejudgment interest compounded annually.

SUMMARY OF EVIDENCE

Christopher J. Abbott at the time of his marriage to Ethel in 1933 was the father of Arthur, age 18, Glaideth, and Phyllis. On January 10, 1954, Christopher died leaving a form of will. It gave one-half the estate to Ethel and out of the other half, specific legacies to Christopher's brother, LeRoy Abbott, Arthur, and Glaideth. It provided for distribution of the remainder to Arthur and his sisters in equal shares. The subscribing witnesses were LeRoy, Ethel, Arthur, and Miles Lee, a lawyer and nonbeneficiary.

Arthur and his sisters, accepting an invitation that excluded any counsel for them, attended a meeting of named beneficiaries. Other beneficiaries were present with counsel. In the confusion and with pressure on them the sisters departed to seek legal advice. They subsequently threatened to contest probate of the will. One objection was defective attestation argued as follows: In event of a will contest Ethel, a subscribing witness, would be compelled to testify. Upon doing so, regardless of the outcome of the contest, she would receive only one-fourth, her intestate share, instead of one-half. The difference between the one-fourth and the one-half was $1,250,000. In the absence of a contest the will would be admissible without her testimony, and she would receive a one-half share. Everyone conceded that the objection was sound.

On March 29, 1954, at a meeting in Omaha of all beneficiaries, except the sisters, Arthur alone was not represented by counsel. There he suddenly offered to give

up enough property to equalize the childrens' shares. Equalization was acceptable to the sisters provided Ethel made up the difference. During the meeting but only in the presence of Arthur and Lee, the promise in suit was given orally by Ethel. She would pay Arthur the difference in value between the property covered in the will provisions for him and the property distributed to him from the estate. The difference would be payable upon final distribution of the assets of the estate. Ethel subsequently repeated the promise, attaching conditions that Arthur would assist in winning his sisters and in gaining admission of the will to probate. Arthur performed.

Counsel, negotiating terms of a settlement, prepared several drafts without consulting Arthur, who had not engaged counsel. The final draft was to be approved in writing by counsel for each party. Upon advice then given by Ethel, Arthur engaged Lee to represent him and the estate. Lee subsequently advised Arthur that the offer of settlement which did not express Ethel's prior oral promise was grossly unfair and unacceptable. Arthur agreed, but he subsequently informed Lee that he intended to sign anyway, and he requested Lee's written approval. Lee approved the settlement but only after Arthur signed a letter setting out Lee's actual advice and in effect exonerating Lee from malpractice.

The settlement was signed on May 10, 1954, the day the will was admitted to probate. It generally saved a one-half share for Ethel. Arthur received $303,412.25 less than he would have received under the will without the settlement. The provision for him under the will was less than was the provision for him under the statutes of descent and distribution. Arthur testified to reliance on the oral promises of Ethel.

Prior to June 1, 1954, Lee was discharged as attorney for Arthur and the estate. From that time to April 1962 Arthur acted without the advice of counsel.

A meeting was held in Lincoln on July 10, 1959, relat-

ing to final distribution of estate property. There Arthur twice was queried whether any promise other than an unrelated one given at the funeral, had been made to him by Ethel. According to his testimony, Arthur knew that he must take a stand then or never, but he thought Ethel's oral promises were not enforceable. The room was quiet for several minutes. Arthur hung his head. Then, according to two lawyers, and Arthur himself, he twice answered, "There were no promises." According to Glaideth and Phyllis, Arthur in a low voice quietly added, "at least not in writing."

Christopher orally had promised Arthur some cattle that were undelivered at his death. At the funeral and prior to any inkling of probate objections Ethel promised Arthur that she would deliver the cattle. That promise was the one mentioned at the meeting in Lincoln. It had not been covered in the family settlement agreement or in plans for final distribution of estate property. On December 29, 1959, Arthur signed an instrument acknowledging receipt of the cattle. His signature was witnessed by LeRoy and James C. Quigley, a lawyer, who had represented LeRoy in the family settlement. The instrument, typewritten, was headed "RECEIPT." It began: "RECEIVED of Ethel S. Abbott . . . 250 . . . head of cattle . . . classified as follows . . .." After listing 11 classes, the value of each, and the total, $37,420, it continued: "in full and complete payment and satisfaction of the only verbal promise made by . . . Ethel . . . to the undersigned, in the deduction of said cattle from her distributive share of the cattle belonging to the estate of Christopher J. Abbott, deceased, the same to be a part of my inheritable share of cattle belonging to said estate."

At the time Arthur signed the "receipt," according to him, he was under pressure to locate ranch land for his cattle. The lease and the receipt formed a single transaction. He read the receipt hurriedly, and he did not notice the disclaimer clause. Had he noticed it, ac-

cording to his testimony, he would not have signed the receipt.

Arthur, a college graduate with a degree in business administration, had been managing ranches of Christopher. He also was a director of several banks. A jury, however, might reasonably find the relationship between Arthur and Ethel to have been the one summarized by Lee: "Well, it seemed obvious, of course, that Arthur . . . was greatly dependent upon someone after his father's death. Ethel . . . took the role of mother as much as a stepmother could. And of course I would say very largely dominated all business matters that affected Arthur and affected the estate. Q. In your observation did Ethel . . . have control over Arthur? A. In my opinion she very largely did, she very largely did."

Pleadings and pretrial stipulations established the following facts: Entry of final decree in the estate and final distribution of the assets had occurred February 9, 1960. Arthur received assets with a value of $303,415.25 less than the value of the assets he would have received under the will. Arthur's petition prayed for recovery of $303,415.25, with interest at 6 percent a year from February 9, 1960. The district court found the claim to be liquidated. It allowed Arthur interest in accordance with the prayer, the $303,415.25 set out in the jury verdict being fixed as a matter of law.

MOTION BY ETHEL FOR JUDGMENT

Ethel contends that the clause in the "receipt" contractually disclaimed promissory fraud on her part, and that it was a release. Several general rules relating to fraud in contract, tort, or both arguably support her contention. A person who offers no explanation to avoid a receipt in which he acknowledged full payment of the amount due under a written agreement not to contest a will in consideration for such payment may not recover. See Knoll v. Knoll, 173 Neb. 602, 114 N. W. 2d 40 (1962). Generally in the absence of fraud, one who does not choose to read a contract before signing it can-

not later relieve himself of its burdens. General Motors Acceptance Corp. v. Blanco, 181 Neb. 562, 149 N. W. 2d 516 (1967). Where ordinary prudence would have prevented the deception, an action for fraud perpetrated by such deception will not lie. Swanson Petroleum Corp. v. Cumberland, 184 Neb. 323, 167 N. W. 2d 391 (1969). Generally a mistake of law is one upon which a party cannot rely, as all parties are bound to know the law. Beltner v. Carlson, 153 Neb. 797, 46 N. W. 2d 153 (1951).

Other rules lend support to the submission of promissory fraud issues to the jury in this case. The parol evidence rule does not prevent reception or consideration of evidence to prove promissory fraud. Abbott v. Abbott, 185 Neb. 177, 174 N. W. 2d 335 (1970); cf. Central Constr. Co. v. Osbahr, 186 Neb. 1, 180 N. W. 2d 139 (1970). A disclaimer clause of a bargain is relevant to the issue whether the claimant in fact relied on the false representation disclaimed in the clause. Without more the clause is ineffective to preclude a trier of fact from considering whether fraud induced formation of the bargain. Camfield v. Olsen, 183 Neb. 739, 164 N. W. 2d 431 (1969). The rules in general attempt to strike a balance among competing policies. Objectivity and certainty in the law of contracts are desirable, but at times they are too weak to protect legitimate expectations of fair dealing.

The emphasis upon fair dealing is nowhere more apparent today than it is in the article of the Uniform Commercial Code relating to sales. "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." § 2-302(1), U.C.C.

Apart from statute, the need for security of transactions in the traditional sense has yielded somewhat to

the need for flexibility. See, Keeton, "Fraud-Statements of Intention," 15 Tex. L. Rev. 185 (1937); Kessler and Fine, "Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study," 77 Harv. L. Rev. 401 at 448, 449 (1964); Seavey, "Caveat Emptor as of 1960," 38 Tex. L. Rev. 439 (1960). A disclaimer clause in a family settlement agreement will not necessarily bar recovery for fraud. A subsequent agreement for a valuable consideration is sometimes strong evidence against the claimant. It may be strong enough to bar recovery as a matter of law. Among the elements for consideration of its effect are the presence or absence of specific assent to the disclaimer, the extent of any inequality of bargaining power, the adequacy of the consideration, and the nature of the relationship between the parties. Cf. Note, 47 Cornell L.Q. 655 (1962). In this case the evidence, including the disclaimer clause of December 29, 1959, was sufficient to support a verdict for Arthur on the issue of promissory fraud.

PREJUDGMENT SIMPLE INTEREST

Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right. "A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. Examples are claims upon promises to pay a fixed sum, claims for money had and received, claims for money paid out, and claims for goods or services to be paid for at an agreed rate." McCormick, Damages, c. 7, § 54, p. 213 (1935). See, also, § 45-104, R. R. S. 1943; Mid States Engineering v. Rhode, 182 Neb. 590, 156 N. W. 2d 149 (1968).

In the present case the value of all property in the estate for inheritance and estate taxation was determined prior to final distribution. Arthur and Ethel were legal representatives of the estate. Those data were sufficient for the court properly to conclude that the claim of Arthur was liquidated. The allowance of pre-

judgment interest was correct. See generally Oleck, Damages to Persons and Property, §§ 300 and 301, pp. 641 to 651 (1961).

COMPOUND INTEREST

Arthur and Ethel were fiduciaries, and Arthur argues an analogy of trust law. Most jurisdictions allow a beneficiary under certain circumstances to recover compensation in the form of prejudgment compound interest from the trustee. See, Restatement, Trusts 2d, § 207(2) (1959); 1 Sedgwick on Damages, § 344, p. 680 (9th Ed., 1912).

The general rule is that in the absence of contract or statute, compensation in the form of compound interest is not allowed to be computed upon a debt. See, Cherokee Nation v. United States, 270 U. S. 476, 46 S. Ct. 428, 70 L. Ed. 694 (1926); United States v. Marina Realty Co., 82 F. Supp. 640 (D. C. Puerto Rico, 1949); Blanchard v. Dominion Nat. Bank, 130 Va. 633, 108 S. E. 649, 27 A. L. R. 78 (1921).

We need not decide whether compensation in the form of compound interest on a claim of fraud is ever recoverable. The evidence in this case compelled no such allowance.

The judgment is affirmed.

AFFIRMED.

CLINTON, J., concurring.

I concur in the result and in the opinion of the court, but I would deal with the issues raised by the "receipt" as follows. The recital in the "receipt" re "the only oral promise" was at most merely an admission against interest. In any event it is ambiguous on its face as to whether it pertains to the transaction which is the basis of the suit. Dunn v. Alexander, 104 Neb. 628, 178 N. W. 215, governs. The receipt raised only a jury question and the jury found for Arthur.

BOSLAUGH, J., dissenting in part.

I dissent from that part of the opinion of the court that allows the plaintiff prejudgment interest. In a case as

doubtful as this, the defendant should be allowed to litigate her rights without the risk of a judgment that will include more than $200,000 in interest.

WHITE, C. J., concurs in this dissent.

LEONARD R. BOYD, DOING BUSINESS AS SOUTHWEST PLUMBING AND HEATING COMPANY, APPELLANT, V. BENKELMAN PUBLIC HOUSING AUTHORITY ET AL., APPELLEES.

195 N. W. 2d 230

Filed March 3, 1972. No. 38029.

1. **Contracts.** In the absence of an otherwise binding agreement, express or implied, there is no privity of contract between a subcontractor and the owner.
2. ———. Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof.
3. **Contracts: Payment: Words and Phrases.** Final settlement is not synonymous with final payment. It precedes payment and denotes the proper administrative determination with respect to the amount due.
4. **Contracts.** Final settlement occurred when an administrative determination was made with respect to the amount due, following completion of the project, which was accepted by the owner.

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

Sarah Jane Cunningham, for appellant.

Leon Hines, Herbert E. Story, and Thomas F. Colfer, for appellees.

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

NEWTON, J.

This is an action brought by a subcontractor to recover, for work and materials furnished on a construction proj-

ect, from the surety on the performance bond of the defaulting principal contractor and from the owner of the project. The district court found for the defendants and we affirm the judgment so entered.

The Benkelman Public Housing Authority entered into a contract with the Joe Dougherty Construction Company for the construction of a housing project. United Bonding Insurance Company became surety on Dougherty's bond as required by section 52-118, R. R. S. 1943. Plaintiff subcontracted the plumbing, heating, air conditioning, and outside utilities portion of the project from Dougherty. On default by Dougherty, United, as surety, undertook to complete the project. It was completed and accepted by the Housing Authority on July 26, 1966. There appears to have been some dispute between United and the Housing Authority as to the sums remaining due from the Housing Authority. A meeting was held between them on September 22, 1966, at which time United offered a compromise settlement calling for a further payment of $4,000 by the Housing Authority in final settlement of all its obligations. On October 4, 1966, the board of commissioners of the Housing Authority approved the settlement in the following language: "* * * BE IT RESOLVED * * * that the compromise settlement presented to this meeting between this Housing Authority and the United Bonding Insurance Company be, and the same hereby is, accepted, and the Executive Director, * * * is herewith authorized and directed to execute the compromise settlement and return it with the payment of the amount set forth therein to the offeror." The settlement agreement was reduced to writing and executed on November 4, 1966, and the $4,000 payment made on November 9, 1966. The settlement agreement provides that it shall not be construed as releasing "United from its obligation to secure payment to persons furnishing material or labor on said project in accordance with the terms of the performance and payment bond executed by United with reference

thereto." Plaintiff seeks to recover for work and materials furnished.

Two questions are presented. First, does plaintiff have a cause of action against the Housing Authority? Second, is the statute of limitation, section 52-118.02, R. R. S. 1943, a bar to plaintiff's action against United?

It seems clear that plaintiff has no right of recovery from the Housing Authority. His contract was with the principal contractor, Dougherty, and not with the Housing Authority. "In the absence of an otherwise binding agreement, express or implied, there is no privity of contract between a subcontractor and the owner." Gatchell v. Henderson, 156 Neb. 1, 54 N. W. 2d 227. See, also, Rosebud Lumber & Coal Co. v. Holms, 155 Neb. 459, 52 N. W. 2d 313.

At the September 22, 1966, meeting, United offered to the Housing Authority certain terms for a final settlement of their respective liabilities under the housing project contract. This offer, as embodied in exhibit 24, was accepted by the Housing Authority on October 4, 1966, and the action recorded in the minutes of the meeting of the officers of the Housing Authority. There was at this time a final settlement entered into notwithstanding the agreement was later reduced to writing. "Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; * * *." Restatement, Contracts, § 26, p. 33. See, also, Annotation, 122 A. L. R. 1217; Reynolds & Maginn v. Omaha General Iron Works, 105 Neb. 361, 180 N. W. 584.

In Westinghouse Electric Supply Co. v. Brookley, 176 Neb. 807, 127 N. W. 2d 465, this court held: " 'Final settlement is not synonymous with final payment. It precedes payment and denotes the proper administrative determination with respect to the amount due.' " The record in the present case does not reflect that "a proper

administrative determination" was made by Dougherty or United which was later accepted by the Housing Authority. Rather, it indicates that a difference of opinion existed which was compromised by means of the settlement agreement. Of necessity, the "final settlement" must be considered to have occurred either on September 22, 1966, or as of the date the settlement agreement was entered into. Plaintiff not having instituted suit until October 27, 1967, more than 1 year after October 4, 1966, it would appear that the action is barred by the limitation set up in section 52-118.02, R. R. S. 1943.

It is true that the record reflects the following facts. Under the settlement agreement United was required to set up a trust fund for the payment of subcontractors and creditors of Dougherty. It is stipulated that plaintiff was such a subcontractor and that there is due him the sum of $5,682.76. United paid to Herbert E. Story, as trustee, the sum of $10,000 for this purpose. Story was, at all times material to this action, acting as attorney for United. On May 18, 1966, he had written to plaintiff assuring him that United was responsible for the payment of all labor and material bills and that funds were to be deposited in trust to pay the claims. Story was aware of plaintiff's claim. The unexpended trust funds inured to the benefit of United which authorized Story to apply the funds on attorney's fees due Story from United. The settlement agreement clearly contemplated payment by United of the outstanding claims against Dougherty. Failure to pay the sum concededly due plaintiff may be a breach of the settlement agreement in regard to which plaintiff was a third party beneficiary. This cannot alter the situation. The pleadings are limited exclusively to the question of liability on the original bond and that liability has been barred by the 1-year statute of limitation. No facts tolling the operation of the statute have been alleged.

The judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH and SPENCER, JJ., dissenting.

Under the facts in this case it is doubtful whether the informal understanding reached at the meeting of the representatives of the parties in Omaha on September 22, 1966, should be considered to be a "final settlement of the principal contract" within the meaning of section 52-118.02, R. R. S. 1943. However, it is unnecessary to decide that question because of the relationship between the plaintiff and United Bonding Insurance Company after the default of Dougherty.

The bonding company concedes that it completed the project under an assignment of the contract from Dougherty. Since it assumed the role of the principal contractor, its liability was not limited to the bond under the facts in this case.

In Southern Surety Co. v. Weaver Bros. (Tex. Civ. App., 1931), 35 S. W. 2d 255, affirmed 56 S. W. 2d 634 (1933), a surety under the terms of its performance bond took over and completed a contract for the construction of a church when the contractor defaulted. The bond provided, in language similar to the case at bar, that the completing surety had an assignment to the rights of the contractor. The Texas court held that when the surety company took over the contract under the assignment, it assumed all of the responsibilities of the contract and was liable to a materialman for material provided to the contractor before default even though the materialman did not file a mechanic's lien within the statutory time.

McCOWN, J., joins in this dissent.

WILLIAM E. NICHOL, DOING BUSINESS AS SCOTTSBLUFF CREDIT BUREAU, APPELLEE, V. MARY CLEMA, APPELLANT.
195 N. W. 2d 233

Filed March 3, 1972. No. 38034.

1. **Husband and Wife: Statutes: Words and Phrases.** The term family as used in section 42-201, R. R. S. 1943, includes a husband who is residing in the same household with the other members.
2. **Husband and Wife: Statutes: Support of Persons.** Medical services furnished a husband individually are necessaries within the meaning of section 42-201, R. R. S. 1943, for which a wife may be liable.
3. ———: ———: ———. Each case of what are necessaries and who is included within the term family as provided in section 42-201, R. R. S. 1943, must be determined on its own facts.

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

Marvin L. Holscher, for appellant.

George A. Sommer, for appellee.

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

CLINTON, J.

This is an appeal from a judgment of the district court for Scotts Bluff County which held under the provisions of section 42-201, R. R. S. 1943, the property of Mary Clema was liable for medical services furnished to her husband, Joseph Clema, at his request. Execution on a judgment against Joseph Clema had been returned unsatisfied. The plaintiff then brought this action under the above statute. Section 42-201, R. R. S. 1943, insofar as it is pertinent, provides as follows: ". . . Provided, all property of a married woman, except ninety per cent of her wages, not exempt by statute from sale on execution or attachment, regardless of when or how said property has been or may hereafter be acquired, shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman after

execution against the husband for such indebtedness has been returned unsatisfied for want of goods and chattels, lands and tenements whereon to levy and make the same."

Mary contends Joseph is not included in the term family as that term is used in the statute and the judgment against him was not for necessaries furnished the family. These contentions are founded upon the highly unusual set of circumstances under which the Clemas live. There is no dispute in the facts. The case was tried upon a stipulation.

The stipulated facts show the Clema marriage has been the subject of constant litigation between the parties. Mary made an unsuccessful attempt to divorce her husband in 1949. In 1951 Joseph filed a suit claiming an interest in certain real estate belonging to Mary. In that action the court held the land in question was the separate property of Mary but Joseph had the right to occupy the dwelling house as a home. Joseph filed suit against Mary in 1960 seeking an order of the court directing her to support him. This case is still pending and no order has been entered. It is stipulated that because of the 1951 decree Mary allows Joseph to live in the house, however, each party maintains his own bedroom and lives separate from the other in every respect. Each furnishes his own support, prepares his own meals, does his own laundry, and, except for occupying the same premises, are as strangers. Mary, however, pays the utilities bills, taxes, and upkeep on the home. Joseph has been totally incapacitated for at least 10 years and has not contributed anything to the support of Mary since 1948 except a $10 payment on a gas bill many years prior to this litigation. Mary filed an action for divorce against Joseph on December 1, 1969, and this action is still pending. Medical services rendered Joseph were furnished from 1965 to 1967 prior to that divorce action.

Both parties cite and rely upon separate portions of the

opinions in Leake v. Lucas, 65 Neb. 359, 91 N. W. 374, 62 L. R. A. 190, adhered to on rehearing 65 Neb. 365, 93 N. W. 1019. In that case this court said: "We do not intend to establish a rule of law by which we shall be conclusively bound in such cases hereafter, for every decision upon this question must necessarily be largely governed by the facts existing in the particular case in which it is rendered. . . . We ought to give the statute a reasonable construction, and we therefore hold, under the facts in this particular case, that when the husband is actually a part of the family, living with it as such, and is for some reason temporarily incapacitated by illness, his maintenance and support, including medical attendance, comes fairly within the rule of the statute which makes the wife liable as his surety therefor. . . . There can be no doubt that the word 'family' includes the husband, and that 'necessaries' furnished him for his individual use, are furnished the family within the meaning of the statute."

Mary of course stresses the portions of the opinion in Leake v. Lucas, *supra,* referring to each case being decided on its own facts, statements in the opinion with reference to temporary incapacity, and the recital that the services furnished enabled the husband to return to health and again support his family. She argues that under the facts here there is no "family" within the meaning of the statute and, apparently by implication at least, the services furnished were not in any event necessaries of the family because Joseph contributed nothing to the wife's support and the medical services were not of any benefit to the family for Joseph could not be restored to health.

This is a case which is not easy of decision, but the following factors persuade us the judgment of the trial court should be affirmed. Joseph and Mary, despite their strained relationship, are in fact husband and wife. Mary has been unsuccessful in her efforts to obtain a divorce. They live in the same house and, to the casual

observer at least, appear to be a family. There was no divorce action pending between them at the time the services were furnished although, as we have noted, it is stipulated that Joseph lives in the home only because of the decree of the court. This decree would appear to be based upon a finding that he has a right to do so because it is the family homestead. Mary appears to have acquiesced in this finding as she has not appealed from that decree. Also, Leake v. Lucas, *supra*, clearly holds that medical services furnished a husband are family necessaries within the provisions of section 42-201, R. R. S. 1943, and we do not understand that our court in that case founded its decision upon the effectiveness of the medical services in restoring the husband to health and earning capacity. Further, practically all the cases which have considered the matter hold medical service furnished the husband individually are a family necessary under statutes comparable to section 42-201, R. R. S. 1943. Under some circumstances even though the husband and wife are not living under the same roof they may still constitute a family. A case worthy of note is In re Guardianship of DeNisson, 197 Wash. 265, 84 P. 2d 1024, where the estate of the wife, who was confined in an asylum, was held liable for the support of an aged and indigent husband.

We reiterate the statement in Leake v. Lucas, *supra:* "We do not intend to establish a rule of law by which we shall be conclusively bound in such cases hereafter, for every decision upon this question must necessarily be largely governed by the facts existing in the particular case in which it is rendered."

In his brief plaintiff asks for an attorney's fee in this court under the provisions of section 25-1801, R. S. Supp., 1969. The existence of conditions precedent for such an allowance are neither pled nor proved. See Andrews v. Wilkie, 181 Neb. 398, 148 N. W. 2d 924. No fee can be allowed.

AFFIRMED.

H. W. PATTERSON, APPELLANT, V. CARL W. RENSTROM ET AL., APPELLEES.
195 N. W. 2d 193

Filed March 3, 1972. No. 38040.

Limitations of Actions: Libel and Slander: Time. The statute of limitations in a libel action commences to run upon publication of the defamatory matter which forms the basis of the action.

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

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

Edward G. Garvey, James R. McGreevy, and Cline, Williams, Wright, Johnson & Oldfather, for appellees.

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

McCOWN, J.

The plaintiff, H. W. Patterson, brought this action against the defendants, Carl W. Renstrom and Tip-Top Products, a corporation, for damages from certain allegedly slanderous, libelous, and defamatory letters published and mailed in November 1960. The defendants demurred on grounds that the claim was barred by the statute of limitations. The demurrers were sustained and the plaintiff has appealed.

Plaintiff operates a business under the name of The Ti-Not Company which sells a women's rubber hair fastener. The defendant, Carl W. Renstrom, is the president of the defendant Tip-Top Products, a corporation. That company operates out of Omaha, Nebraska, and manufactures and sells various hair accessory products.

In October 1960, the plaintiff wrote to some of his customers that the defendant, Tip-Top Products, was misrepresenting the patent status of a competing Tip-Top product. In November 1960, Tip-Top Products, in a letter to its customers, written by defendant Renstrom, responded by agreeing to hold the customers harmless

on all claims pertaining to the questioned patent. In some letters, Tip-Top also enclosed a Dun and Bradstreet report on plaintiff Patterson and his business and referred to plaintiff's "considerable irresponsibility."

In October 1970, in the course of a patent suit, the plaintiff discovered that such letters had been written by the defendant, Tip-Top, in 1960. This action was filed on November 6, 1970, in the district court for Douglas County.

The sole issue argued in the district court involved the applicable statute of limitations and when it began to run. It is the plaintiff's contention that the statute of limitations in an action for libel or defamation should not begin to run until the fact of the libel or defamation is discovered. He relies on judicial interpretations of limitation statutes applicable to professional malpractice and fraud cases.

Section 25-208, R. R. S. 1943, provides in part: "The following actions can only be brought within the periods herein stated: Within one year, an action for libel, slander, assault and battery, false imprisonment, malicious prosecution, or an action upon a statute for a penalty or forfeiture, * * *."

In this state, the statute of limitations in a libel action commences to run upon publication of the defamatory matter which forms the basis of the action. See, Tennyson v. Werthman, 167 Neb. 208, 92 N. W. 2d 559; Reller v. Ankeny, 160 Neb. 47, 68 N. W. 2d 686.

Even if it be assumed that a 4-year statute of limitations was involved or that the principles involved are akin to those of malpractice or fraud, it does not help the plaintiff. In such cases we have consistently held that "discovery" means discovery of the facts constituting the basis of the cause of action, or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. See Jameson v. Graham, 159 Neb. 202, 66 N. W. 2d 417.

Here there is no allegation of fraud or fraudulent concealment. By analogy the statute of limitations under section 4 of the Clayton Act involves related issues. Under that statute mere ignorance of the facts constituting a cause of action, in the absence of the defendant's fraud, and mere ignorance of the evidence which would be probative of the plaintiff's claim, will not suffice to postpone the operation of the statute of limitations. See 4 Callmann, Unfair Competition Trademarks and Monopolies (3d Ed.), § 87.5(b), p. 164. It is quite apparent that if there had been any special damage, required to be alleged and proved in a case such as this, the existence of such damage would undoubtedly have been sufficient to put the plaintiff on inquiry as to the source long before even a 4-year statute of limitations might have expired.

The action of the district court in sustaining the demurrers of both defendants was entirely correct and is affirmed.

AFFIRMED.

BOSLAUGH, J., not participating.

SALLY JO SCHNEIDER, APPELLEE, V. HAROLD DUANE SCHNEIDER, APPELLANT.

195 N. W. 2d 227

Filed March 3, 1972. No. 38053.

1. **Divorce: Parent and Child.** In a proceeding for modification of an order for child support a post-decree birth is a change of circumstances, although the decree provided for support of the unborn child.
2. ———: ———. A father is primarily liable for support of his minor children, his liability being independent of the assets of the mother.
3. **Divorce: Parent and Child: Appeal and Error.** The order of the trial court in a child support proceeding will not be overturned unless there is found an abuse of discretion.

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

George A. Sommer, for appellant.

Wright & Simmons and John F. Wright, for appellee.

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

SMITH, J.

The district court increased the allowance payable by Harold Duane Schneider to Sally Jo Schneider for child support to $200 a month. Harold appeals.

On May 6, 1970, Sally and Harold stipulated that he would pay her $150 a month for child support. The payment was to be for the support of Kari and an unborn child. The following day the court incorporated the stipulation into a decree that awarded Sally an absolute divorce.

On September 8, 1970, Sally gave birth to a child, Karmen. On October 26 she petitioned for an increase to $250 a month for child support. At the trial in January 1971 she testified as follows. At the time of the stipulation she had not anticipated certain circumstances. They were living expenses and the length of her unemployment because of the pregnancy. In addition she desired to send Kari, age 3½, to preschool at a cost of $5 a day.

Sally at the time of trial was employed at a monthly salary of $320 gross, $260 net. Harold was a manager of Universal C.I.T. at a gross monthly income of $745 which he had been receiving for some time. A Christmas bonus in 1970 amounted to $260. His net monthly income was $575 which resulted partly from his claim of one exemption for withholding of income taxes. He intended to claim two more exemptions for the children in 1971. He owned an automobile which he needed in his employment. Among his other assets were a trailer, a color television set, and a stereophonic sound console. The trailer was heavily encumbered.

If the circumstances of the parties shall change or it shall be to the best interests of the children, the court may alter the decree respecting care and maintenance of the children. § 42-312, R. R. S. 1943. A post-decree birth is a change of circumstances, although the decree provided for support of the child.

A father is primarily liable for support of his minor children, his liability being independent of the assets of the mother. The order of the trial court in a child support proceeding will not be overturned unless there is found an abuse of discretion. Benton v. Benton, 187 Neb. 205, 188 N. W. 2d 685 (1971).

The district court in this proceeding committed no abuse of discretion. The order is affirmed. Sally requests an allowance for services of her counsel in this court. The request is denied.

AFFIRMED.

NEWTON, J., dissenting.

I disagree with the majority opinion. Decree of divorce was entered herein on May 7, 1970, following a hearing at which both parties were represented by able counsel. A stipulation had been entered into regarding disposition of the property of the parties, custody of a minor daughter, and one unborn child, child support for the children including the one not born, and medical expenses. On October 26, 1970, plaintiff filed her petition for an increase in child support payments previously fixed at $150 per month by stipulation incorporated in the decree. The court decreed an increase to $200 per month.

At the time of the divorce, plaintiff was earning $260 per month, her apartment rent, with utilities included, was $135 per month, defendant's salary was $745 per month and remains unchanged. Plaintiff moved to Sidney, Nebraska, and is presently employed at a salary of $320 per month. She has purchased a house carrying monthly payments of $80 and has utilities expense of $35 per month. She had an automobile before the divorce

and there has been no change in transportation expense except that she has purchased a new car and is making payments of $50 per month. She states her baby-sitting expense has increased by about $45 per month and wishes to send the 3½-year-old daughter to preschool at a cost of $100 per month. Her house expense is now $20 per month less than the rent she formerly paid and with each payment she increases her equity in the house. She now enjoys a salary increase of $60 per month. These factors nearly offset the increase in car payments and baby-sitter's fees. The only new element of consequence is plaintiff's presently conceived desire to send her child to preschool which is not ordinarily considered necessary for a child's welfare and has not been shown to be such in the present case.

It is a rule of long standing that any application for modification of a divorce decree with respect to care, custody, and maintenance of minor children must be founded on new facts which have arisen since entry of the decree. See Hossack v. Hossack, 176 Neb. 368, 126 N. W. 2d 166. In the present instance modification of the decree was sought within 6 months of its entry. Under such circumstances the court has power to vacate or modify the decree. See § 42-340, R. R. S. 1943.

The right to set aside or modify a divorce decree within 6 months is not absolute but must be exercised within a sound judicial discretion. Good reason must be shown for such action. See, Hubbard v. Hubbard, 176 Neb. 768, 127 N. W. 2d 503; Zachry v. Zachry, 185 Neb. 336, 175 N. W. 2d 616. Here we have a stipulation regarding the matter at issue entered into by the parties knowingly, willingly, and with advice of competent counsel. No substantial change in circumstances appears, no deceit is charged or proved, and no good reason for modifying the stipulation and decree is shown. The order modifying the original decree should be reversed.

If the rule mentioned above is not followed, the trial

judge will be at liberty to tinker with divorce decrees at will during the 6-month period following entry of decree.

STATE OF NEBRASKA, APPELLEE, V. GENE H. ROSE, APPELLANT.
195 N. W. 2d 215

Filed March 3, 1972. No. 38107.

1. **Criminal Law: Evidence: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
2. **Criminal Law: Attorneys at Law: Appeal and Error.** The record must support the claim of ineffective counsel.

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

Gene H. Rose, pro se.

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.

CLINTON, J.

The defendant was found guilty by a jury of having on about May 10, 1970, knowingly and unlawfully sold or offered for sale cannabis, sometimes known as marijuana. He was sentenced to a term in the state penal complex.

Two issues are raised on the appeal: (1) The sufficiency of the evidence to sustain the conviction; and (2) ineffective assistance of counsel by reason of which he was denied a fair trial. At the trial the defendant was represented by counsel apparently of his own choosing. On this appeal the public defender's office was

first appointed to represent the defendant. That office was permitted by the court to withdraw after full compliance with Anders v. California, 386 U. S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493; and State v. Williams, 181 Neb. 692, 150 N. W. 2d 260. The basis of the withdrawal and the order of the court permitting the same was that the appeal was frivolous.

We have carefully examined the record. As to the first assignment there is no merit. The State's evidence established a prima facie case of the sale by the defendant to an undercover agent. The defendant took the stand in his own behalf and denied the transaction. The only question was one of credibility and this the jury has resolved.

As to the second assignment the defendant's position seems to be that his counsel failed to call a witness, Ada, defendant's sister-in-law, to testify that she was not the "Ada" present at the transaction in question as claimed to have been testified to by the undercover officer. There is nothing in the record to establish what this witness' testimony would have been. If her evidence would have been helpful surely the defendant himself could have arranged for her appearance as a witness in his behalf. We cannot assume that counsel would fail in a matter so obvious. The record of the trial reveals no ineffectiveness or incompetency of counsel.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRED L. KIMES, APPELLANT.
195 N. W. 2d 216

Filed March 3, 1972. No. 38111.

Criminal Law: Guilty Plea: Plea Bargaining: Sentences. Under the circumstances in this case, where the plea of guilty was induced in part by a misunderstanding as to the recommendation the county attorney would make at the sentencing hearing,

the sentence is vacated and the cause remanded for resentencing.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Sentence vacated; cause remanded for resentencing.

Merrell L. Andersen, 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.

BOSLAUGH, J.

The defendant was convicted of second degree murder upon a plea of guilty and sentenced to imprisonment for 40 years. The appeal challenges the validity of the sentence.

The defendant was originally charged in two counts with murder in the first degree. At the arraignment on October 2, 1970, the defendant pleaded not guilty. On November 25, 1970, the information was amended to charge murder in the second degree and defendant entered a plea of guilty. Before accepting the plea the district judge advised the defendant fully as to his rights; determined that there was a factual basis for the plea; and that the plea was entered voluntarily and understandingly. At this hearing, in response to an inquiry by the court, the defendant stated that there had been no plea bargaining.

At the hearing on sentencing, held on December 23, 1970, the defendant testified as to the circumstances of the crime. He had been renting an apartment from the deceased, Minnie M. Kaminska, who was 81 years of age. A dispute arose over a refund of rent when the defendant was asked to vacate. Mrs. Kaminska refused to refund any part of the rent, the defendant struck her on the head several times with a length of pipe, and took the money from her purse. The State produced addi-

tional evidence concerning the crime and the defendant's criminal record.

The statements of counsel made at the conclusion of the evidence do not appear verbatim, but the record shows that the county attorney recommended a sentence of imprisonment for 50 years. Following the statements of counsel, the trial court imposed the sentence of imprisonment for 40 years.

Immediately following the hearing, a conference was held in chambers where counsel for defendant stated to the court, for the first time, that there had been a plea bargain and that it had been violated. The county attorney acknowledged that there had been an agreement between counsel but denied that there had been any violation of the agreement.

A motion for new trial was filed and an evidentiary hearing held on the motion. At this hearing the defendant's counsel testified that it was their understanding that in return for the defendant's plea of guilty to second degree murder, the county attorney would recommend a sentence for a definite term of years as opposed to a life sentence. If asked by the trial court for a recommendation as to the length of the term, the county attorney would recommend a sentence of 40 years.

The county attorney testified that it was his understanding he was free to recommend a sentence for a stated number of years; that a 40-year sentence had been mentioned during an earlier conference; and that at the final conference he had told the defendant's counsel any recommendation made would be in a high range of years.

It is apparent from the evidence that there was a misunderstanding between counsel as to the terms of the plea bargain. The question to be determined is whether this affords any basis for granting the relief the defendant requests.

Upon the facts presented it is difficult to see where there was any substantial prejudice to the defendant.

The recommendation was to be imprisonment for 40 years. The sentence imposed was imprisonment for 40 years. The motion for new trial was heard before the sentencing judge, and after being fully advised as to the facts and contentions of the defendant, the motion was overruled.

In Santobello v. New York, 404 U. S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427, decided December 20, 1971, the United States Supreme Court vacated the sentence where there had been a breach of the plea bargain. The defendant had agreed to plead guilty to a reduced charge in return for a promise that the prosecutor would make no recommendation as to sentence. At the sentencing hearing a new prosecutor recommended the maximum sentence of 1 year. Upon protest by the defendant, the judge stated that without regard to any recommendation by the prosecutor, the facts disclosed in the probation report required that the defendant be sentenced to imprisonment for 1 year.

The Supreme Court held, in effect, that prejudice to the defendant was not a controlling circumstance. The court stated: "* * * when a plea rests in any significant degree on a promise or agreement of the prosecutor, * * * such promise must be fulfilled." The court further stated: "We need not reach the question whether the sentencing Judge would or would not have been influenced had he known all the details of the negotiations for the plea. He stated that the prosecutor's recommendation did not influence him and we have no reason to doubt that. Nevertheless, we conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration."

Although the record here does not show a clear breach of a plea bargain, it does show that the plea was induced in part by a reasonable misunderstanding of the

plea bargain. Under all the circumstances, we conclude that the cause should be remanded to the district court for resentencing. For the purpose of that hearing we resolve the dispute concerning the terms of the plea bargain in favor of the defendant. The county attorney shall make no recommendation for imprisonment in excess of 40 years.

The sentence imposed by the district court is vacated and the cause remanded for resentencing.

SENTENCE VACATED; CAUSE REMANDED FOR RESENTENCING.

GORDON R. PHILLIPS, APPELLEE, V. SUE M. PHILLIPS, APPELLANT.
195 N. W. 2d 160

Filed March 3, 1972. No. 38128.

1. **Divorce: Parent and Child.** In determining the question of who should have the care and custody of children upon divorce, the paramount consideration is the best interests and welfare of the children.
2. **Divorce: Parent and Child: Trial.** If the circumstances of the parties change and it is in the best interests of the children, the court may from time to time revise or alter a divorce decree so far as custody, care, and maintenance of children is concerned.
3. **Divorce: Parent and Child: Appeal and Error.** In cases involving determinations of child custody, 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.

Appeal from the district court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Robert C. Vondrasek, for appellant.

Abrahams, Kaslow & Cassman, for appellee.

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

NEWTON, J.

This action presents a question of child custody. On April 17, 1961, plaintiff Gordon R. Phillips obtained a decree of divorce from defendant Sue M. Phillips. Custody of two minor daughters was awarded to defendant. By decree entered April 16, 1971, custody of the children was awarded to plaintiff. We affirm the judgment of the district court.

We have examined the record in this case and find it strongly supports the judgment entered. It would serve no good purpose to detail the facts therein revealed. Suffice it to say that defendant has consistently failed to maintain a home for the children which was free of immorality and has not given the children adequate care and attention. On the other hand, plaintiff, a sergeant in the U.S. Air Force, has remarried, has one child by his second marriage, and has at all times appeared to be a fit and proper person to have the custody of his minor daughters.

In determining the question of who should have the care and custody of children upon divorce, the paramount consideration is the best interests and welfare of the children. See Bauer v. Bauer, 184 Neb. 777, 172 N. W. 2d 231.

If the circumstances of the parties change and it is in the best interests of the children, the court may from time to time revise or alter a divorce decree so far as custody, care, and maintenance of children is concerned. See Johnson v. Johnson, 177 Neb. 445, 129 N. W. 2d 262.

In cases involving determinations of child custody, 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. See, State v. Randall, 187 Neb. 64, 187 N. W. 2d 586; Hanson v. Hanson, 187 Neb. 108, 187 N. W. 2d 647.

A change in custody was necessary to promote the best interests of the children and no abuse of discretion appears.

The judgment of the district court is affirmed and the request of defendant for additional attorney's fees is denied.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEROY CASADOS, APPPELLANT.
195 N. W. 2d 210

Filed March 3, 1972. No. 38161.

1. **Criminal Law: Jury: Constitutional Law.** The Nebraska system of selecting jurors by the use of voter registration lists is constitutionally permissible.
2. ———: ———: ———. 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.
3. **Criminal Law: Jury: Trial: Evidence.** It does not become the burden of the State to establish that there was no discrimination in jury selection until at least a prima facie case of discrimination has been established.
4. **Criminal Law: Trial: Evidence.** As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution.
5. **Criminal Law: Intent: Trial: Evidence.** Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged.
6. **Criminal Law: Trial: Evidence.** Proof of another distinct substantive crime is not admissible in a criminal prosecution unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue.
7. **Criminal Law: Prosecuting Attorneys: 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.

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

Charles F. Fitzke and James T. Hansen, 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.

McCOWN, J.

The defendant, Leroy Casados was convicted of child stealing and sentenced to 3 to 5 years imprisonment.

The "child," who was the State's chief witness, was a female not quite 18 years old at the time she ran away from home. She met the defendant several months before while she was working part-time as a waitress at a cafe in Minatare, Nebraska, her home. The defendant, Leroy Casados, was 28 years of age and worked with his brother in a garage. The complaining witness testified that she told the defendant some of her problems from time to time, including problems with her family. These conversations occurred at the cafe where she worked.

Sometime in late September 1970, the defendant told her that he was going to Denver in a few days and offered to take her to Colorado and help her get started there. She decided to leave home. On the morning of October 2, 1970, she drove to Scottsbluff, Nebraska, left her car in a hospital parking lot, and left Nebraska with the defendant in his car. She testified that up to this time everything was done of her own free will, and she went with the defendant willingly. They drove to Cheyenne, Wyoming, and spent the night with friends of the defendant. The next day they drove to Denver, Colorado, where they stayed for approximately one month with Louise Trujillo, a sister of the defendant. During this period, the defendant Casados was gone for days at a time. In early November of 1970, the complaining witness moved to the apartment of Carol Stoner in Lakewood, Colorado, a suburb of Denver. While there, the complaining witness got a job as a waitress for a few days. On November 25, 1970, the defendant agreed to

drive her home. He took her to Kimball, Nebraska. She called her parents, who came and picked her up there.

The complaining witness had many opportunities to go home or to let her whereabouts be known. She did not at any time during her absence communicate or attempt to communicate with her parents.

The defendant was charged with child stealing under section 28-418, R. R. S. 1943. The relevant portion of that statute reads as follows: "Whoever maliciously or forcibly or fraudulently leads, takes or carries away or decoys or entices away any child under the age of eighteen years, with intent unlawfully to detain or conceal such child from its parents * * * shall be imprisoned * * *." That statute has remained unchanged since 1901.

The defendant first asserts that Mexican-Americans have been systematically excluded from service on juries in Scotts Bluff County, Nebraska. We have recently held that the Nebraska system of selecting jurors is clearly within constitutional limits and that 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. See State v. Gutierrez, 187 Neb. 383, 191 N. W. 2d 164. Here there is no evidence to establish that a Mexican-American surname is an accurate criteria for measuring the percentage of the class in the general population. There is also no information whatever as to the number of Mexican-American surnames on voter registration lists from which jury panels are drawn. While figures as to school populations may have some rough significance, there is no evidence to establish its relationship to general population data. The fact that over a period of 4½ years only 8 out of 439 persons on jury panels in Scotts Bluff County had Mexican-American surnames is insufficient to establish even a prima facie case of discrimination in jury selection in the absence of a specific showing as to the percentage of Mexi-

can-Americans on the voter registration lists. Neither does it become the burden of the State to establish that there was no discrimination until at least a prima facie case of discrimination has been established. See Turner v. Fouche, 396 U. S. 346, 90 S. Ct. 532, 24 L. Ed. 2d 567.

The defendant was charged with the crime of child stealing, committed on October 2, 1970. The essence of the crime was maliciously taking or carrying away, with intent to unlawfully detain or conceal the "child" from her parents. On a number of occasions throughout the trial, the State elicited from the complaining witness testimony that after the defendant had driven her out of the State of Nebraska on October 2, he committed other specific crimes over a period of some 7 weeks thereafter. There were vigorous objections on the part of the defendant's counsel and various motions for mistrial were made. They were overruled and the evidence admitted. The county attorney and the court indicated outside the presence of the jury that the evidence as to those crimes was admissible for the purpose of proving the necessary intent for the crime of child stealing. There was no indication to the jury that the evidence was being received only for that limited purpose. The evidence also involved some instances of sexual intercourse without force. There is no showing as to the age of consent in Colorado and even if we should indulge the presumption that the law is the same as in Nebraska, there might or might not be a crime involved. Our discussion is limited to the evidence of crimes other than the specific crime charged.

As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. See State v. Easter, 174 Neb. 412, 118 N. W. 2d 515.

In many instances, courts have limited such evidence

to proof of prior similar acts. Other courts have extended it to include similar acts occurring after the particular crime charged, provided there was at least one former act. In any event, proof of another distinct substantive crime is not admissible in a criminal prosecution unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue.

"Peculiarly applicable to criminal cases is the rule which prohibits the introduction of evidence of other wholly independent offenses as the basis for an inference that the defendant is guilty of the offense for which he is being tried. * * * One basic reason for the rule is that such evidence is apt to be given too much weight, rather than too little, by the jury, thus resulting in the conviction of a defendant because he is a bad man and not because of his specific guilt of the offense with which he is charged." 1 Jones on Evidence (5th Ed.), § 162, p. 290. See, also, 2 Wigmore on Evidence (3d Ed.), § 302, p. 200.

Here the evidence of other distinct crimes after October 2, 1970, might be relevant to establish malice or the necessary intent to constitute the crime of child stealing. The complaining witness testified that the defendant committed forcible rape and forcible sodomy on two or three occasions. In view of the extensive testimony as to other sexual conduct between the defendant and the complaining witness over a 7-week period which the jury was permitted to consider, there is serious question as to whether this uncorroborated testimony as to these two crimes was relevant to establish the specific malice or intent required for the crime of child stealing with which he was charged, or whether it was introduced to establish that the defendant was a "bad man." The connection and relevance of such testimony should be weighed carefully by the trial court in view of the general rule excluding evidence of other crimes.

The evidence here also included testimony of the com-

plaining witness charging the defendant with possession, procuring, furnishing, and using several different kinds of illegal drugs on various occasions. Clearly this evidence could not ordinarily establish the necessary malice or intent for the crime of child stealing with which the defendant was charged, nor did it tend to establish any essential fact in issue. In the context of this record, this testimony was inflammatory and had no proper relevance to establish the commission of the crime for which the defendant was charged. The rule excluding such evidence of other independent crimes is one of the distinguishing features of our common law jurisprudence and it rests on fundamental demands for justice and fairness which nourish the roots of our whole system of justice. The admission of this evidence was prejudicial and requires reversal.

The defendant also asserts that the remarks of the prosecutor in final argument to the jury were improper, misleading, and prejudicial to the extent of constituting misconduct and depriving the defendant of a fair trial. The State's response is to assert that where no record is made of the closing arguments at trial, a conviction should not be set aside on the ground of improper statements of the prosecutor in closing argument. In this case, however, while no record was made at the time, the parties have stipulated as to what occurred during final argument, and that stipulation is before us as part of the bill of exceptions. The record reveals that during his final argument, the prosecutor referred to the defendant as a "despicable" person, to which objection was made; that the county attorney argued that the evidence showed the defendant was the most lowly person the jury would have occasion to judge, to which objection was made; and that the prosecutor during final argument argued that the evidence showed the defendant was a pimp and that the evidence showed what a pimp was, to which objection was also made. In each instance, the court merely admonished the jury

that it was to disregard any statement made by counsel which was not supported by the evidence. It is specifically stipulated that in no case did the court direct the jury to disregard any of the remarks made by the prosecutor but that he did instruct the jury to consider only those remarks supported by the evidence.

Inflammatory or vindictive remarks by a prosecutor during a closing argument often are not considered sufficiently prejudicial to constitute error. It is difficult to analyze the dividing line between prejudice and lack of it. Courts are invariably quick to condemn all such practices, even where they find no prejudice. In this case, the evidence of defendant's guilt of child stealing was not overwhelming. Nevertheless, that was the specific crime with which he was charged and the comments to the jury clearly do not refer to such an offense but to the evidence of other crimes to which reference has already been made. Timely objection was made by defense counsel but the court did not even order the jury to disregard the statements. The trial judge merely directed the jury to disregard any statements not supported by the evidence. In the absence of a strong rebuff by the trial court, the inflammatory nature of the prosecutor's remarks is apparent.

It is a fundamental concept of our criminal law that an accused, whether guilty or innocent, is entitled to a fair trial. It is not only the duty of the trial court but of the prosecutor as well to see that he gets one. A prosecution solidly based upon the law and the facts and supported by sound reasoning does not require bolstering by appeals to passion and prejudice. The argument here clearly violated one or more of the subsections of Standard No. 5.8 of the American Bar Association Standards Relating to the Prosecution Function. Part V of the American Bar Association Standards Relating to the Prosecution Function, dealing with the trial and specifically Standards 5.1 to 5.10, inclusive, are appropriate and proper standards and should be complied with by

prosecutors in the trial of criminal cases.

As recently as State v. Smith, 187 Neb. 152, 187 N. W. 2d 753, this court stated: "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. * * * Where the defendant has been prejudiced, the conviction will be set aside." While each case must be determined on its own facts, the combination of circumstances here persuades us that the defendant did not receive a fair and impartial trial.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

SPENCER, J., WHITE, C. J., and BOSLAUGH and NEWTON, JJ.

We join in the opinion of the court, with the understanding that the evidence of the sexual relations of the defendant with the child were admissible to prove motive.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM T. MELOY, APPELLANT.
195 N. W. 2d 173

Filed March 3, 1972. No. 38181.

Criminal Law: Sentences: Appeal and Error. A sentence imposed within statutory limits will not ordinarily be disturbed in the absence of an abuse of judicial discretion.

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

Joseph D. Martin, 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.

McCOWN, J.

The defendant, William T. Meloy, pleaded guilty to one count of drawing and uttering an insufficient funds check with intent to defraud. After a full evaluation, the district court sentenced the defendant to the Nebraska Penal and Correctional Complex for a period of 2 to 5 years. The sole contention on appeal is that the sentence was excessive.

The record reveals that the defendant was 24 years old. He joined the Army in February 1968. His criminal record began in July of 1968, when he was convicted on a felony charge of false swearing and received a 1-year suspended sentence in Atlanta, Georgia. A few months thereafter he was charged with grand larceny at Tampa, Florida, but the case was nolle prossed and he was released to military authorities. In 1969, he was arrested on worthless check charges in Columbia, Tennessee, and at about the same time he was charged with desertion from the Army. In March 1971, he was arrested in Jackson, Mississippi, on a charge of false pretenses. The check involved here was issued in January 1971. An additional count for the issuance of another check in Hall County was dismissed before the guilty plea here. There were four or five hold orders on the defendant at the time of sentencing, including at least two from other counties in Nebraska, and one from the Army.

Under such circumstances, it is quite apparent that there was no abuse of discretion on the part of the trial court and that the sentence here was not excessive. A sentence imposed within statutory limits will not ordinarily be disturbed in the absence of an abuse of judicial discretion. State v. Leadinghorse, 187 Neb. 386, 191 N. W. 2d 440.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN B. DAVIS, APPELLANT.
195 N. W. 2d 175

Filed March 3, 1972. No. 38195.

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

Thomas P. Lott, 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.

Affirmed. See Rule 20.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALOYSIOS MONROE, APPELLANT.
195 N. W. 2d 159

Filed March 3, 1972. No. 38206.

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

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

Joseph D. Martin, 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.

This is a prosecution for drunken driving in which the defendant's only contention on appeal is that the evidence is insufficient to submit to the jury the question of whether he was actually operating or in actual physical control of the motor vehicle at the time and the place charged in the information.

In other words, the question involved in this case is was the defendant sufficiently identified as the driver of the automobile? There appears to be no dispute in either the evidence in this case or on appeal as to the intoxicated condition of the defendant. The evidence shows that a member of the auxiliary police force of Grand Island, Nebraska, while off duty, was driving north on State Highway No. 281 between Hastings and Grand Island. He observed an older model car driving north and weaving from one side of the road to the other. At the intersection of State Highway Nos. 281 and 34, the car stopped for a flashing red light and the auxiliary policeman pulled up directly behind him. The auxiliary policeman testified that the man driving the front car, the individual on the left-hand side of the car, got out on the *left* side of the car and came back and made an indistinguishable remark to him. This man was identified as the defendant Monroe. The auxiliary policeman then followed the car north on State Highway No. 281 where it pulled into a filling station in Grand Island. At this point, the auxiliary policeman, his wife, and the filling station attendant all observed Mr. Monroe drive into the station, stop, and eventually get out the left-hand side of the vehicle and stagger into the filling station. The defendant had a passenger with him riding on the right-hand side, in the front seat.

This evidence was denied by the defendant. His contention in substance is that a companion, John William Nelson, drove all the way from Alliance, and Nelson testified that he fooled the police by sliding over to the right-hand side of the car because he did not have a

driver's license. This was refuted on rebuttal by the patrolman, and by the auxiliary policeman who testified that Mr. Nelson was seated on the right-hand side, in the front seat, and that he was wearing a large cowboy hat. This testimony was also corroborated by the filling station attendant, who also identified the defendant as he drove into the filling station.

It is obvious that the testimony at a minimum is conflicting and is therefore for the jury under familiar rules. It would further appear from the evidence that the defendant Monroe was the driver of the vehicle is so overwhelming it makes further argument as to the insufficiency of it to go to the jury a simple exercise in frivolity. The case was properly submitted to the jury and the judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH COTTONE, APPELLANT.
195 N. W. 2d 196

Filed March 3, 1972. No. 38233.

Criminal Law: Sentences: Probation and Parole: Appeal and Error. In imposing sentence and denying probation in a criminal case the judgment of the district court will not be disturbed on appeal unless the record shows an abuse of discretion.

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

Eugene T. Atkinson of Atkinson & Kelly, for appellant.

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., and Randall E. Sims, for appellee.

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

WHITE, C. J.

This is a criminal case, where the defendant pled guilty to the amended information which charged him with arson in the fourth degree. The court sentenced the defendant to a term of 18 months to the Division of Corrections of the Department of Public Institutions of the State of Nebraska. The defendant appeals contending that the sentence was excessive. We affirm the judgment and sentence of the district court.

As the defendant himself concedes, the district court in this case gave extremely careful and conscientious attention to the requirements of the law in receiving the guilty plea and in according the defendant a full presentation of his contention with reference to the matter of the amount of the sentence. The bill of exceptions of the testimony in this case stretches to 56 pages and reveals a detailed examination by counsel and by the court itself in all of the pertinent circumstances necessary for the court to make its determination.

The only contention that is argued in the defendant's brief is to the effect that the 82nd Nebraska Legislature enacted L.B. 680, effective August 27, 1971, which generally accomplished some major changes in the probation system of the State of Nebraska. He argues that it was the intent of the Legislature to give much more "effect" to the system of probation rather than to the system of incarceration. Assuming this to be true, the defendant fails to point out where this principle has any application to the particular facts and circumstances of his case. The statute contended for, L.B. 680, was not in effect at the time of the sentencing in this case on June 24, 1971. We also observe that section 29-2260(3), R. S. Supp., 1971, section 15 of the act, specifically states the grounds of probation that are listed therein are not controlling of the discretion of the court. Although not argued by the defendant, we briefly review the discretion of the trial court. The court had before it a presentence investigation report, the defendant's current work

situation, social adjustment, past work record, and his previous record of having been in detention in the Boys' Training School at Kearney. Considering the nature of the crime involved, and the danger to the public and the consideration of protection to society, we can find nothing that would indicate in the least an abuse of discretion by the trial court in imposing the sentence that it did after an exhaustive and conscientious determination and deliberation of all of the facts involved. State v. Steinhausen, 180 Neb. 778, 145 N. W. 2d 584; State v. Hylton, 175 Neb. 828, 124 N. W. 2d 230.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WARDELL MOORE, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. WARDELL MOORE, APPELLANT.

195 N. W. 2d 253

Filed March 3, 1972. Nos. 38246, 38249.

Criminal Law: Appeal and Error. Relief cannot be granted on appeal when it is frivolous and completely lacking in merit.

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

Wardell Moore, 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.

NEWTON, J.

Defendant Wardell Moore was charged in two separate informations with two separate and distinct assaults with intent to inflict a great bodily injury. A plea of

guilty was entered to each charge. Separate appeals were taken but consolidated for hearing before this court as they involve identical issues and briefs. We affirm the judgment of the district court in each case.

The record discloses that defendant's constitutional rights were explained to him. He thereafter waived the services of a lawyer and waived a preliminary hearing in each case. This was reaffirmed on his appearance in the district court. Defendant then waived the services of a lawyer in the district court and entered pleas of guilty in each case. At a later appearance, he denied having entered the pleas of guilty, said he had no knowledge of it, and demanded a lawyer. At a still later date, the defendant appeared with his attorney and received concurrent sentences. While the cases were pending, a psychiatric examination of defendant was had pursuant to an order of the court, entered on motion of defendant, and he was found to be mentally competent.

Defendant's allegations that he was denied counsel and that his pleas of guilty were involuntary due to incompetency are frivolous and entirely lacking in merit.

The judgments of the district court are affirmed.

AFFIRMED.

BERNARD L. STAUFFER, APPELLANT, V. C. L. WEEDLUN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, ET AL., APPELLEES.
195 N. W. 2d 218

Filed March 10, 1972. No. 38028.

1. **Motor Vehicles: Constitutional Law.** An issued motor vehicle operator's license gives rise to such legal entitlement as may not be taken away without procedural due process.
2. **Motor Vehicles: Constitutional Law: Administrative Law: Statutes: Notice: Hearings.** Due process does not require notice and hearing before an order of revocation is issued by the Director of Motor Vehicles for point violations under sections 39-7,129 and 39-7,130, R. R. S. 1943. In these cases the like-

lihood of error and irreparable harm to the individual is so slight that the compelling governmental interest in removing from the highway drivers who have by a record of convictions demonstrated unsafe driving habits outweighs the need for prior notice and hearing.

3. **Motor Vehicles: Constitutional Law: Administrative Law: Notice: Motions, Rules, and Orders.** The due process of law provisions of the federal and state Constitutions do not in every case prevent an administrative agency from issuing an order affecting the private rights of an individual without formal notice and hearing before such order.

4. **Trial: Constitutional Law: Administrative Law: Courts: Motions, Rules, and Orders.** The due process requirements may under some circumstances be satisfied if full hearing in the courts is available after the administrative order with judicial power to stay irreparable injury pending court hearing.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Phillips & Murphy, 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.

CLINTON, J.

The plaintiff, Bernard L. Stauffer, received from the defendant, the Director of the Department of Motor Vehicles of the State of Nebraska, notice under the provisions of section 39-7,130, R. R. S. 1943, of revocation of his license to operate a motor vehicle. The ground of revocation was the accumulation of 12 or more point violations under sections 39-7,128 and 39-7,129, R. R. S. 1943. The notice of revocation was dated December 30, 1970, and contained the information required by section 39-7,130, R. R. S. 1943. On January 7, 1971, plaintiff, pursuant to the provisions of that statute, filed his petition on appeal in the district court for Lancaster County and that court issued a restraining order and stay of revocation which remained in effect until the

hearing on the merits. After the hearing the district court held the revocation valid and reinstated the order of revocation. Plaintiff then perfected his appeal to this court. We affirm.

The evidence in this case tends to show the present livelihood of the plaintiff depends upon his continued ability to use and drive an automobile in the occupation in which he is engaged. There is no evidence in the record to show the plaintiff in fact was required to physically surrender his license or that he, prior to the trial on the merits, suffered any damage on account of the order of revocation.

The principal issue in this case is whether sections 39-7,129 and 39-7,130, R. R. S. 1943, violate the due process clauses of Article I, section 3, Constitution of Nebraska, and the Fourteenth Amendment to the Constitution of the United States. Plaintiff relies upon Bell v. Burson, 402 U. S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90, decided May 24, 1971, in which the Supreme Court of the United States held, insofar as is pertinent here: (1) Suspension of an issued driver's license involves state action that adjudicates important interest of the licensee and such license may not be taken away without procedural due process; (2) procedural due process, in connection with suspension of a driver's license pursuant to *state safety responsibility* law, is satisfied by an inquiry limited to the determination whether there is reasonable possibility of judgment in amounts claimed being rendered against the licensee; and (3) except in emergency situations due process requires that when the state seeks to terminate an interest such as a driver's license it must afford notice and opportunity for hearing appropriate to the nature of the case before termination becomes effective. The court in that case held the motor vehicle safety responsibility law of Georgia was unconstitutional because it did not meet the requirements of notice and opportunity to be heard, and the plaintiff here asserts that sections 39-7,129 and 39-7,130, R. R. S. 1943, are

deficient in these same respects. Section 39-7,129, R. R. S. 1943, provides in part: "Whenever it shall come to the attention of the Director of Motor Vehicles that any person has, as disclosed by the records of such director, accumulated a total of twelve or more points within any period of two years, as set out in section 39-7,128, the director shall summarily revoke . . . the license . . .." Section 39-7,130, R. R. S. 1943, provides that within 24 hours after revocation the Director of the Department of Motor Vehicles shall notify the person of such revocation and this statute prescribes the manner of service and the contents of such notice. This section also provides that if the person fails to surrender the license as directed the Director shall forthwith direct any peace officer or authorized representative of the Director to secure possession of such license.

This court has heretofore in a case involving revocation under the motor vehicle Financial Responsibility Act held because an operator's license was not property and because it was a mere privilege the due process clause of the Constitutions did not apply to proceedings for its revocation. Hadden v. Aitken, 156 Neb. 215, 55 N. W. 2d 620, 35 A. L. R. 2d 1003. Such holding is obviously contrary to Bell v. Burson, *supra,* and to the extent that Aitken holds the due process provisions do not apply to proceedings for revocation of a motor vehicle driver's license under the motor vehicle Financial Responsibility Act that case is overruled.

There still remain however the questions whether (1) due process has been satisfied under the facts in this particular case and (2) whether the holding in Bell v. Burson, *supra,* is applicable to revocation for point violation under the aforementioned sections of the statutes.

Since the decision in Bell v. Burson, *supra,* the Supreme Court of the United States has decided on November 9, 1971, Jennings v. Mahoney, 404 U. S. 25, 92 S. Ct. 180, 30 L. Ed. 2d 146, a case arising under the financial responsibility law of the State of Utah. In

that case the motorist claimed: "Utah's statutory scheme falls short of these requirements in two respects (1) by not requiring a stay of the Director's order pending determination of judicial review, the scheme leaves open the possibility of suspension of licenses without prior hearing; (2) in confining judicial review to whether the Director's determination is supported by the accident reports, and not affording the motorist an opportunity to offer evidence and cross-examine witnesses, the motorist is not afforded a 'meaningful hearing.'" The court stated: "There is plainly a substantial question whether the Utah statutory scheme on its face affords the procedural due process required by Bell v. Burson. This case does not however require that we address that question. The District Court in fact afforded this appellant such procedural due process. That court stayed the Director's suspension order pending completion of judicial review, and conducted a hearing at which appellant was afforded the opportunity to present evidence and cross-examine witnesses." Jennings v. Mahoney, *supra,* applies here. We hold that under the circumstances of this case the plaintiff was in fact afforded due process.

We also choose to place our holding upon an additional ground. A revocation for traffic violations under the point system of our statutes involves a substantially different situation than revocation under the financial responsibility acts. The financial responsibility acts are founded upon the premise the motorist involved in an accident may be at fault. In Bell v. Burson, *supra,* the court held before the driver's license and registration of the motorist could be revoked there must be a determination made at a hearing "appropriate to the nature of the case" that there is a reasonable possibility he is in fact at fault. It is evident that the danger which the court wishes to guard against was an unreasonable possibility of wrongfully depriving the motorist of a valuable entitlement. Under the point sytem of revocation as established by our statutes, is there a reasonable possi-

bility of error and are the procedural safeguards which are inherent in the system such as afford an opportunity to correct before irreparable damage occurs such errors as might happen? The answers to these questions require an examination of the statutory scheme and an analysis of the possible mistakes against which protection should be afforded under procedural due process.

Section 39-7,128, R. R. S. 1943, prescribes the number of points to be assessed against the licensee for each conviction under the various categories of violations. Section 39-7,129, R. R. S. 1943, as already noted, provides for revocation of the license if there is an accumulation of 12 or more points within a 2-year period. Section 39-794, R. R. S. 1943, specifies the duties of the tribunals in which the traffic conviction takes place with reference to entry of judgment in such case and together with section 39-795, R. S. Supp., 1969, requires the forwarding of an abstract of the convictions to the Director of the Department of Motor Vehicles. Such abstracts must be upon a standard form prepared and furnished to the tribunals by the Director as authorized and required in section 39-796, R. S. Supp., 1969. These standard forms as they were used in this case are in the record. These set forth the date of the violation; the date of hearing; the name and address of the motorist; his date of birth; his operator's license number; the vehicle number; the docket and page number of the proceedings in the court; the judgment of conviction including fine and costs; the plea; a description of the offense; the name of the enforcing agency and the officer's name; the date of any appeal from the judgment or the date the appeal was dismissed if that is the case; and a form of certificate for the judge, clerk, or magistrate to sign.

Every motorist is of course charged with notice of the contents of the statutes specifying the points assessed for the various violations. For every offense he has or is afforded an opportunity for hearing. He therefore is charged by law with knowledge that his license is in

jeopardy and at all times is charged by law with notice of the state of his record as it pertains to the points charged against him.

In the foregoing setting, what are the facts with reference to which error might be made? They would seem to be these: (1) Improper determination of the number of points assessed for a given conviction; (2) incorrectly determining the 2-year period; (3) incorrect addition of the points; and (4) misidentification of the motorist. The information required to be set forth in the abstracts of conviction is entirely adequate to readily determine the matters required. These determinations in the system outlined are simple ministerial matters and are so characterized by the statute, section 39-796, R. S. Supp., 1969, and by this court. Bradford v. Ress, 167 Neb. 338, 93 N. W. 2d 17. This characterization is more than a mere euphemism. They truly seem to be merely ministerial. While error might occur in one or more of these items, the likelihood certainly is not very great. There is of course in the system no latitude for discretion nor does it require any factual determinations in the judicial, quasi-judicial, or administrative law sense. There are no inferences to be drawn.

We eliminate from consideration, of course, such matters as completely void judgments as would be the case of no process being served upon the motorist and no appearance by him. We also eliminate such things as fraudulent records of conviction or fraudulent abstracts. We are not required to assume on the appeal that any agency of government will indulge in such practices. Cf. Bourjois, Inc. v. Chapman, 301 U. S. 183, 57 S. Ct. 691, 81 L. Ed. 1027.

If errors do occur, or if there should be fraud, or an absolutely void judgment, what remedy is afforded? Section 39-7,130, R. R. S. 1943, provides for an appeal from an order of revocation to the district court and authorizes the judge to stay the order of revocation pending the appeal. This court has also held that the

procedures authorized by section 60-420, R. R. S. 1943, are available. Durfee v. Ress, 163 Neb. 768, 81 N. W. 2d 148. Both procedures contemplate a full evidentiary hearing. Under the statutes no fact finding of the Director is binding on the courts. In this context is due process lacking under sections 39-7,129 and 39-7,130, R. R. S. 1943? We believe not.

We think that in a very real sense the essential facts have been determined in the judicial proceedings in connection with each conviction. In a very real sense the Director acts only ministerially. The result—the revocation—flows from the operation of the statute upon the already judicially determined facts, that is, the series of convictions of traffic offenses. Of these the motorist already has knowledge. Of their effect point-wise he is charged by law with knowledge just as with any other case of knowledge of the law. These circumstances do, in our opinion, make the procedures applicable to revocation of a driver's license for an accumulation of points for traffic offense conviction clearly distinguishable from revocation under the financial responsibility law as in Bell v. Burson, *supra*. The financial responsibility statutes in effect create without any hearing a presumption of fault. This, if we understand the footing of Bell v. Burson, *supra*, is their constitutional deficiency. Such a situation does not exist in the case here involved. We hold that under the statutory scheme of Nebraska no notice and hearing were required before the issuance of the order of revocation.

The Supreme Court of the United States, in Goldberg v. Kelly, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287, has recently said: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' Joint Anti-Facist Refugee Committee v. McGrath, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental

interest in summary adjudication. Accordingly, as we said in Cafeteria & Restaurant Workers Union v. McElroy, 367 U. S. 886, 895 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' See also Hannah v. Larche, 363 U. S. 420, 440, 442 (1960). . . . It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing." See cases cited in note 10, p. 263. That court has long recognized that the requirements of due process may vary according to the nature of the interest to be protected and the likelihood of harm to the individual. In Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 315, 70 S. Ct. 652, 94 L. Ed. 865, the court, quoting from another case, said: " 'The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' " See, also, 16A C. J. S., Constitutional Law, § 628b, p. 856. The due process of law provisions do not prevent an administrative agency in every case from issuing an order affecting the private rights of an individual without formal notice and hearing before such order. The due process requirements may under some circumstances be satisfied if full hearing in the courts is available after the administrative order with judicial power to stay irreparable injury pending court hearing. Parker v. Board of Barber Examiners (La. App.), 84 So. 2d 80.

"Apart from statute, the necessity of notice and hearing in an administrative proceeding depends on the character of the proceeding and the circumstances of the case; insofar as generalization is possible, it may be stated as a general rule that notice and hearing are required where an administrative body acts in a quasi-judicial

manner but not where its actions are executive, administrative, or legislative." 73 C. J. S., Public Administrative Bodies and Procedures, § 130, p. 452.

Under the Nebraska scheme the Director acts ministerially. The likelihood of error is small. The compelling public interest in removing from the highways those drivers whose records demonstrate unsafe driving habits outweighs the need for notice and hearing prior to the order to protect the individual against mistake. In this connection the matter must be viewed not as an isolated case but in the collective aspect, that is, the removal of many such drivers from the highways.

Cases such as Francisco v. Board of Dental Examiners (Tex. Civ. App.), 149 S. W. 2d 619, where summary revocation of a dental license followed upon a conviction of a felony involving moral turpitude, are distinguishable upon at least two grounds. First, in the cited case there was the question of whether the felony involved moral turpitude and this requires a separate determination or judgment apart from the conviction itself, and second, the conviction in that case would not have any necessary and immediate relationship to the competence of the individual to practice dentistry hence no direct immediate relationship to the public health. On the other hand, in our case the Legislature has determined, and we believe reasonably so, that a habit of repeated traffic violations has a definite relationship to the fitness of the driver to operate a motor vehicle and hence to the compelling public interest in safety on the highways.

If a ministerial error has occurred or if there is a fraudulent abstract a notice of revocation is void and this may be determined on the appeal. There is in fact no final "taking" until the court review has occurred or the motorist has acquiesced by failing to take an appeal. The following we think is pertinent. Forkosch, Constitutional Law (2d Ed.), § 191, p. 208, says: "The concept of procedural due process, as we have seen, gives to every person the constitutional right to notice and

hearing before his life, liberty or property is finally taken. To this point we have assumed that the agency, in its proceedings, is 'taking' because its findings of fact are binding upon the judiciary when reviewed. Regardless of this finality, and even if it is or is not present a person is entitled only to one fair hearing (adequate notice is assumed) at some point before a final taking. This fair hearing may or may not be in an agency proceeding, as there may be a court or judicial one instead or in addition. Obviously this latter proceeding accords with procedural due process; if the former, then the question is whether procedural due process was given therein. We are not here concerned with substantive rights * * *, so that if all of the required procedural rights are obtained either in the agency, or in the courts on review, or in a combination of both, before a final taking occurs, then no procedural violation has occurred."

The Court of Appeals of Kentucky, in Commonwealth, Dept. of Public Safety v. Thomas (Ky. App.), 467 S. W. 2d 335, may have come to a different conclusion than have we as to the scope of Bell v. Burson, *supra,* for it has applied the principles of that case to void that State's "point" statute because of lack of provision for prerevocation hearing. There are, however, some significant differences between our and the Kentucky statute. There the administrative agency was entrusted with discretion both as to whether the license should be suspended upon conviction and also as to the period of suspension. The details of the statutory scheme are not set forth. We think, however, that the element of discretion is sufficient to clearly distinguish the case. If discretion is to be exercised, it must be based upon some factual basis if it is not to be purely arbitrary and this would of course require notice and hearing.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES LEE BIRDWELL, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. WALTER ALLEN GREEN, APPELLANT.
195 N. W. 2d 502

Filed March 10, 1972. Nos. 38087, 38088.

1. **Officers.** The authority of a de facto officer cannot be challenged by collateral attack.
2. **Criminal Law: Guilty Plea.** A valid plea of guilty in the district court cures any defect that may have occurred in the proceedings before the examining magistrate.
3. **Criminal Law: Sentences: Post Conviction.** Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief.

Appeals from the district court for Dawes County: ROBERT R. MORAN, Judge. Affirmed.

James Lee Birdwell and Walter Allen Green, pro se.

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 defendants were convicted of burglary upon pleas of guilty. The convictions were affirmed in State v. Green, 185 Neb. 673, 178 N. W. 2d 271, and State v. Birdwell, 185 Neb. 676, 178 N. W. 2d 270. Thereafter the defendants filed separate motions for post conviction relief which were denied on March 22, 1971, without an evidentiary hearing. Since the motions present identical grounds for relief, we consider the appeals together.

The defendants alleged their convictions are void because they were bound over to the district court by an acting county judge whose appointment had expired; their waivers of counsel before the acting county judge were invalid; and the trial court failed to allow them to examine the presentence report.

The acting county judge was at least a de facto officer and his authority cannot be challenged by a collateral attack. See State ex rel. Weiner v. Hans, 174 Neb. 612, 119 N. W. 2d 72.

The defendants' waivers of counsel and pleas of guilty in the district court were considered in the prior appeals and held valid. State v. Green, *supra;* and State v. Birdwell, *supra.* The pleas of guilty cured any defects that might have occurred in the proceedings in the county court.

The presentence reports could be relevant only to the sentences imposed upon the defendants. Sentences imposed within statutory limits furnish no basis for post conviction relief. State v. Bullard, 187 Neb. 334, 190 N. W. 2d 628.

The files and records show conclusively that the defendants were not entitled to post conviction relief. The trial court was not required to grant evidentiary hearings or appoint counsel for the defendants in these proceedings.

Subsequent motions filed April 5, 1971, and denied April 16, 1971, are not before us. However, they are subject to the rule announced in State v. Reichel, 187 Neb. 464, 191 N. W. 2d 826.

The judgments are affirmed.

AFFIRMED.

ELLYN L. HOLDEN, SPECIAL ADMINISTRATRIX OF THE ESTATE OF DALE SCOTT HOLDEN, DECEASED, ET AL., APPELLANTS, V. CITY OF TECUMSEH, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

195 N. W. 2d 225

Filed March 10, 1972. No. 38090.

1. **Municipal Corporations: Annexation: Ordinances.** Annexation ordinances may be considered at special meetings of the city council in the absence of a statutory provision to the contrary.

2. **Municipal Corporations: Annexation: Ordinances: Notice: Constitutional Law.** Annexation is a legislative matter and there is no constitutional requirement that affected landowners be notified before passage of an annexation ordinance. A failure to give such notice is not a denial of due process of law.
3. **Municipal Corporations: Annexation: Statutes.** Agricultural lands which are urban or suburban in character are subject to annexation under section 17-405.01, R. S. Supp., 1967.
4. **Municipal Corporations: Streets.** The location of city streets is a matter generally within the discretion of municipal authorities.

Appeal from the district court for Johnson County: WILLIAM F. COLWELL, Judge. Affirmed.

Healey, Healey, Brown & Burchard and William B. Brandt, for appellants.

Ginsburg, Rosenberg, Ginsburg & Krivosha and Thomas L. Morrissey, for appellees.

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

BOSLAUGH, J.

This is an action to determine the validity of an annexation ordinance of the city of Tecumseh, Nebraska. The plaintiffs are landowners whose property was annexed to the city by the ordinance in question. The defendants are the city and its mayor and councilmen.

The district court found that the ordinance was valid. The plaintiffs appeal, contending that the ordinance was invalid because it was considered and adopted at special meetings of the city council without notice to the plaintiffs and because their land was not subject to annexation.

The plaintiffs contend that section 17-405(2), R. S. Supp., 1967, requires that annexation matters be considered only at regular meetings of the city council. The statute cited relates to voluntary annexation by resolution upon the request of owners and inhabitants. Section 17-405.01, R. S. Supp., 1967, provides that the mayor

and council of a city of the second class may by ordinance "at any time" annex contiguous or adjacent lands which are urban or suburban in character and not agricultural lands which are rural in character. There was no statutory provision which prevented consideration of the annexation ordinance at special meetings of the council.

The evidence shows that the members of the council were notified of the meetings but there was no public notice of the meetings other than a notice posted on the door of the city hall. Section 84-1402, R. S. Supp., 1967, was not in effect at the time of the meetings in question.

Annexation is a legislative matter and there is no constitutional requirement that affected landowners be notified before passage of an annexation ordinance. Williams v. County of Buffalo, 181 Neb. 233, 147 N. W. 2d 776. A failure to give such notice is not a denial of due process of law.

The principal issue presented by the appeal is whether the land referred to as the Holden tract was subject to annexation. The Holden property is a rectangular tract of land located generally in the northeast quarter of Section 28, Township 5 North, Range 11 East of the 6th P.M. It has an area of 146 acres. The other tracts involved are relatively small and most are used for residential purposes.

The plat of the original town of Tecumseh was located in the south half of Section 28. The city developed largely to the north from the original town so that it eventually formed an L-shaped configuration bordering on the south and west of the Holden tract. The Tecumseh public schools are located adjacent to the southwest corner of the Holden tract. The Johnson County courthouse, which is situated on the town square, is approximately 2 blocks south and 2 blocks west of the southwest corner of the Holden tract. State Highway No. 50 runs along the east side and through a part of the

Holden tract. U.S. Highway No. 136 runs along the north side of the Holden tract.

Expansion to the south and west is limited by the Nemaha River and its flood plain. As a result there has been some residential and commercial development to the north and east of the Holden tract. The effect of the annexation was to change the city from an L-shaped area to an area more rectangular in shape and to include areas adjacent to the former limits where development was taking place.

Although the principal use made of the Holden tract is for agricultural purposes, the evidence shows that its value for residential or commercial use exceeds its value as agricultural land. Because of the development of the city it has become urban or suburban in character rather than rural. Thus, it was subject to annexation under section 17-405.01, R. S. Supp., 1967. See, Sullivan v. City of Omaha, 183 Neb. 511, 162 N. W. 2d 227; Voss v. City of Grand Island, 186 Neb. 232, 182 N. W. 2d 427.

The ordinance contained a provision that the owners of the land annexed were compelled to lay out streets, ways, and alleys in and through the property in conformity with and contiguous to the streets, ways, and alleys of the city. This provision merely requires that streets, ways, and alleys, when laid out, shall conform generally to those already established in the city. The location of city streets is a matter generally within the discretion of municipal authorities. See 10 McQuillan, Municipal Corporations (1966 Rev. Ed.), § 30.21, p. 656.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN REEDER, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. JOHN REEDER, APPELLANT.
195 N. W. 2d 509

Filed March 10, 1972. Nos. 38093, 38094.

Appeals from the district court for Platte County: C. THOMAS WHITE, Judge. Reversed and remanded with directions.

George H. Moyer, Jr., of Moyer & Moyer, 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.

PER CURIAM.

The nature of this case and the essential facts are set forth in the opinions of Clinton, J., and Newton J., which follow. Since the court is evenly divided with three votes for each opinion and one vote for reversal without concurrence in the opinion of Clinton, J., the judgment below is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

SMITH, J., concurring.

State v. Smith, 181 Neb. 846, 152 N. W. 2d 16 (1967), in my opinion is distinguishable. It implies that the 1-year period of suspension ran prior to issuance of the Missouri license to Smith. It also implies that Smith failed to obtain an insurance policy. Under rules of stare decisis my going behind the fact basis of the majority opinion in Smith to reexamine records or briefs would be futile. See, County of Madison v. School District No. 2, 148 Neb. 218, 27 N. W. 2d 172 (1947); International Harvester Co. v. County of Douglas, 146 Neb. 555, 20 N. W. 2d 620 (1945).

In the present case the Colorado license was issued to Reeder subsequent to the 1-year period of suspension.

He possessed an insurance policy with coverages equal in amount to those required by the financial responsibility law. See, Laws 1959, c. 299, § 1 (10), p. 1123; former § 60-501 (10), R. R. S. 1943.

I therefore concur with the Per Curiam opinion.

CLINTON, J.

These cases were tried, briefed, and argued together, and involve identical issues. The defendant was convicted in the district court for Platte County on two separate charges of driving while his motor vehicle operator's license was under suspension. § 60-418, R. R. S. 1943. The cases were tried upon a stipulation of facts and present only a question of law.

On April 12, 1968, the defendant had been convicted of driving during suspension of his operator's license and his driving privileges and license were suspended for a period of 1 year from that date. In August 1968 the defendant moved from Butler County, Nebraska, which was then his residence, to Arapahoe County in the State of Colorado where he resided until about January 1, 1970. On about April 12, 1969, the defendant was notified by the Department of Motor Vehicles of the State of Nebraska that he was eligible to have his driver's license reinstated upon compliance with the financial responsibility laws and payment of the $25 reinstatement fee. On May 6, 1969, being then a resident of Colorado, he obtained a Colorado operator's license by passing the required examination. It was stipulated that the license which he so procured was in full force and effect on February 12, 1970, and February 20, 1970, which are the pertinent dates in these prosecutions. At the time of the issuance of the Colorado license he had been issued and there was in effect a policy of liability insurance with limits of $10,000, $20,000, and $5,000. He never paid to Nebraska any reinstatement fee nor did he attempt to procure a Nebraska motor vehicle operator's license.

When the defendant returned to Nebraska about Janu-

ary 1, 1970, he apparently stayed here continuously until the time of the offenses charged on February 12 and February 20, 1970.

The defendant was clearly guilty of a violation of section 60-410, R. S. Supp., 1969, which requires a nonresident to obtain upon a continuous residence in Nebraska for 30 days a Nebraska driver's license and limits the privilege of operating on a foreign operator's license to that 30-day period. The question is whether the defendant is under the facts guilty of violating section 60-418, R. R. S. 1943.

When the defendant procured a valid Colorado operator's license the suspension in Nebraska had expired. In State v. Smith, 181 Neb. 846, 152 N. W. 2d 16, this court under a similar set of facts affirmed the conviction of a driver, a resident of Missouri, who was temporarily driving a motor vehicle in this state and had no residence herein. I conclude that State v. Smith, *supra,* was wrongly decided and insofar as inconsistent with this opinion ought to be overruled. The prosecutor who handled these cases in the court below is not subject to any criticism for having filed what I consider to be the wrong charges because he was entitled to rely upon our opinion in State v. Smith, *supra.*

The effect of State v. Smith, *supra,* was to say that a driver whose license has been suspended or revoked in Nebraska may never again drive in Nebraska until he has procured a Nebraska license and complied with the motor vehicle financial responsibility law, even though he may have established residence elsewhere and after the period of suspension procured a valid license under the laws of the state of his residence. In summary even though he might be passing through this state as a tourist 20 years after the suspension he would still be guilty of violation of section 60-418, R. R. S. 1943. I have reexamined the pertinent Nebraska statutes and conclude they do not authorize or require such a result.

An examination of Chapter 60, article 4, R. R. S. 1943, clearly shows the statutes do not contemplate the issuance of a Nebraska license to nonresidents. § 60-403, R. R. S. 1943. It clearly contemplates that nonresidents may operate in Nebraska on their nonresident licenses until "a period of thirty days continuous residence" in this state has expired. § 60-410, R. S. Supp., 1969.

Nebraska may of course suspend a nonresident's privilege of driving in this state, § 60-422, R. R. S. 1943, and under the provisions of section 60-418, R. R. S. 1943, neither a "resident or nonresident whose operator's license or right or privilege . . . has been suspended" in Nebraska may operate under a "license, permit . . . issued by any other jurisdiction or otherwise . . . until a new license is obtained when and if permitted under this act." The only reasonable construction of this provision is to say that it contemplates as far as a nonresident is concerned issuance of a license to him in his own jurisdiction after the suspension period and which license is then valid in this state.

As already noted, I believe the statutes do not authorize or contemplate the issuance of Nebraska licenses to nonresidents until they have residence here and that residence continues or is intended to continue beyond 30 consecutive days. Statutes must be so construed if possible as to render them constitutional. If a nonresident, including a former resident of Nebraska who has become a nonresident, whose license or privilege has been suspended or revoked in Nebraska may not again drive upon the highways in Nebraska after the expiration of the suspension period until he again procures a Nebraska license, which license he cannot procure without again residing in Nebraska with the intention to stay more than 30 days, then Nebraska has in all probability placed an unreasonable burden upon interstate commerce contrary to the provisions of the Constitution of the United States. A construction of the statutes

which gives this result is not justified by the language of the statute itself.

The construction this opinion would place upon the statute conforms to the administrative interpretation placed upon it by the Department of Motor Vehicles of the State of Nebraska which is the agency charged with administering the statute. Weight should be given to the construction placed upon the statute by the department even though such construction is not controlling. Allen v. Morsman, 46 F. 2d 891; Belitz v. City of Omaha, 172 Neb. 36, 108 N. W. 2d 421.

The construction I would place upon the statute is in accord with the construction placed upon similar statutes by the Supreme Court of the State of Washington. State v. Kristofferson, 58 Wash. 2d 317, 362 P. 2d 596. It is also impliedly supported by the decision of the Supreme Court of the United States in District of Columbia v. Fred, 281 U. S. 49, 50 S. Ct. 163, 74 L. Ed. 694, where it was held that *during the period of suspension* the foreign license need not be recognized.

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

The two cases are identical. They involve convictions for driving a motor vehicle while the operator's license of defendant was suspended.

The driver's license of defendant was suspended for the period of 1 year under the point system on April 17, 1967. On April 12, 1968, he was convicted of operating a motor vehicle while his driver's license was suspended and was placed on probation for 1 year during which time his license was again suspended. On September 5, 1969, the order of probation was revoked and he was sentenced to 30 days in jail, but the 1 year suspension of license was not reimposed.

On August 1, 1968, defendant had moved to Colorado where he resided until January 1, 1970. On April 12, 1969, defendant was notified by the Nebraska Department of Motor Vehicles that he was eligible for rein-

statement of his Nebraska driver's license upon complying with the financial responsibility law and paying the required fee. The Nebraska license was never reinstated but on May 6, 1969, defendant applied for and obtained a license in Colorado. He then obtained insurance of a nature to satisfy the financial responsibility requirements of both states. In the Colorado application, he stated his driving privilege was not then under suspension. The pending complaints are for driving on February 12 and 20, 1970, more than 30 days after his return to Nebraska.

Defendant contends that being a resident of Colorado, he was not eligible to receive a Nebraska license and that Nebraska must give full faith and credit to the Colorado law and license.

Section 60-430, R. R. S. 1943, provides: "* * * any person convicted of operating a motor vehicle in violation of any order of suspension or revocation of * * * license * * *, or after such suspension or revocation *and before reinstatement of the license or issuance of a new one,* shall be punished, * * *." (Emphasis supplied.)

Section 60-418, R. R. S. 1943, provides: "Any resident or nonresident whose operator's license or right or privilege to operate a motor vehicle in this state has been suspended or revoked as provided in this act, shall not operate a motor vehicle in this state under a license, permit or registration certificate issued by any other jurisdiction or otherwise during such suspension or after such revocation until a new license is obtained *when and if permitted under this act.*" (Emphasis supplied.)

Section 60-526, R. R. S. 1943, provides that an operator's license may not be reinstated until proof of financial responsibility is given.

Section 60-531, R. R. S. 1943, provides a means whereby proof of financial responsibility may be given by a nonresident.

Section 60-422, R. R. S. 1943, provides for the sus-

pension of a nonresident operator's license on violation of Nebraska laws and section 60-557, R. R. S. 1943, makes it unlawful for a nonresident to drive in this state if his license has been suspended or revoked. Section 60-527, R. R. S. 1943, provides that when a nonresident's license is suspended or revoked, it shall *remain so* until proof of financial responsibility is given.

Section 60-410, R. S. Supp., 1969, provides a nonresident may operate a motor vehicle in this state without a Nebraska operator's permit for a period not exceeding 30 days continuous residence, but if he "be convicted by any court within the state of violating any of the laws of this state relating to motor vehicles or the operation thereof, he shall immediately thereafter be subject to and required to comply with all the provisions of this act relating to the registration of motor vehicles owned by residents of this state and the licensing of operators of motor vehicles."

Section 60-505.02, R. R. S. 1943, requires the payment of a fee of $25 as a precedent to reinstatement of an operator's license or to obtaining a new one.

Defendant was a resident of Nebraska when his license was suspended. During the period of suspension, he became a resident of Colorado and after expiration of the period of suspension obtained a Colorado license. He again became a resident of Nebraska and had been such more than 30 days before arrest on the pending charges. He did not apply for a Nebraska license and did not comply with the Nebraska requirements pertaining to a showing of financial responsibility and payment of a fee necessary to secure a reinstatement of his license or a new license. Section 60-527, R. R. S. 1943, provides that under such circumstances his license shall remain suspended. It is clear that after 30 days residence in Nebraska, any right he may have had to operate under a foreign license had expired and to get a Nebraska license he had to comply with these provisions. Not having done so, and his Nebraska license

remaining suspended, he was obviously guilty of driving under a suspended license.

Defendant contends he could not, while a nonresident, obtain a new Nebraska license. The contention is without merit. There is no statute of Nebraska prohibiting the issuance of a license to a nonresident or making residency a requirement to obtaining a license. He could have at any time paid the required fee and complied with section 60-531, R. R. S. 1943, pertaining to a showing of financial responsibility. A nonresident who violates the laws of Nebraska while driving in Nebraska is subject to the same penalties, including license suspension, as a resident. The statutes specifically provide for the restoration of a nonresident's suspended or revoked license and he cannot again drive in Nebraska until he has fully complied by furnishing a showing of financial responsibility and paying the required fee. Why should a person who leaves and then returns to Nebraska be favored over both permanent residents and nonresidents? We do not believe the law intends or provides for such favoritism.

Defendant argues that his convictions are in violation of Article IV, Constitution of the United States, requiring each state to give full faith and credit to the acts of other states. We are unable to follow this argument. Defendant obtained a Colorado license by misrepresentation. He denied that his Nebraska license was then suspended. His privilege of driving on a foreign license had expired. Most important, however, is the fact he was driving in Nebraska and thereby became subject to the laws of Nebraska. These laws treat residents and nonresidents exactly alike in regard to the suspension and reinstatement of drivers' licenses. Operation of motor vehicles in Nebraska is exclusively a Nebraska concern in regard to which other states have no voice. It is a subject upon which Nebraska, and Nebraska alone, is competent to legislate. "The full faith and credit clause does not require a State to substitute for its own

statute, applicable to persons and events within it, the conflicting statute of another State, even though that statute is of controlling force in the courts of the State of its enactment with respect to the same persons and events * * *." Pacific Employers Ins. Co. v. Industrial Accident Comm., 306 U. S. 493, 59 S. Ct. 629, 83 L. Ed. 940.

The full faith and credit provision of the federal Constitution may not be used to compel one state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. State Farm Mut. Auto. Ins. Co. v. Duel, 324 U. S. 154, 65 S. Ct. 573, 89 L. Ed. 812.

This case is analogous to State v. Smith, 181 Neb. 846, 152 N. W. 2d 16, wherein we held: "The right to operate a motor vehicle after suspension or revocation is not restored by mere lapse of time. The right to operate thereafter depends upon the receipt of a new license.

"Under section 60-525, R. S. Supp., 1965, a license to operate a motor vehicle remains suspended and revoked until the operator has complied with the financial responsibility laws of this state and has secured a new license as permitted under the motor vehicle laws of this state. * * *

"A resident or nonresident whose operator's license or privilege to operate a motor vehicle in this state has been suspended or revoked cannot evade compliance with the statutes of this state by the expedient of securing a license in another state or jurisdiction."

In District of Columbia v. Fred, 281 U. S. 49, 50 S. Ct. 163, 74 L. Ed. 694, under similar circumstances it was held that the defendant, who had moved out of the District of Columbia to Virginia, after suspension of his driver's license in the District, and had obtained a Virginia license, was still subject to arrest and conviction in the District for driving under a suspended license during the term of suspension. Of similar import is State v. Harkness, 189 Kan. 581, 370 P. 2d 100. See, also,

7 Am. Jur. 2d, Automobiles and Highway Traffic, § 104, p. 671, and § 127, p. 687.

The statutes of Nebraska clearly require an affirmance of this case. It is possible that the Legislature would prefer a limitation of the violation, as regards nonresidents with out-of-state operators' licenses, to the original period of suspension fixed, but that is a legislative matter and any change by this court constitutes judicial legislation.

The judgments of the district court should be affirmed.

STATE OF NEBRASKA, APPELLEE, V. NATHANIEL LAWRENCE HALL, APPELLANT.

195 N. W. 2d 201

Filed March 10, 1972. No. 38127.

1. **Criminal Law: Guilty Plea.** The standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
2. **Criminal Law: Guilty Plea: Confessions: Post Conviction: Attorneys at Law.** A guilty plea motivated by the existence of a coerced confession is not subject to collateral attack where the defendant had counsel unless the counsel was incompetent.
3. **Criminal Law: Guilty Plea: Attorneys at Law: Post Conviction.** When counsel has advised a defendant to plead guilty, a defendant who has heeded such advice may not subsequently attack the voluntariness of a guilty plea so long as the counsel's advice was within the range of competence demanded of attorneys in criminal cases.
4. ———: ———: ———: ———. That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post conviction hearing.
5. **Criminal Law: Guilty Plea: Evidence: Trial.** Where the actual verbatim record of the proceedings on taking a plea of guilty has been lost, a reasonably accurate account of what took place established by other evidence is not a "silent record" within the proscription of Boykin v. Alabama.

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

David L. Herzog and J. Patrick Green, 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.

MCCOWN, J.

This is a post conviction proceeding in which the defendant, Nathaniel Lawrence Hall, seeks to challenge his conviction for first degree murder while in the commission of a robbery. On May 7, 1965, the defendant, represented by the public defender's office, entered his plea of guilty. He was adjudged guilty by a three-judge court and sentenced to life imprisonment on June 14, 1965.

An extensive evidentiary hearing was held in this proceeding and the defendant was represented throughout by court appointed counsel. The trial judge made extensive, thorough, and detailed findings of fact and conclusions of law following the evidentiary hearing.

The defendant's first contention was that at the time he was taken before the municipal court shortly after his arrest for the purpose of having bond set, he was not given notice and warnings as to his constitutional rights. At and subsequent to the preliminary hearing, the defendant was at all times represented by counsel. It is conceded that no Nebraska statute or rule requires a defendant be advised of his constitutional rights when bond is set. In the federal courts, Rule 5 of the Federal Rules of Criminal Procedure was not amended to require it at that stage until 1966. The occurrence here arose in 1964. There is no merit to this claim.

The defendant also asserts that a statement was taken from him by the police in the absence of his counsel and that he was substantially motivated to enter his guilty

plea because he had previously given a confession. He also asserts that his counsel was ineffective and incompetent because they did not test the validity and admissibility of his confession and advised him instead to plead guilty. The confession occurred shortly after Escobedo became effective and almost two years before Miranda. The defendant made no request for counsel, nor was he denied counsel and it is quite obvious that under the factual circumstances here Escobedo was not applicable. See, United States ex rel. Harvin v. Yeager, 428 F. 2d 1354 (1970); People v. Doverspike, 382 Mich. 1, 167 N. W. 2d 285 (1969).

The trial court here specifically found that the confession given by the defendant in this case was voluntarily given and in compliance with all necessary requirements existing at the time the confession was given. Even though the confession may or may not have been admissible, the standard was and remains whether the guilty plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. See North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162.

It is quite apparent that a guilty plea motivated by the existence of a coerced confession is not subject to collateral attack where the defendant had counsel unless the counsel was incompetent. McMann v. Richardson, 397 U. S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763. As the Supreme Court stated in that case: "His later petition for collateral relief asserting that a coerced confession induced his plea is at most a claim that the admissibility of his confession was mistakenly assessed and that since he was erroneously advised, either under the then applicable law or under the law later announced, his plea was an unintelligent and voidable act. The Constitution, however, does not render pleas of guilty so vulnerable."

When counsel has advised a defendant to plead guilty, a defendant who has heeded such advice may not subse-

quently attack the voluntariness of the guilty plea so long as the counsel's advice was within the range of competence demanded of attorneys in criminal cases. See Brewer v. Peyton, 431 F. 2d 1371 (4th Cir., 1970).

It should also be pointed out here that the trial court specifically found that defendant's trial counsel were exceptionally skilled by virtue of their years of experience in the office of the public defender. In State v. Workman, 186 Neb. 467, 183 N. W. 2d 911, we quoted from McMann v. Richardson, *supra:* "Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts. * * * That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post conviction hearing."

The final issue with which we must deal involves problems arising from the disappearance of the record of what transpired at the time the defendant tendered his plea of guilty to the three-judge panel. At the outset of the post conviction proceedings, extensive efforts were made to obtain the transcript or bill of exceptions containing the actual proceedings before the three-judge court. Counsel and others were unable to find the record of the proceedings or to locate the court reporter who reported them. In the absence of the record, the evidentiary hearing considered the testimony of the defendant as to what occurred and in addition heard the testimony of the presiding judge of the panel which took and accepted the defendant's plea of guilty.

The presiding judge testified that he did not remember verbatim everything that was said on the occasion of taking the plea and sentencing, but he did have and still has a memorandum of the questions asked of the defendant and the sections of the Constitution which he points out and explains in every felony case. He also testified that he did ask those questions and make those

explanations to the defendant at that time. The trial court specifically found the defendant's testimony that he was not advised of anything essential was incredible and unbelievable.

This case, while unusual because of the lost record, does not fall within the proscription of Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274. Although the absence of any evidence as to what actually occurred would bring Boykin v. Alabama into play, that is not the case here. We think it wholly unrealistic to determine that the loss of the actual record of proceedings should require the vacation of a guilty plea even where the State has established by other evidence a reasonably accurate account of what took place. Such a record is not a "silent record" even though it speaks with less authority than the verbatim record of the proceedings required under section 1.7, American Bar Association Standards Relating to Pleas of Guilty, previously adopted by this court in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763.

The conclusions of the trial court here are buttressed by the fact that because of the seriousness of the crime, a special three-judge panel was convened, and the acceptance of the plea of guilty was signed by each of those judges. The findings of fact and conclusions of law made by the trial judge in this post conviction proceeding extend over 21 pages of the transcript. Those findings were eminently correct and the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HUBERT R. ETCHISON, APPELLANT.
195 N. W. 2d 498

Filed March 10, 1972. No. 38193.

1. **Criminal Law: Searches and Seizures: Motor Vehicles.** When

the condition of an automobile which is indicative of a criminal offense is in plain sight of an officer looking at the automobile from the outside, an examination is justified and legal.

2. **Criminal Law: Sentences: Appeal and Error.** Where punishment for a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not ordinarily be disturbed unless an abuse of discretion appears.

3. **Criminal Law: Sentences: Appeal and Error: Evidence.** When, in the opinion of this court, a sentence is excessive or not warranted by the evidence, the statute contemplates correction on appeal.

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

L. W. Jim Weber and Larry F. Fugit, 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.

NEWTON, J.

Defendant was convicted of failing to stop after being involved in an accident resulting in personal injuries. Defendant was traveling south in a northbound lane on a four-lane highway. He struck a northbound motorcycle and injured the driver. He then proceeded south a short distance, turned around, and while northbound, passed the scene of the accident. He did not stop at any time. We affirm the judgment of the district court as herein modified.

The license number of the automobile involved in the accident was obtained at the scene by a witness. It proved to be defendant's. Another witness positively identified defendant as the driver of the car which struck the motorcycle and the make and model of the car. A piece of chrome found at the scene appeared similar to a piece missing from defendant's automobile. The evidence of involvement in the accident and of a failure to stop seems conclusive. As a defense, de-

fendant maintained that he was afflicted with hypertension and high blood pressure which caused him to black out on occasion. He says he was suffering from such an attack at the time of the accident, was unaware of the accident, and has no recollection of it.

Defendant asserts the statute, section 39-762, R. R. S. 1943, is unconstitutional due to vagueness in that the term "injury" is not adequately defined. The statute refers to injury to the person. It is a term in common and accepted use. It is defined as "A hurt or damage done to a man's *person.*" Black's Law Dictionary (De Luxe 4th Ed.), p. 925. It is asserted that a layman may not be able to determine if an injury has been inflicted. Since knowledge that an injury has occurred is an essential element of the offense, it is apparent that this contention is without merit. See State v. Snell, 177 Neb. 396, 128 N. W. 2d 823.

After the accident, officers called at defendant's home, informed him he was suspected of being involved in an accident, and requested him to go to the police station. He did so, accompanied by his family, and on arrival, his wife, at the request of an officer, drove defendant's automobile into the police garage where it was examined by the police. Defendant asserts he was unlawfully arrested at his home without a warrant and that testimony relating to the examination and condition of his automobile was not admissible. There was no illegal search here. The damage to the car was to the outside and readily apparent. If the facts here were to be considered to constitute a search, it is the rule that when the condition of an automobile which is indicative of a criminal offense is in plain sight of an officer looking at the automobile from the outside, an examination is justified and legal. See State v. Rys, 186 Neb. 341, 183 N. W. 2d 253.

Defendant objects to that portion of the instruction which sets out the elements of the offense charged which are as follows: "2. That said defendant knew that the

accident happened and that an injury to a person had been inflicted." We can find no flaw in the instruction. The entire instruction refers to occurrences at the time of the accident and the jury could not have been misled into believing that subsequently acquired knowledge of the accident and injury was sufficient to sustain a conviction.

Defendant also excepts to the instruction given in regard to the credibility and weight to be given the testimony of an expert witness. The court gave the first paragraph of NJI No. 14.55 but omitted the rest. While it may be best to give the full instruction as recommended, the instruction as given has been approved. See, Penhansky v. Drake Realty Constr. Co., 109 Neb. 120, 190 N. W. 265; Christoffersen v. Weir, 110 Neb. 390, 193 N. W. 922; Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151. Error, if any, was harmless and not prejudicial.

The most serious question deals with the severity of the sentence. In determining whether probation should be granted, and, if a sentence is to be imposed, its severity, there are many factors to be considered. The primary function of the criminal law is to protect individuals and society from the depredations of the criminally bent. In furtherance of this purpose, it is deemed necessary to mete out punishment as a deterrent to others and to lock up incorrigible criminals. On the other hand, the rehabilitation of criminals is one of society's major safeguards. Among factors meriting consideration are the family ties, age, mentality, education, experience, and social and cultural background of the convicted individual; his willingness to work at honest labor; his past criminal record or law abiding conduct; the motivation for the offense, the nature of the offense, and the amount of violence, if any, involved; the frankness and willingness of the defendant to cooperate; narcotic addiction, if any; circumstances aggravating or mitigating the offense; community attitudes toward the offense; and

the individual's potentialities for reform or recidivism.

The present case highlights some of the difficulties encountered by the sentencing judge in such situations. The defendant is a 47 year old man with a wife and three children. He has served 22½ years in the Armed Forces and recently received an honorable discharge. He receives retirement pay and a disability allowance. His wife is a school teacher and following his discharge from the service, defendant has held two responsible positions with private firms. His employers, associates, and acquaintances all speak highly of his character, industry, and integrity. His record is that of a law abiding citizen and the present is his first felony conviction. He is now employed and incarceration will result in his losing his position and render it difficult for him to obtain future employment. It likewise may embitter him and turn one who has been a law abiding citizen in the past into a recalcitrant criminal.

Where punishment for a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not ordinarily be disturbed unless an abuse of discretion appears. See State v. Martin, 185 Neb. 699, 178 N. W. 2d 573. When, in the opinion of this court, a sentence is excessive or not warranted by the evidence, the statute contemplates correction on appeal. See § 29-2308, R. R. S. 1943.

Defendant drove down a left-hand lane and struck a motorcycle, severely and permanently injuring the cyclist's foot. Defendant then turned around and returned past the scene of the accident. He failed to stop, offer aid, or comply with statutory requirements. There is absolutely no evidence of intoxication. Leaving the scene of an accident does not ordinarily involve willful violence or a heinous or vicious act. It is usually inspired by fear rather than a deliberate intent to commit a criminal act.

Defendant has been a good citizen and family man. He has also been industrious. If placed on probation

and permitted to continue as a responsible member of society, it is highly unlikely that he will ever again appear before the bar of justice. Under the circumstances, we believe that both the interests of defendant and of society require that he be granted probation on appropriate terms to be delineated by the trial judge.

As modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. REX L. FUSBY, APPELLANT.
195 N. W. 2d 495

Filed March 10, 1972. No. 38199.

Post Conviction: Trial: Evidence. In post conviction cases, the rule is clear that the petitioner has the burden of establishing a basis for relief.

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

Mark M. Sipple, for appellant.

Clarence A. H. Meyer, Attorney General, and Gerald S. Vitamvas, for appellee.

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

SPENCER, J.

This is an appeal from the denial of defendant's motion for post conviction relief under the provisions of sections 29-3001 to 29-3004, R. S. Supp., 1969, after an evidentiary hearing. We affirm.

Defendant, on July 10, 1970, pled guilty to the issuance of a check on a bank in which he knew his account was closed, Defendant had previously been in custody on check charges. On February 23, 1970, he

was released from custody when his parents paid off all the checks then held by the county attorney. At that time, the county attorney stated that if other checks were received, dated prior to February 23, 1970, defendant would be given an opportunity to make restitution provided no other checks were received which were written after that date.

On June 8, 1970, defendant was arrested and charged with writing a check on a bank in which he had no account. This check was dated May 30, 1970. On June 26, 1970, the defendant attempted to plead guilty to this charge, but the court refused to accept his plea. Thereafter charges were filed on the check involved herein, which was dated February 12, 1970. Defendant was sentenced thereon after the acceptance of his plea of guilty.

Defendant alleges that his constitutional rights were violated through fear and as a result of mistake and representations amounting to fraud, on the part of the Platte county officials, making his plea of guilty on July 10, 1970, involuntary. There is no merit to defendant's contentions.

Defendant's claim is predicated on the fact that the check on which he was sentenced was dated February 12, 1970, which was prior to February 23, 1970, when the county attorney advised him that he would be given an opportunity to make good other outstanding checks, providing no others were written after that date. It is defendant's contention that sometime within the week following June 26, 1970, he wrote to his parents advising them of his predicament, and delivered this letter to the deputy sheriff to be mailed. His parents testified this letter was never received by them. Defendant contends that he pled guilty to the charge only because he felt that his parents had abandoned him when they did not reply to his letter.

On or about June 9, 1970, the defendant was permitted to call his mother, but his parents, who lived in

an adjoining county, made no attempt to see him. At the time of calling his mother he was charged on the check dated May 30, 1970. After the refusal to accept his plea on June 26, 1970, defendant was told by the deputy county attorney that he was going to be charged with writing a no-account check dated February 12, 1970. This was done, and it was to this charge that defendant entered his guilty plea. The other charge was subsequently dismissed.

Defendant infers that in some way the Platte county authorities suppressed or failed to mail his letter. The trial court specifically found that the Platte county sheriff's office did not decline to mail and did not suppress any correspondence addressed by the prisoner to his parents or to any other person. The deputy sheriff testified that any letters given to him by the defendant were mailed. He had no independent recollection of the letters actually mailed, but was certain that all letters delivered to him were mailed. He did recall mailing a letter to defendant's parents but was unable to testify when this occurred.

The defendant, who was 35 years of age, was represented by competent counsel throughout the proceeding. He had ample opportunity to discuss his situation with his counsel. There certainly was no reason why defendant could not have asked his counsel to communicate with his parents or why he did not do so himself by telephone. The policy of the Platte county sheriff's office was to permit prisoners to use the telephone on reasonable occasions. Defendant had telephoned his parents on June 9, 1970. Defendant admitted he was never refused the use of the telephone but made no attempt after June 9, 1970, to contact his parents in that manner.

We have examined the proceedings and are convinced that there is no basis on which the guilty plea could be held to be involuntary. The fact that defendant was under the impression his parents were ignoring his let-

ter is not a sufficient reason to now set aside the sentence. In post conviction cases the rule is clear that the petitioner has the burden of establishing a basis for relief. See State v. Myles, 187 Neb. 105, 187 N. W. 2d 584. This case is not substantially different on the principle involved from McMann v. Richardson (1970), 397 U. S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763, in which the United States Supreme Court held that a defendant who pled guilty because of a prior coerced confession was not without more entitled to a hearing on his petition for habeas corpus.

This case is in no way analogous to Santobello v. New York (December 20, 1971), 404 U. S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427, as defendant's counsel suggested on oral argument. There, a promise was made as a part of a plea bargain. Here, there was no plea bargain. Defendant was conditionally given an opportunity to make good the checks issued before February 23, 1970. While he was in custody at that time, he testified no charges had been filed. There is no need to consider whether defendant could acquire a vested right in immunity from prosecution by a promise made by the county attorney because it is evident defendant made no serious attempt to comply with any such alleged agreement.

At the time of his arraignment on June 10, 1970, the trial judge advised defendant of his rights prior to his plea, as well as the range of sentence that could be imposed. The defendant did not bring up the circumstances now urged by him to avoid the plea. In the present hearing, he testified that he did not mention the letter to his attorney although he had visited with his attorney about the previous agreement. His plea of guilty was not only intelligently made with full knowledge of his rights and the consequences of his plea, but the record is conclusive that he entered it knowingly, understandingly, and voluntarily.

At the hearing on July 10, 1970, it was disclosed that the county attorney had received approximately 50

checks written by the defendant for sums ranging from $6 to $50, from various business places in Platte County. At the time of the hearing there were outstanding checks in excess of $300, in addition to the check on which the charge was filed.

The record indicates defendant received the utmost consideration from the trial court and from the Platte county authorities. He was represented by competent counsel who would have contacted his parents if defendant had so requested.

The defendant in fact committed the crime to which he pled guilty on July 10, 1970. His plea was made voluntarily and with full knowledge of the consequences and of the range of sentence that could be imposed by the court. There is no merit to defendant's present contentions. The motion for post conviction relief was properly denied.

Judgment affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL GEORGE BLOTZER, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. GEORGE WILLSON RUTHERFORD, APPELLANT.
195 N. W. 2d 199

Filed March 10, 1972. Nos. 38237, 38238.

1. **Criminal Law: Larceny: Words and Phrases.** Stealing may be defined as a taking without right or leave, with intent to keep wrongfully.
2. **Criminal Law: Larceny: Evidence: Intent.** Evidence that property was taken without right or leave and abandoned at a distant place will sustain a finding of an intent to keep wrongfully.

Appeals from the district court for Dawson County: HUGH STUART, Judge. Affirmed.

Bruce Smith, for appellants.

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.

BOSLAUGH, J.

The defendants appeal from convictions for auto theft. The appeals were consolidated for briefing and argument in this court.

The evidence shows that on May 3, 1971, the defendants took a 1964 Chevrolet automobile owned by Charles Louis Gregory and drove it from Cozad, Nebraska, to a point approximately 15 miles east of Sterling, Colorado. They were apprehended there by a Colorado state patrolman. The defendants had left Manhattan, Kansas, on May 1, 1971, in a stolen automobile which they abandoned in Lincoln, Nebraska. They took another car and drove to Hastings, Nebraska, where they abandoned it and took a third car. They abandoned the third car in Kearney, Nebraska, and took a fourth car which they abandoned in Cozad. The defendants intended to go to California and testified that they would have abandoned the Gregory automobile when it ran out of gas.

The principal assignments of error relate to the intent which is an essential element of the crime. The defendants contend the evidence was insufficient to sustain a finding that they intended to deprive the owner of his property permanently and that the instructions to the jury were erroneous because they did not advise the jury that such an intent was an essential element of the crime.

The statute refers to any person who "steals" an automobile. § 28-522, R. R. S. 1943. Instruction No. 8 defined "steal" as a taking without right or leave with intent to keep wrongfully. This is a commonly understood meaning of the word and has been approved by other courts. See, Morissette v. United States, 342 U. S. 246, 72 S. Ct. 240, 96 L. Ed. 288; Grooms v. State, 85

Fla. 413, 96 So. 296. The instruction conformed to the definition contained in NJI No. 14.10 and was not erroneous.

The principal distinction between automobile theft and the lesser offense of taking an automobile for wrongful use (§ 28-521, R. R. S. 1943) is the intent to keep wrongfully which is an element of automobile theft. Where the property is returned to the owner promptly there may be no basis for a finding of intent to keep wrongfully. Where the property is abandoned at some distant place, after it has served the purposes of the taker, there is some conflict in the authorities as to whether the circumstances will sustain a finding of an intent to keep wrongfully. See, 50 Am. Jur. 2d, Larceny, § 37, p. 197; 52A C. J. S., Larceny, § 27, p. 450. We think the better rule is that abandonment at a distant place presents a question for the jury as to whether there was an intent to keep wrongfully. See State v. Warner, 187 Neb. 335, 190 N. W. 2d 786.

The evidence shows the defendants intended to drive the Gregory automobile as far as they could before abandoning it. When the automobile was recovered at Sterling, Colorado, it had been driven 240 miles and had been damaged mechanically. The motor mounts were broken; the center carrier bearing on the drive shaft was broken; the front wheels were out of alignment; there was but little oil left in the crankcase; and the left rear fender and two pieces of chrome had been damaged. There is nothing in the record to suggest an intention to return the automobile to the owner. The evidence was clearly sufficient to sustain a finding of an intent to keep wrongfully.

The defendants complain the trial court in a preliminary statement to the jury, and the county attorney in his closing argument, used the term "joy riding" when referring to the offense of taking for wrongful use. The term is one in common use and could not have misled the jury. See State v. Eyle, 236 Ore. 199, 388 P. 2d 110,

9 A. L. R. 3d 628. The trial court was not required to give the requested instruction that taking for wrongful use is a serious offense for which an adequate punishment is provided.

The defendants also complain that the sentences of imprisonment for 18 months to 5 years are excessive. The defendants were absent without leave from the military service and were under the influence of drugs at the time they left Manhattan, Kansas. They were on their way to California when apprehended in Colorado and had stolen 4 automobiles before they took the Gregory automobile. In view of these circumstances we are unable to say that the sentences are excessive.

The indeterminate sentences will allow the defendants to be released at a relatively early date if they make a sincere effort at rehabilitation.

The judgments are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLARENCE E. ECKSTEIN, APPELLANT.
195 N. W. 2d 194

Filed March 10, 1972. No. 38244.

1. **Criminal Law: Constitutional Law: Powers.** A State is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment.
2. **Criminal Law: Constitutional Law: Statutes.** Section 28-743, R. R. S. 1943, is not violative of constitutional clauses concerning unreasonable classification and equal protection, nor does it violate the provisions of the Eighth Amendment prohibiting cruel and unusual punishments.

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

T. Clement Gaughan, Richard L. Goos, and Paul M. Conley, 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.

MCCOWN, J.

The defendant, Clarence E. Eckstein, an inmate of the Penal and Correctional Complex, was found guilty by a jury of unlawfully assaulting, threatening, and detaining two guards for the purpose of compelling or inducing the performance of an act by another person. The defendant was sentenced to the minimum term of 10 years as provided by section 28-743, R. R. S. 1943. The defendant's contention on appeal is that section 28-743, R. R. S. 1943, violates the equal protection clause of the Fourteenth Amendment and constitutes cruel and unusual punishment prohibited by the Eighth Amendment.

On September 1, 1970, the defendant, along with several other inmates of the maximum security unit in the Nebraska Penal and Correctional Complex, took and held two guards as hostages for approximately 21 hours for the purpose of exacting several demands from the prison administration. The substance of the evidence was that the defendant held a knife on the hostages and threatened them.

Section 28-743, R. R. S. 1943, provides: "Whoever, being an inmate of any jail or correctional or penal institution, shall assault, threaten, imprison, or detain any person for the purpose of compelling or inducing the performance of any act by such person, or by any other person, shall be guilty of a felony and shall, upon conviction thereof, be imprisoned in the Nebraska Penal and Correctional Complex for a term of not less than ten years nor more than fifty years. Such sentence shall commence upon the termination of the first or former sentence."

The defendant's argument seeks to equate this sec-

tion with general criminal statutes dealing with felonious assault or false imprisonment, which carry penalties of 2 to 15 years and 1 year respectively. On that basis, he urges that the statute here, which applies only to inmates of penal institutions, creates an unreasonable and arbitrary classification, and denies him the equal protection of the laws.

This argument was shot down by this court in State v. Holland, 183 Neb. 485, 161 N. W. 2d 862. That case involved a statute making a simple assault and battery committed by certain prisoners a felony punishable by not more than 5 years imprisonment. The identical offense committed by others was a misdemeanor punishable by imprisonment in the county jail for not more than 6 months. This court held that the classification of those prisoners for special treatment was reasonable and that the statute was not violative of constitutional clauses concerning unreasonable classification, equal protection, or due process.

The defendant's second contention rests on the Eighth Amendment. He contends that a 10 to 50 year sentence is cruel and unusual punishment in proportion to punishments for intrinsically the same type of crime by non-inmate citizens.

We point out that section 28-743, R. R. S. 1943, should be equated with the kidnapping statute, section 28-417, R. S. Supp., 1969, rather than with the felonious assault or false imprisonment statutes as the defendant attempts to do. As applied to the taking of hostages, the language of the kidnapping statute and that of the statute involved here are virtually identical when they define the required intent as being "for the purpose of compelling the performance of any act by such person or by any other person." The penalty for violation of the relevant portion of the kidnapping statute is 3 to 50 years imprisonment, while the penalty for violation of section 28-743, R. R. S. 1943, is 10 to 50 years.

The dangers to society, custodians, and prisoners

which are inherent in administration and control of penal institutions are by now well known to everyone. The legislative classification here was not arbitrary or unreasonable. "A State is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment." Skinner v. Oklahoma, 316 U. S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655.

The Holland case primarily involved distinctions as to the maximum periods of imprisonment while this case primarily involves distinctions in the minimum periods of imprisonment. Such differences do not destroy nor change the application of the principals involved. Eighth Amendment attacks, equally with those based on equal protection, must fall. State v. Holland, 183 Neb. 485, 161 N. W. 2d 862, is controlling on all issues here.

Section 28-743, R. R. S. 1943, is not violative of constitutional clauses concerning unreasonable classification and equal protection, nor does it violate the provisions of the Eighth Amendment prohibiting cruel and unusual punishments.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BERT BOOTH, APPELLANT.
195 N. W. 2d 198

Filed March 10, 1972. No. 38266.

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

Stephen Greenburg, Paul E. Watts, Michael N. Schirber, and Samuel A. Boyer, Jr., 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.

CLINTON, J.

The sole question on this appeal is whether the sentence is excessive. On November 24, 1969, the defendant, being represented by counsel, pled guilty to a charge of burglary and was placed on probation for a period of 3 years. On June 7, 1971, he was charged with probation violation. One of the conditions of probation was that he report monthly in person and in writing to his probation officer. At the violation hearing defendant was represented by counsel and it was stipulated that he had not reported during the probation period. The court, after obtaining a presentence report, imposed an indeterminate sentence of 3 to 5 years on the burglary charge. At the violation hearing defendant took the stand himself to present evidence in mitigation.

The defendant at the time of sentence was 20 years old. The record reveals no justifiable reason for failure to make the reports as required. His own evidence shows other violations of the conditions of probation. It also shows violation of a prior probation order on a minor charge and the presentence report indicates a record of juvenile offenses including stealing tires and cars, and escape from the Youth Center at Omaha. The defendant is married and has two small children but was living apart from his family during the time he was failing to report. His stated motive in living apart from his family was to avoid apprehension. He testified that he was making contributions to his family's support as he could.

On the record we cannot say the trial court abused its discretion.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD DUANE JOHNSON, APPELLANT.

195 N. W. 2d 517

Filed March 17, 1972. No. 37879.

Criminal Law: Trial: Instructions. An instruction that the jury is to make no inferences from the fact a defendant did not testify is a cautionary instruction for the benefit of the defendant.

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

Donald Duane Johnson, pro se.

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

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

WHITE, C. J.

The sole question presented in this case is the validity of instruction No. 11 given by the district court. The instruction is as follows: "You are to draw no conclusions or inferences from the fact that the defendant has not testified in this case, and you are entitled to draw no conclusions or inferences as to his reason in that regard." In Murray v. State, 119 Neb. 16, 226 N. W. 793, the defendant alleged error in the following instruction: " 'You are instructed that the defendant has not testified in his own behalf in this case, as he had a lawful right to do. Nothing must be taken against him because he has not so testified.' " The court approved this instruction. In the recent case of State v. Adams, 181 Neb. 75, 147 N. W. 2d 144, this court approved a similar instruction on the same subject matter.

It is obvious, without further analysis, that there is no merit to the defendant's contention. The instruction was clearly framed in the light of our holdings in Murray and Adams. The instruction did not imply that the

defendant had a duty to testify and the instruction could not have prejudiced the defendant in any way.

The assignment of error is without merit, and the sentence and judgment of the district court are correct and are affirmed.

AFFIRMED.

IN RE PETITION OF ELOISE E. CAIN FOR A WRIT OF HABEAS CORPUS.

ELOISE E. CAIN, APPELLANT, V. DAVID ADAMS ET AL., APPELLEES, RODERICK H. DAVIS ET AL., INTERVENERS-APPELLEES.

195 N. W. 2d 489

Filed March 17, 1972. No. 38033.

Infants: Habeas Corpus: Parties: Trial. In a child custody action between a grandmother and an aunt, the court will consider the best interests of the child and will make such order for its custody as will be for its welfare.

Appeal from the district court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Paul E. Watts, Michael N. Schirber, Samuel A. Boyer, Jr., and Stephen Greenberg, for appellant.

Fromkin, Fromkin & Herzog, for appellees.

Richard L. Weill of Kutak, Rock, Cohen, Campbell & Peters, for interveners-appellees.

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

WHITE, C. J.

This is a habeas corpus action to determine the custody of 3-year-old Stephen Mathew Adams, between his grandmother, Eloise E. Cain, and his father, David Adams, and his aunt, Joan C. Davis. Roderick H. Davis and Joan C. Davis intervened seeking custody. The dis-

trict court, after a full hearing, found that both the appellant grandmother and the interveners were fit to have the custody of Stephen Mathew Adams. It further concluded and determined that the best interests of the child as between the grandmother and the interveners were served by granting the custody to the interveners. We affirm the judgment and order of the district court.

Stephen Mathew Adams was 3 years of age, the grandson of the appellant, and the nephew of Joan C. Davis. The natural father, David Adams, has been convicted of manslaughter of the child's natural mother and is presently incarcerated. It would serve no purpose in this opinion to recite in detail all of the testimony introduced. We will recite briefly the pertinent facts. Joan C. Davis is the sister of the natural father. She and her husband, Roderick H. Davis, have been married about 4 years and have a 3-year-old son. Joan was 25 years of age at time of trial and both are college educated. Roderick H. Davis is an agent of the Equitable Life Assurance Society and was earning approximately $15,000 per year. Mrs. Davis is a housewife and mother, is not now working, and was staying at home to care for the children. They live in a west Omaha apartment complex with playground facilities, swimming pool, and grassy areas. There are numerous small children in the neighborhood.

In contrast to this general situation, the appellant, Eloise E. Cain, is 53 years old and resides in Little Rock, Arkansas where her 78 year old mother lives with her. She has been twice divorced, and testified that she would not remarry. She is a Civil Service employee, earning $7,856 a year. Since she is employed, she testified that the minor child would attend a day-care center in Little Rock during the hours she worked.

In this case the court is not faced with the many times onerous problem of weighing the comparative value of parental rights or determining the fitness or unfitness of the custodial applicant. The contestants in this controversy are people of high moral character, and possess

the requisite love and desire for the care of Stephen Mathew Adams. They are financially able to furnish proper food and clothing and the other environmental requirements for the raising, training, and care of Stephen Mathew Adams. We need not investigate any of the fine distinctions present in some of the rules applicable to custody controversies in a habeas corpus proceeding. In a controversy of this nature and between these parties, the court will consider the best interests of the child, and will make such order for its custody as will be for its welfare. Steward v. Elliott, 113 Neb. 421, 203 N. W. 580; Reed v. Reed, 152 Neb. 819, 43 N. W. 2d 161; Hausman v. Shields, 184 Neb. 88, 165 N. W. 2d 581.

In weighing the evidence in this case it is quite obvious that the district court, in exercising its discretion, considered the age of the parties and the effect of age on their ability to raise a child of tender years such as Stephen Mathew Adams is. The appellant is 53 years of age and plans to retire at the age of 65 years. Undoubtedly the trial court took into consideration the generation gap between the grandmother and Stephen Mathew Adams and was responsive to the principle that child rearing is a difficult problem in a modern age and such problems are accentuated by an age difference between the child and a custodial grandmother, such as we have here. When Stephen is 15 years of age and a teenager, his grandmother will be 65 years of age. On the other hand, the interveners, Joan C. Davis and her husband, are now just beginning their own family, and are obviously much better equipped over the next 20 years to raise a small child. We feel that one of the considerations impelling the lower court's decision was that when a child grows up with younger people, as here, in a family with other children, it has a better opportunity for a more normal and wholesome development than with people separated from it in age by about 50 years.

See In re Adoption of Jackson, 201 Wis. 642, 231 N. W. 158.

Touching briefly upon home conditions, the differential is apparent in that Mrs. Cain will continue working and the child would have to undergo, at a tender age, the loss of contact with the grandmother for long periods of time. She also described in her testimony that the problem of Stephen's playmates would be taken care of by transporting Stephen across the city to play with children of his own age and maturity. In contrast to this situation, Joan and Roderick Davis have a son, Rick, Jr., who is about 3 years of age and obviously would make a companion of Stephen Mathew Adams as he grew up. It takes no child psychiatrist to speculate about the tremendous advantage of this situation in the rearing of a small child over transporting it across a city to play for short periods of time with other children. Not decisive, but apparent in the record, is the fact that the Davises are now and will be in the future more financially able to furnish Stephen Mathew Adams the support and care necessary in a modern environment, including perhaps more advanced education, than he would probably be able to receive with the grandmother. Considering the other factors of a father figure being present in the home, his being able to live as a member of a happy family unit, and that the Davises would be able to handle much better the perhaps difficult problem of the natural father's visitation in the future, we have no doubt the district court came to the correct conclusion in this case. There is not a scintilla of evidence or argument in this case which would indicate that the trial judge abused his discretion in reaching the conclusion he did.

We have held in matters of this type that the decision of the trial court is peculiarly entitled to respect. It not only saw the parties and the witnesses and was better able to evaluate them, but was in much closer touch with the situation than this court, which is limited to a review of a written record. The judgment of the trial

court in cases of this nature is entitled to great weight in determining the best interests of children in custody proceedings. Fisher v. Fisher, 185 Neb. 469, 176 N. W. 2d 667.

The judgment of the trial court is in all respects correct and is affirmed.

AFFIRMED.

WILLIAM R. BAKER, APPELLEE, V. JOSEPH S. DALY, SPECIAL ADMINISTRATOR OF THE ESTATE OF LEONARD LOUIS DUFFY, APPELLANT, IMPLEADED WITH IDEAL CEMENT STONE COMPANY, APPELLEE.

195 N. W. 2d 755

Filed March 17, 1972. No. 38049.

1. **Trial: Evidence: Jury.** In every case, before the evidence on an issue is submitted to the jury, there is a preliminary question for the court, not whether there is literally no evidence, but whether there is any upon which a jury can proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
2. ———: ———: ———. A mere scintilla of evidence is not enough to require the submission of an issue to the jury.
3. **Trial: Evidence: Jury: Pleadings.** Where an issue, even assuming that it is properly pleaded, affords no basis for recovery under the evidence adduced in the case, the trial court's submission of such an issue to the jury constitutes error.
4. **Negligence: Motor Vehicles: Pedestrians.** The failure of a pedestrian with the right-of-way to see an approaching car within the limit of danger or to misjudge its speed does not ordinarily constitute contributory negligence as a matter of law.

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

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

David A. Johnson and Emil F. Sodoro, for appellee Baker.

Joseph P. Cashen, for appellee Ideal Cement Stone Co.

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

WHITE, C. J.

This is an appeal from a jury verdict and judgment for $17,600 resulting from a pedestrian-automobile collision at an intersection in the City of Omaha, Nebraska. Generally, the appeal raises questions of error in the instructions and the sufficiency of the evidence to sustain the verdict. We reverse the judgment of the district court and remand the cause for a new trial.

A detailed analysis of the facts is not necessary in the light of the disposition we make in the case. For purposes of clarity we recite a general background summary of the evidence. On the day of the accident, September 16, 1968, the plaintiff was employed as a truck driver by the Ideal Cement Stone Company. He and two other employees, returning from a company errand, and each driving a dump truck, stopped for coffee at Harold's Coffee Shop, which is located on the southeast corner of the intersection of Thirtieth and State Streets in Omaha. The men parked their trucks in a line facing south on the west side of Thirtieth Street. The plaintiff's truck was the last in line, and the end of his truck was parked within 10 feet of State Street. The men waited in their trucks a few minutes until a hard rainfall subsided, then crossed the street and entered the coffee shop.

Upon leaving the coffee shop, one of the plaintiff's coworkers walked across State Street to buy a newspaper. The other, Allen Curtiss, jaywalked in a southwesterly direction across Thirtieth Street toward his truck. About the same time, the plaintiff began to cross Thirtieth Street. He testified that he looked first to the south, and seeing no cars, to the north. He saw a car approaching from that direction, but it was about a block away, so he proceeded to cross. The plaintiff testified

that he was in the crosswalk at all times. He safely crossed the northbound lane, and looked again to the north just before he was hit by a car driven by defendant's decedent.

The district court admitted in evidence, over objections, the Omaha city ordinance regulating the right-of-way between vehicles and pedestrians at intersections controlled by automatic signal lights. In the court's instructions, the jury was advised of the ordinance and the issue of the violation of the ordinance was submitted to the jury. There is insufficient evidence to submit this issue to the jury. The plaintiff himself testified there was no traffic light at the intersection. The policeman who investigated the accident and two on-the-scene witnesses, Coyle and Shipley, all testified there was no traffic signal or light at the corner at the time of the accident. The submission of this issue to the jury rests entirely upon the rather uncertain testimony of one of the companions of the plaintiff who was present at the intersection at the time the accident occurred. More important, the city records concerning the installation and position of traffic lights were subpoenaed, and affirmatively show that there was no traffic signal light at the time of the accident, and that in fact such traffic signal light was installed and connected on a date about 1 month after the accident. Applying to this situation the familiar rule applicable to the determination of the sufficiency of the evidence to submit an issue to the jury, we have no hesitation in determining that reasonable minds could not differ in coming to the conclusion that the evidence as to the physical facts establishes conclusively that there was no traffic signal light as provided by the ordinance of the City of Omaha installed and operating at the time of the accident.

It is contended that the testimony of the one witness, which is contrary to what the plaintiff testified to, the police officer, and the official records of the City of Omaha, is sufficient to carry the issue to the jury. This

court has said many times that in every case, before the evidence on an issue is submitted to the jury, there is a preliminary question for the court, not whether there is literally no evidence, but whether there is any upon which a jury can proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. A mere scintilla of evidence is not enough to require the submission of an issue to the jury. Where an issue, even assuming that it is properly pleaded, affords no basis for recovery under the evidence adduced in the case, the trial court's submission of such an issue to the jury constitutes error. Edmunds v. Ripley, 172 Neb. 797, 112 N. W. 2d 385; Raff v. Farm Bureau Ins. Co., 181 Neb. 444, 149 N. W. 2d 52; Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531; Springer v. Henthorn, 169 Neb. 578, 100 N. W. 2d 521; Buchanan v. Zorn, 169 Neb. 396, 99 N. W. 2d 773; Pullen v. Novak, 169 Neb. 211, 99 N. W. 2d 16; Johnsen v. Taylor, 169 Neb. 280, 99 N. W. 2d 254. It is quite obvious that the error was prejudicial, because it permitted the jury to find negligence on the part of the defendant's decedent in violating a signal light, where reasonable minds could not differ that it was not in existence as a matter of physical fact. This was reversible error.

Since the judgment in this case must be reversed, we briefly examine the other assignments of error to the extent necessary for proper submission of the cause on remand. There is evidence in this case that the plaintiff was crossing the intersection in a clearly marked crosswalk, giving him the right-of-way across the intersection under the state statute and the applicable Omaha city ordinance. There is also evidence that the plaintiff in crossing in the crosswalk observed the automobile of defendant's decedent approximately 1 block away. It is the defendant's contention, in essence, that as a matter of law, the plaintiff was guilty of contributory negligence in not again looking and seeing the car in time to avoid the accident. We are of the opinion that this is a

question for the jury under proper instructions. In a closely similar, if not almost identical case, involving a pedestrian crossing at a crosswalk at an intersection in the City of Omaha, this court said as follows in Beck v. Trustin, 177 Neb. 788, 131 N. W. 2d 425:

"Defendant further argues that the plaintiff was guilty of contributory negligence more than slight as compared with any negligence proved against the defendant, and specifically contends that plaintiff's negligence was *in failing to see the automobile of the defendant; in leaving a place of safety and placing himself in the path of the approaching automobile; and in exposing himself to an obvious danger which would have been apparent to him if he had looked.*

"We consider first whether the plaintiff was guilty of negligence more than slight in comparison with the negligence of the defendant. It is defendant's contention that plaintiff did not look to the north before entering the street. The plaintiff's testimony is unequivocal that he did. It is true he made statements on the day of the accident which tend to question his testimony, but this merely made it a jury question, and the jury must have accepted the plaintiff's version. The defendant further contends that the evidence is undisputed that the plaintiff did not look to the north after he had entered the intersection until he had proceeded almost to the center of the intersection where he was struck by the defendant's car. Is this negligence more than slight as a matter of law when compared with the negligence of the defendant? *We determine under the facts in this case that it is not.*

"Section 35.16.010, city traffic code of the Omaha city ordinances, provides in part: ' "a) The driver of any vehicle shall yield the right of way to a pedestrian crossing the street within any marked crosswalk or within any unmarked crosswalk at the end of a block, * * *." * * * "h) Notwithstanding the provisions of this section every driver of a vehicle shall exercise due care

to avoid colliding with any pedestrian upon a roadway, and shall give warning by sounding the horn when necessary." '

"The provisions of 'a' above are substantially the same as those of section 39-751, R. S. Supp., 1963, covering the rights of pedestrians at intersection crossings. The evidence of the only disinterested witness places the defendant's automobile north of the intersection when the plaintiff stepped off the curb. Certainly the jury, under the evidence, could find that plaintiff was in the crosswalk and had the right-of-way when the defendant entered the intersection. * * *

"As pointed out in Costanzo v. Trustin Manuf. Corp., 176 Neb. 136, 125 N. W. 2d 556, before a verdict can be directed against a motorist for failing to see an approaching vehicle at a nonprotected intersection, the position of the approaching vehicle must be undisputedly located in a favored position. Certainly, a pedestrian with a right-of-way is in a much stronger position, and if his right-of-way is to be protected, *we cannot permit the failure to see an approaching car or a misjudgment as to its speed to be the sole criteria. The failure of a pedestrian with the right-of-way to see an approaching car within the limit of danger or to misjudge its speed does not ordinarily constitute contributory negligence as a matter of law. It is no more than evidence from which a jury may find contributory negligence.*" (Emphasis supplied).

The issues of negligence and contributory negligence were properly submitted to the jury under all the evidence in this case. Because of error in the submission of an issue to the jury upon which there was no proper supporting evidence, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

PHILIP F. VERZANI ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.
195 N. W. 2d 762

Filed March 17, 1972. No. 38069.

1. **Eminent Domain: Damages.** In an eminent domain proceeding where a part of the property is taken, the landowner may recover the value of the land appropriated and the depreciation in value of the remainder of the land. The remainder is generally considered to be land which is owned by the same proprietor, contiguous to the land taken, and devoted to the same use.
2. ———: ———. In an eminent domain proceeding, anticipated profits from the continued carrying on of a business in an established location cannot be considered in estimating the damages, and the profits of a business cannot be shown for the purpose of proving the value of property.
3. **Eminent Domain: Damages: Pleadings.** Damage claimed to result from improper design or construction of a highway should be pleaded specially.
4. **Eminent Domain: Damages.** Damage related to traffic flow is not compensable.

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

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., Gary R. Welch, Dale L. Babcock, Jr., and Royce N. Harper, for appellant.

Smith, Smith & Boyd and Robert G. Scoville, for appellees.

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

BOSLAUGH, J.

This is an appeal in a proceeding in eminent domain. On August 4, 1969, the defendant, State of Nebraska, condemned 4.85 acres of land in Dakota County, Nebraska, for highway purposes. The land taken was part of a 10-acre tract which was being purchased by the plaintiff Raymond L. Kilberg from Philip F. Verzani and Emma L. Verzani. While the proceeding was pend-

ing, the contract was completed and the land conveyed to Raymond L. Kilberg and Robert C. Kilberg. See Northeastern Nebraska R.R. Co. v. Frazier, 25 Neb. 42, 40 N. W. 604. The vendors have filed a disclaimer in the proceeding.

In the district court the damages were fixed at $27,017. The State has appealed and contends that the trial court erred in permitting the jury to consider certain items of damage.

The principal controversy concerns severance damages. The evidence shows that the 10-acre tract was being used in conjunction with adjacent land lying to the west in the operation of a racetrack known as Raceway Park. The adjacent land consisted of a tract 22 rods wide owned by Raymond L. Kilberg and Darlene Kilberg, and a 1-acre tract owned by Raceway Park, Inc. Raceway Park, Inc., and Robert C. Kilberg were not parties to the proceeding.

Raceway Park, Inc., is a corporation in which 40 percent of the stock is owned by Raymond L. Kilberg, 40 percent by Robert C. Kilberg, 10 percent by Robert Murphy, and 10 percent by Eugene A. Kock. In addition to owning the 1-acre tract of land, the corporation held a lease on the other property. The record indicates that the racetrack; other improvements consisting of bleachers, retaining walls, office building, concession stands, and toilets and washroom facilities; and fencing were located on the 1-acre tract and the 22-rod tract. The 10-acre tract was used as a parking lot.

Over the objection of the defendant, the trial court permitted the plaintiffs to introduce evidence concerning consequential damages to the land and improvements adjacent to the 10-acre tract. The defendant contends that any severance damage should have been limited to the 5.15 acres remaining in the 10-acre tract after the taking.

The rule is well established that where only a part of the property is taken, the landowner may recover the

value of the land appropriated and the depreciation in value of the remainder of the land. The remainder is generally considered to be land which is owned by the same proprietor, contiguous to the land taken, and devoted to the same use. Rath v. Sanitary Dist. No. One, 156 Neb. 444, 56 N. W. 2d 741; Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200. As stated in 4A Nichols on Eminent Domain (3d Ed.), § 14.31 (2): "It is, of course, essential to constitute a single parcel that it be owned in its entirety by one owner or one set of owners."

The evidence in this case established a diversity of ownership in the land and improvements adjacent to the 10-acre tract. The facts did not justify a disregard of the corporate identity of Raceway Park, Inc. See Jonas v. State, 19 Wis. 2d 638, 121 N. W. 2d 235, 95 A. L. R. 2d 880. The evidence as to severance damages should have been restricted to that part of the 10-acre tract remaining after the appropriation of 4.85 acres.

The plaintiffs produced an expert witness, Leonard W. Dierking, who testified that the only remainder land damaged was the 5.15 acres. However, he was permitted to testify over objection as to the value of the improvements before and after the taking by a capitalization of income method. The plaintiffs rely upon Iske v. Metropolitan Utilities Dist., 183 Neb. 34, 157 N. W. 2d 887, and contend that this was a proper method for determining the value of the improvements.

In the Iske case, the witness capitalized royalty income from minerals in place and rental income to be received from the property after the minerals had been removed. In this case the opinion testimony was based upon a capitalization of profits from a business conducted upon the property. The witness used a mixture of assumed amounts and information taken from the books of the racetrack to calculate income before and after the taking.

In an eminent domain proceeding, anticipated profits

from the continued carrying on of a business in an established location cannot be considered in estimating the damages, and the profits of a business cannot be shown for the purpose of proving the value of property. Lechliter v. State, 185 Neb. 527, 176 N. W. 2d 917; James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273. The profits from a business furnish no test of the value of the property upon which the business is conducted because the profits depend to a large extent upon capital employed and the skill of management. 4 Nichols on Eminent Domain (3d Ed.), § 12-3121 (1). The opinion evidence based upon a capitalization of income from the operation of the racetrack should have been excluded in this case even if the value of the improvements had been an issue.

The plaintiffs were also allowed to introduce evidence of damage resulting from failure to properly locate drains under the highway, and damage resulting from a restriction of access due to the separation of opposing traffic lanes of the new highway.

The pleadings raised no issue concerning damage resulting from improper design or construction of the highway, and damage related to traffic flow is not compensable. See, Clary v. State, 171 Neb. 691, 107 N. W. 2d 429; Scheer v. Kansas-Nebraska Natural Gas Co., Inc., 158 Neb. 668, 64 N. W. 2d 333; Painter v. State, 177 Neb. 905, 131 N. W. 2d 587.

It is unnecessary to consider the other assignments of error.

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

REVERSED AND REMANDED.

SMITH, J., concurring.

The requirement that the condemnee in an eminent domain proceeding must plead damage from improper construction of a highway or other improvement is a product of several rules. A final condemnation award is not conclusive in a subsequent action for remainder

damage that was caused by improper construction or operation and that was not actually litigated in the first proceeding. Recovery in a subsequent suit is permitted because such new element was not contemplated or determined at the time of the taking or damaging. Hansen v. County of Cass, 185 Neb. 565, 177 N. W. 2d 568 (1970). I classify improper design with improper construction and operation.

ABEL CONSTRUCTION COMPANY, A CORPORATION, APPELLANT, V. SCHOOL DISTRICT OF SEWARD, IN THE COUNTY OF SEWARD, IN THE STATE OF NEBRASKA, A CORPORATION, APPELLEE.
195 N. W. 2d 744

Filed March 17, 1972. No. 38075.

1. **Contracts: Damages: Penalties.** As a general rule, the question of whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court.
2. ———: ———: ———. If the damages arising from a breach of the contract are difficult of ascertainment or admeasurement, and if the stipulated amount is not disproportionate to the amount of damages that may be reasonably anticipated from the breach, it will usually be regarded as a provision for liquidated damages.
3. ———: ———: ———. Liquidated damages in a fixed sum for each day's delay in performing a construction contract, which in effect grades the damages according to the extent of the breach, and where the effect of the delay is difficult to estimate and the daily amounts are not clearly unreasonable are not penal.
4. **Contracts: Time.** Provisions in construction contracts providing that requests for additional time, necessitated by cause beyond the contractor's control, to complete the contract must be in writing are generally binding.
5. **Contracts: Time: Evidence: Trial: Agency.** There must be evidence to support a finding that the inaction of certain parties for whose actions the owner was allegedly responsible was in fact the cause of the delay in completion of a construction contract.
6. **Contracts: Evidence: Agency.** Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising

from and in accordance with the other's manifestations to such third persons.

7. **Contracts: Time: Damages: Waiver: Agency.** The engineer's authority under terms of the construction contract to observe, inspect, suspend, or reject work, or to make decisions in connection with technical specifications does not extend to waiving general contractual requirements relating to written request for time extensions and waiver of liquidated damages.

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

James W. Hewitt, for appellant.

Blevins, Bartu & Blevins, for appellee.

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

CLINTON, J.

This is an action by Abel Construction Company, plaintiff, to recover from the defendant, School District of Seward, $5,175 alleged to be the balance owed upon a contract for the construction of an athletic track with a rubber asphalt resilient surface and other improvements at the Seward high school. The contract provided for liquidated damages of $75 for each day completion of the construction extended beyond the specified 60-calendar day "contract period." The defendant had withheld the liquidated damages for a claimed completion delay of 69 days. The trial judge determined as a matter of law that since the plaintiff had failed to request in writing an extension of the contract period as provided for in the construction contract the only question to be decided was the extent of the delay, and he therefore submitted to the jury the question of whether the contract was completed September 1, 1967, or September 8, 1967. The jury returned a verdict for the plaintiff in the amount of $525. The plaintiff appealed. We affirm the verdict and the judgment.

The plaintiff in its petition pled the contract by the incorporation of a copy thereof, admitted it had not

completed the construction within the time provided in the contract, and alleged that the work was completed September 1, 1967, which was 60 days after the stipulated contractual completion date. It alleged that the delay was excusable because: (a) Rain during the period May 27, 1967, to July 3, 1967, was so far in excess of normal and in such quantity that construction could not take place during that period. (b) The defendant was responsible for a portion of the delay because a testing laboratory hired by the defendant did not complete determination of the "leveling mix" and the "rubber mix" and furnish the same to the plaintiff until June 20 and 23, 1967. (c) The rubber manufacturer's representative was required to be present at the laying of the resilient layer and through no fault of the plaintiff he was not able to be present until July 24, 1967.

The plaintiff further pled that the contractual provision for liquidated damages was void because it constituted a penalty and alleged that the defendant suffered no actual damage because of the delay.

The defendant in its answer pled specifically various provisions of the contract upon which it relied and to which we will refer in this opinion as required, including the failure of the plaintiff to request an extension of time in accordance with contract provisions. In an amended reply filed on the day trial began plaintiff alleged an estoppel to rely upon this contract provision because an employee of the defendant's engineer, one Charles Kemery, had told the plaintiff "not to worry about liquidated damages, as time lost would be adjusted by" the engineer.

The principal issues on appeal as raised by the assignments of error are: (1) Is the contract provision for liquidated damages void? (2) The effect, as related to the matters pled in excuse, of the contract provision requiring that the contractor request in writing extensions of the "contract period" and the effect thereon of the

statement of Kemery. All of which of course reaches the question of the propriety of the partial direction of the verdict by the trial court.

We first discuss the validity of the provision for liquidated damages. The contract provided: "Work shall be commenced within 10 days from the date of the written Notice to Proceed and shall be completed within sixty (60) calendar days after the date of the Notice to Proceed. . . . *Liquidated Damages.* As time is an essential element of the contract, all work shall be completed within the contract period. For each calendar day that any work remains uncompleted after the end of the contract period, the amount of Seventy Five Dollars ($75.00) per calendar day will be assessed, not as a penalty, but as a predetermined and agreed amount to be used to pay, in part, any additional engineering expenses incurred by the Owner after the end of the contract period."

At the trial evidence was adduced by defendant to show that: Because of the delay the defendant incurred additional engineering expenses of $1,137.16; it incurred in unascertainable amounts additional expense in moving bleachers which would have been avoided had the work been completed in time so that the movement could have been made with regular employees; it was unable to use for a period of time some associated athletic facilities; there was expense and inconvenience in protecting the work while it cured which would have been avoided; and there were other items of inconvenience to the school and public to which no monetary valuation could be affixed. The total contract price was $80,896.98.

This court has had occasion previously to consider the question as to whether a liquidated damage provision similar to that here is valid. In Parsons Constr. Co. v. Metropolitan Utilities Dist., 170 Neb. 709, 104 N. W. 2d 272, the court had before it such a provision calling for liquidated damages of $150 per day. We there said: "In the case of Stanford Motor Co. v. Westman, 151 Neb.

850, 39 N. W. 2d 841, this court held: 'As a general rule, the question of whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court.' The court cited 15 Am. Jur., Damages, § 246, p. 678, as follows: 'In such cases the court must find out whether the payment stipulated is in truth liquidated damages or a penalty. The question whether it is the one or the other is a question of law and one quite independent of the agreement of the parties to call it the one or the other.' The court further said: 'We said in Gustin & Co. v. Nebraska Building & Investment Co., 110 Neb. 241, 193 N. W. 269: ". . . where the damages are uncertain, and not readily capable of exact ascertainment by any known rule, and the parties surveyed the whole situation at the time of contract, and agreed upon the amount of damages, in case of a breach in the contract to construct a building by a certain time, such sum, in case of a breach, is the true measure of recovery and is liquidated damages and not a penalty." ' The court further held: 'If the damages arising from a breach of the contract are difficult of ascertainment or admeasurement, and if the stipulated amount is not disproportionate to the amount of damages that may be reasonably anticipated from the breach, it will usually be regarded as a provision for liquidated damages.' See, also, Sofio v. Glissmann, 156 Neb. 610, 57 N. W. 2d 176; Edgar v. Anthes, 109 Neb. 546, 191 N. W. 682."

At 5 Williston on Contracts (3d Ed.), § 785, p. 733, we find the following: "It is commonly provided in building and construction contracts that there shall be deducted from the contractor's compensation a fixed sum for each day's delay in performing the contract beyond the day fixed therein. Such damages are obviously graded according to the extent of the breach, increasing proportionately with each day's delay. Moreover, each day's delay, while unquestionably injurious, is in-

jurious frequently in ways that are difficult to estimate. Accordingly, unless the sum fixed in the contract is very unreasonable the provision is treated as one for liquidated damages." See, also, 5 Corbin on Contracts, § 1072, p. 402. We hold that the trial court's determination that the contract provision for liquidated damages was not penal is correct.

We next turn to the question whether the delay in performance was excusable under the terms of the contract and whether there was a jury question on any point related to this issue other than the contract completion date. The contract provides: "59. . . . The Contractor expressly covenants and agrees that in undertaking to complete the work within the contract period fixed in the contract documents, he has taken into consideration and made allowances for all delays and hindrances incidental to such work, whether growing out of delays in securing materials or workmen, or otherwise. *Should the Contractor be delayed* in the prosecution and completion of the work *by any cause beyond his control*, he shall have no claim or right of action for damages from the Owner for any such cause or delay, unless the cause or delay is the result of fraud or active interference by the Owner. The Contractor will in such case be granted an extension of the time specified for completion of the work as the Owner may award in writing on account of such delay, provided however, that claim for such extension of time is made by the Contractor to the Owner, through the Engineer, in writing, within two weeks from the time when any such alleged cause for delay shall occur. The Owner, through the Engineer, reserves the right to withhold granting of any time extensions until the stipulated contract period is about to expire.

"The Owner at the Owner's sole discretion may waive the above requirements and grant extensions of time for any reason or reasons the Owner deems valid. Time extensions, however, will not be granted for rain, wind,

flood or other natural phenomenon of normal intensity for the locality where work is performed.

"An extension of the contract period may be granted by the Owner for any of the following reasons: . . . b. Delays caused by the Owner . . .." (Emphasis supplied.)

Contract specification GC (general condition) 58 grants the owner the right to withhold liquidated damages from payment, contains other provisions re liquidated damages, and then provides: "Extensions of time granted by the Owner in accordance with the provisions of 'Extensions of the Contract Period' *shall not operate to the contrary, unless such extensions granted by the Owner specifically provide for the waiving of liquidated damages* during and over such period of time extension." (Emphasis supplied.) GC-68: "During freezing weather or weather which would be unsuitable for the proper execution of the work in a first-class manner, all work must be stopped and properly protected from possible injury."

We note first the claim that because of abnormal rainfall during the period May 27, 1967, to July 3, 1967, plaintiff was prevented from proceeding with the work. Competent evidence received by the court would support such a conclusion. The plaintiff argues that because of the provisions of GC-68 above it was not required to make a written request for extension under GC-59. We do not so construe the contract. GC-59 by its terms refers to and contemplates delays caused by unusual weather conditions. GC-68 refers to protecting the work from any weather conditions, normal or abnormal, which would be harmful to it. A contractual requirement that requests for "contract period" extensions must be in writing has been upheld by this court as binding. Parsons Constr. Co. v. Metropolitan Utilities Dist., *supra;* Olson Constr. Co. v. Commercial Building & Inv. Co., 127 Neb. 609, 256 N. W. 22; Carter v. Root, Inc., 84 Neb. 723, 121 N. W. 952.

We next turn to an examination of the two defenses

of excusability labeled (b) and (c) in the second paragraph of this opinion. Assuming the testing laboratory and the manufacturer's representative were parties for whose action or inaction the defendant was responsible and that this would constitute a legal excuse the evidence does not show the alleged inaction of the two parties caused the delays in the performance of the contract. All the evidence shows is the testing laboratory furnished the required formulas on the dates alleged and the manufacturer's representative was not present until July 24, 1967. There is no evidence whatever to show the plaintiff was ready to make use of the mixing formulas before it received them or that it could or would have completed the contract in time had they been furnished earlier. Neither is there any evidence that the laboratory would not have furnished the information earlier had plaintiff made request therefor. The record as a matter of fact clearly supports contrary inferences. The contract provision GS-7-1 states in part: "The Contractor shall submit samples of all materials to be used in the rubber asphalt mix to a testing laboratory designated by the Owner." There is no evidence to show when the samples were furnished. The record does show the plaintiff did not order the rubber needed for the construction until May 19, 1967. Receipt of the order was confirmed May 24, 1967. There is no showing as to when the shipment arrived. The record does show that the plaintiff was not ready to lay the resilient course until July 22, 1967, 22 days after the expiration of the "contract period."

As to the presence of the manufacturer's representative the record shows that he was delayed 2 days beyond the date agreed upon with the contractor. The construction contract contains no provision requiring the presence of the manufacturer's representative. This was a matter insisted upon by the plaintiff and the manufacturer. The defendant was in no way responsible in this connection.

For the reasons just set forth we are not called upon to decide the plaintiff's contention that where the owner is responsible for the delay the contract provisions requiring written requests for extensions and the liquidated damages provision do not apply. It relies upon Peter Kiewit Sons' Co. v. Pasadena City Junior College Dist., 59 Cal. 2d 241, 28 Cal. Rptr. 714, 379 P. 2d 18. Even if the contrary decisions of this court, viz., Olson Constr. Co. v. Commercial Building & Inv. Co., *supra,* needs reexamination, as plaintiff contends, this is not a case in which we can do it.

We have carefully examined the record relative to the contention of estoppel claimed to have arisen because of the alleged statement of Charles Kemery. The plaintiff's president, Costin, testified to a conversation as follows: "A. I said, 'I am concerned with the passing of the calendar days and I would like to request an extension of time.' And he answered, 'Jim, you are unduly concerned, we will handle this as we always do when the job is complete.' Q. And did he tell you who would handle it or how it would be handled? A. He said, 'Our company will handle this when the job is complete.' " Costin further testified to his conclusionary view that Kemery was the engineer in charge for the corporate engineer. He testified to the functions which he observed Kemery perform. There is testimony of the corporate engineer's representative which classified Kemery only as an inspector. Be that as it may the contract itself defines the authority of the engineer and the inspector. Neither definition of authority includes the authority to waive general conditions of the contract. Such authority as the engineer may have in this respect seems confined to plans and specifications. There is in the record no evidence of any act, or failure to act, by the defendant which could give rise to an apparent authority on the part of Kemery to waive the contractual requirement that requests for extensions of the "contract period" and the granting of such requests must

be in writing. At this point it is pertinent to call attention to the provision of GC-58 already noted that the granting of extensions of time does not release the provision on liquidated damages "unless such extensions granted by the Owner specifically provide for the waiving of liquidated damages during and over such period of time extension."

"Apparent or ostensible authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declarations, or conduct of the agent. The principal is only liable for appearance of authority caused by himself. Ostensible and apparent agency have been treated in this jurisdiction as being synonymous. In Farmers Cooperative Shipping Assn. v. Adams Grain Co., 84 Neb. 752, 122 N. W. 55, this court said: 'It is well established that the authority of an agent cannot be established by his own acts and declarations. . . . Consequently, when we speak of the apparent authority of an agent as binding his principal, we mean such authority as the acts or declarations of the principal give the agent the appearance of possessing. Closely related to this doctrine of apparent authority, and really a part of it, is the doctrine of estoppel under which a party who has knowingly permitted others to treat one as his agent will be estopped to deny the agency.'

"Maryland Casualty Co. v. Moon, 231 Mich. 56, 203 N. W. 885, states: 'The apparent authority for which the principal may be liable must, however, be traceable to him and cannot be established by the acts and conduct of the agent. The principal is only liable for that appearance of authority caused by himself.' " Rodine v. Iowa Home Mutual Cas. Co., 171 Neb. 263, 106 N. W. 2d 391. See, also, Restatement, Agency 2d, § 27, p. 103.

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

AFFIRMED.

JOHN W. SINNETT, APPELLANT, V. RONALD M. ALBERT ET AL., APPELLEES.

195 N. W. 2d 506

Filed March 17, 1972. No. 38079.

1. **Libel and Slander: Trial: Privileged Communications.** Absolute privilege attaches to defamatory statements made incident to, and in the course of, a judicial proceeding if the defamatory matter has some relation to the proceedings.
2. ———: ———: ———. The rule of absolute privilege is applicable not only to judicial proceedings but to quasi-judicial proceedings as well.
3. **Libel and Slander: Trial.** The relevancy of the defamatory matter is not a technical legal relevancy but instead a general frame of reference and relationship to the subject matter of the action.
4. **Libel and Slander: Trial: Privileged Communications: Attorneys at Law.** There is an absolute privilege to publish false and defamatory matter in a complaint made to the committee on inquiry of the Nebraska State Bar Association regarding the alleged misconduct of an attorney where the defamatory matter has some relation thereto.
5. **Attorneys at Law: Trial: Witnesses.** It is against sound principles of professional ethics for one who knows that he is to be called as a material witness in a case to appear as attorney therein.

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

Claude D. Shokes and Douglas McArthur, for appellant.

William H. Mecham and Carl L. Klekers, for appellees.

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

MCCOWN, J.

This is an action by plaintiff, John W. Sinnett, against defendants, Ronald M. Albert and Hie Food Products, Inc., for damages for libel. At the close of the plaintiff's case, the district court sustained defendants' motion for a directed verdict and dismissed the plaintiff's petition. The critical issue on appeal involves the nature

and extent of "privilege" where the alleged defamation of the plaintiff occurred in connection with proceedings to disbar or discipline an attorney who is not the plaintiff.

It should be noted that in Nebraska, proceedings before a committee on inquiry must be had prior to instituting the judicial procedure for discipline of attorneys. Unless requested by the attorney charged, neither the hearing, records, or proceedings of the committee on inquiry shall be made public nor any publicity be given thereto prior to the filing of a complaint against the attorney in this court. See, Rules Creating, Controlling and Regulating the Nebraska State Bar Association, Article XI, paragraphs 10 and 11; and Revised Rules of the Supreme Court of Nebraska, Disciplinary Proceedings, paragraphs 10 and 11, p. 32 (November 15, 1971).

The defamatory statement here was a part of a complaint lodged by the individual defendant with a committee on inquiry of the Nebraska State Bar Association against an attorney. The complaint involved the attorney's conduct in connection with a previous lawsuit between the parties involved here. Although the allegedly defamatory statement was never admitted into evidence, it may be inferred that it was an incidental or explanatory part of the complaint against the attorney. The members of the committe on inquiry properly refused to testify as to any of the records or proceedings before the committee.

Although the plaintiff asserts various errors in connection with the exclusion of evidence, we do not reach those matters in view of our determination on the basic issue of privilege.

"The absolute privilege to publish defamatory matter under the circumstances to which the privilege applies is based upon the ground that 'there are certain relations of life in which it is so important that the persons engaged in them should be able to speak freely that the law takes the risk of their abusing the occasion and speaking maliciously as well as untruly, and in order

that their duties may be carried on freely and without fear of any action being brought against them, it says: "We will treat as absolutely privileged any statement made in the performance of these duties." ' " Ramstead v. Morgan, 219 Ore. 383, 347 P. 2d 594 (1959). See, also, Restatement, Torts, Introductory Note, Chapter 25, Title B, p. 223.

The absolute privilege attaches to defamatory statements made incident to, and in the course of, a judicial proceeding if the defamatory matter has some relation to the proceedings. Restatement, Torts, §§ 586, 587, and 588, pp. 229 to 234; Annotation, 77 A. L. R. 2d 493.

The rule of absolute privilege is applicable not only to judicial proceedings but to quasi-judicial proceedings as well. Shumway v. Warrick, 108 Neb. 652, 189 N. W. 301. As to judicial proceedings, it is not necessary that the defamatory matter be relevant or pertinent to any issue before the court. It is necessary only that it have some relevance to the judicial function which is being performed. See Reller v. Ankeny, 160 Neb. 47, 68 N. W. 2d 686. Even in a quasi-judicial proceeding, the relevancy of the defamatory matter is not a technical legal relevancy but instead a general frame of reference and relationship to the subject matter of the action. Fenning v. S. G. Holding Corp., 47 N. J. Super. 110, 135 A. 2d 346; Shumway v. Warrick, *supra*.

Proceedings for the discipline or disbarment of attorneys have been regarded as judicial in character. On the issue of privilege in connection with complaints or institution of proceedings to discipline or disbar attorneys, the case of Ramstead v. Morgan, 219 Ore. 383, 347 P. 2d 594 (1959), is a leading case. After an extensive review of the authorities involved, the court noted that if the defendant's letter of complaint had set in motion the bar's trial procedure and he had been called before the trial committee to testify as a witness, the quasi-judicial character of the proceeding would warrant the application of the rule of absolute privilege. The

court then said: "Considering the purpose of the rule, we think that relevant statements made in a complaint designed to initiate such quasi-judicial action should also be protected. * * * Our conclusion rests upon the basic premise that disciplinary proceedings are carried on as one of the processes of this court. It makes no difference whether the process is denominated judicial or quasi-judicial; it is an integral part of the functioning of the judicial branch of government and the process includes the filing of an informal complaint by one who wishes to charge an attorney with unprofessional conduct."

We think it deserves comment that all of the proceedings before the committee on inquiry were completely protected from public disclosure while any judicial proceeding which might have followed would no longer be private. It is unquestioned that there is an absolute privilege to publish false and defamatory matter in judicial proceedings, where the matter has some relation to the proceeding. We therefore hold that the same rule of absolute privilege attaches to defamatory statements contained in a complaint made to the committee on inquiry of the Nebraska State Bar Association regarding the alleged misconduct of an attorney. The rule applies whether or not the complaint resulted in later formal hearings.

People have a right to complain about professional misconduct of an attorney to the properly constituted authorities. The exercise of that right should not be discouraged by fear on the part of the complainant that he may have to defend a lawsuit for defamation by anyone who deems himself defamed by relevant statements made in the complaint. Reasonable demands of sound public policy require the imposition of absolute privilege. Where the defamatory matter has some relation to the proceeding, that shield of immunity defends the complainant not only from the attorney complained

against but against any other person who might have been defamed.

One other issue must be covered. The plaintiff's original attorney in this action was required to withdraw as counsel immediately following the voir dire when the court became aware that the counsel was expecting to be a witness. Plaintiff complains that this was improper because it may have worked a substantial hardship. It is against sound principles of professional ethics for one who knows that he is to be called as a material witness in a case to appear as attorney therein. Muse v. Stewart, 173 Neb. 520, 113 N. W. 2d 644; American Bar Association Code of Professional Responsibility, Dr 5-101. Even an inexperienced lawyer must be charged with knowledge of so basic a rule of professional conduct.

The judgment of the district court is affirmed.

AFFIRMED.

EDWARD VACEK ET AL., APPELLEES, V. EUGENE MARBURGER, APPELLANT.
195 N. W. 2d 515

Filed March 17, 1972. No. 38089.

1. **Actions: Parties: Trial.** A defendant in the Nebraska Penal and Correctional Complex is under no disability barring the prosecution of an action in the courts of this state by reason of his imprisonment.
2. **Actions: Parties: Pleadings: Words and Phrases.** The words "unavoidably prevented" refer to circumstances beyond the control of the party desiring to file a pleading in our courts. The law requires diligence on the part of clients and attorneys and the mere neglect of either will not enable a party to relief on that ground.

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

Duane L. Nelson, for appellant.

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

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

SPENCER, J.

This was an action by Edward Vacek, Harry Vacek, and James Vacek, appellees, to cancel a lease of farm land to Eugene Marburger, appellant; to have growing crops harvested at appellant's expense; to remove appellant's property from the premises; to restrain appellant from entering upon the premises; and for damages. The case was tried on the general issues raised by the petition in a default proceeding. The court granted the relief requested, and ordered appellees to pay $300 into court for the benefit of appellant. We affirm.

At all stages of the proceeding herein the appellant was in custody on criminal charges. At the outset of the litigation in September 1970, he was in the Clay County jail. At that time he was represented herein by the counsel who was defending him on the criminal complaint on which he was being held. This counsel filed an answer and cross-petition for him. On October 2, 1970, appellant was transferred to the Nebraska Penal and Correctional Complex where he was confined at the time judgment was entered against him. The case was originally set for trial December 11, 1970. On or about December 1, 1970, when appellant learned that the case was set for trial in spite of his confinement, he decided that his counsel was not representing his interests and terminated the attorney-client relationship. The appellant then requested his wife, who lived in the county in which this action was pending, to secure counsel for him. She was unable to do so.

Appellant believed that one of the appellees, who knew he was incarcerated, would not take final action until he had an opportunity to employ counsel or was released from custody. He was also of the belief that James Vacek, the appellee who made the lease with him, was out of the country and unavailable for trial. James

Vacek actually appeared at the trial. Appellant was notified December 22, 1970, that the case would be tried on January 14, 1971. He was unable to obtain counsel and relied on his belief that no action would be taken.

Appellant admits he received notice of the trial date. Trial was held on that date, with no appearance by the appellant's wife or any attorney representing his interests. Appellant filed a motion for new trial on February 1, 1971, or 17 days after judgment was rendered, premised on the theory that he had unavoidably been prevented from securing counsel by reason of his incarceration. This motion was overruled. On this appeal appellant contends it was an abuse of discretion on the part of the trial court to deny his motion for a new trial where a judgment had been entered in the absence of appellant or his representative because appellant was incarcerated on a criminal charge, and as a result thereof was unable to prepare for trial.

Section 25-1143, R. R. S. 1943, provides: "The application for a new trial must be made, within ten days, either within or without the term, after the verdict, report or decision was rendered, except (1) where unavoidably prevented, or (2) for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial."

Appellant's motion for new trial was not filed within the time required unless he was unavoidably prevented by virtue of his confinement in the Nebraska Penal and Correctional Complex, which is the same issue on which he premises his right to a new trial.

Was appellant unavoidably prevented from contesting the present action by reason of his confinement in the Nebraska Penal and Correctional Complex? The answer is in the negative. In Kock v. State (1905), 73 Neb. 354, 102 N. W. 768, the defendant, in an attempt to justify his failure to institute proceedings in error within the

required time, contended that he was one of the class of persons mentioned in the statute as being under a disability. He insisted that because he was taken to the Penitentiary and imprisoned therein in compliance with the judgment of the court, the time limitation therein did not apply to him. This court stated: "The mere statement of this proposition is its own refutation. If this contention should be held good, the defendant could serve out his full six years of imprisonment and still have one year thereafter in which to prosecute his petition in error. The fact is that he is under no disability by reason of his imprisonment; * * *."

See, also, Stanosheck v. State (1959), 168 Neb. 43, 95 N. W. 2d 197, in which we said: "The provisions of section 29-2103, R. R. S. 1943 (new trial in criminal proceedings), are mandatory and a motion for new trial in a criminal action must be filed within 10 days after the verdict or judgment is rendered in order to be considered on appeal, except for the cause of newly discovered evidence or unless the defendant was unavoidably prevented from filing the motion within 10 days.

"The words 'unavoidably prevented' as used in section 29-2103, R. R. S. 1943, are equivalent in meaning to circumstances beyond the control of the party desiring to file the motion for new trial. The law requires diligence on the part of clients and their attorneys, and the mere neglect of either will not entitle a party to relief on that ground."

This has been the interpretation given to those words since the early case of Roggencamp v. Dobbs (1884), 15 Neb. 620, 20 N. W. 100, where this court said: "The words 'unavoidably prevented' evidently refer to circumstances beyond the control of the party desiring to file the motion. The law requires diligence on the part of clients and attorneys, and the mere neglect of either will not entitle a party to relief on that ground." We determine that confinement in a penal institution does not

unavoidably prevent a party from making a defense to an action against him.

In the instant case the appellant had counsel whom he discharged. He had been in contact with his wife who he expected to secure counsel for him. The fact that he guessed wrong on the presence of James Vacek at the trial, or as to whether or not a trial could be had in his absence, does not come within the ambit of "unavoidably prevented" as used in our law.

The judgment of the trial court is affirmed.

AFFIRMED.

A. C. NELSEN ENTERPRISES, INC., A CORPORATION, APPELLANT, V. R. H. DOC COOK ET AL., APPELLEES.
195 N. W. 2d 759

Filed March 17, 1972. No. 38110.

Zoning: Equity. Where a certificate of occupancy has been properly obtained in accordance with zoning statutes and ordinances, it may not be arbitrarily revoked where the certificate holder has incurred substantial expenses, commitments, and obligations in good faith reliance upon the certificate.

Appeal from the district court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded for further proceedings.

Edward Shafton and Bernard E. Vinardi, for appellant.

Herbert M. Fitle and Allen L. Morrow, for appellees.

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

McCOWN, J.

The district court for Douglas County, Nebraska, dismissed plaintiff's petition and appeal challenging a decision of the Board of Appeals of the City of Omaha which revoked a certificate of occupancy issued to the plaintiff.

On February 4, 1969, the plaintiff, A. C. Nelsen Enterprises, Inc., applied to the City of Omaha for a certificate of occupancy to use the premises at 13117 West Dodge Road for the retail sale of mobile homes and allied equipment. That location is outside the City of Omaha but within the 3-mile area of its zoning jurisdiction. The chief building inspector of the City of Omaha ordered that a certificate of occupancy be issued. It was issued to the plaintiff on February 4, 1969. The certificate recited that the property had been inspected and found suitable for occupancy and use for retail sales of mobile homes and allied equipment and that the proposed use complied with all regulations and ordinances in force relating to such occupancy and use. The certificate showed that the property was zoned as C-1, first commercial.

On February 12, 1969, the plaintiff leased the premises from the owner for a 3-year term at a rental of $500 per month, a total of $18,000. Thereafter, the plaintiff expended approximately $12,000 in preparing the premises for use as a mobile home sales lot. Plaintiff also committed itself for an advertising campaign and obligated substantial sums for acquisition of inventory.

On May 5, 1969, plaintiff was notified by the superintendent of the permits and inspection division, over whose name the certificate of occupancy had been issued, that the certificate had been issued in error and was therefore void. Plaintiff was notified to remove its mobile home sales business from the property within 15 days. On May 8, 1969, plaintiff was advised that the "error" was that first commercial zoning did not allow trailer or mobile home sales and that mobile home sales was not a proper use in that zone. The plaintiff duly lodged his appeal with the Board of Appeals and it was denied on June 9, 1969. Appeal was then duly perfected to the district court and thereafter to this court.

The zoning code of the City of Omaha describes the

first commercial (C-1) district as being primarily to provide neighborhood retail shopping facilities and personal service facilities. Approximately 70 specified commercial uses are permitted in C-1. They include auto sales and service, including open-air displays of new and used cars; auto accessory stores; auto laundries; department stores; gasoline filling stations; garden supply stores, including open-air displays of trees, shrubs and flowers; marine equipment and service stores, including open-air displays of boats; hotels and motels; boarding and lodging houses; and restaurants and theaters, including drive-in establishments. The evidence reflects that the building inspector for a number of years had interpreted the zoning provisions to permit retail sales of trailers in the first commercial zone.

The City contends that retail sales of mobile homes or trailers are limited to the sixth and second commercial districts. The C-6 district is established primarily for automobile oriented businesses, together with other traditional open-air types of retail establishments. All but 2 of the 18 specified uses are also included in the 70 permitted uses in C-1. Trailer sales and rentals constitute one of those two uses. The C-2, second commercial district, permits any commercial use except specified excluded uses. Retail sales of mobile homes or trailers is not excluded.

The City contends that when a ministerial officer issuing a certificate of occupancy does so under a mistake of fact or in contravention of applicable zoning laws, the recipient of the certificate acquires no vested rights and the City is not estopped from revoking such a permit. That is not the situation here.

In this case, there was no mistake of fact. It is seriously questionable that there was even a mistake of law. The certificate of occupancy was lawfully issued by the municipal officer having authority to issue it and in accordance with the departmental interpretation of the

zoning laws which had been in effect for some years. There is no evidence of misconduct, fraud, or deceit of any kind and, in addition, there was substantial good faith expenditure of funds and change of position in reliance upon the certificate issued.

Where a certificate of occupancy or building permit has been issued lawfully, even though in accordance with a questionable interpretation of the zoning ordinances or regulations, courts have generally held that it may not arbitrarily be revoked, particularly where the permittee has incurred substantial expenses and liabilities in reliance upon it. See 8 McQuillin (3d Ed.), Municipal Corporations, § 25.158, pp. 506, 507.

In Parker-Quaker Corp. v. Young, 23 Conn. Supp. 461, 184 A. 2d 553 (1962), the court held that a substantial change in position by the permittee after issuance of the permit and before its revocation was sufficient to create a vested right to proceed and that the City acted illegally in ordering permits revoked. The court said: "* * * the general rule is that any substantial change of position is sufficient. There is no easy formula to resolve issues of this kind. The ultimate objective is fairness to both the public and the individual property owner. * * * The factual situation must be dealt with separately."

In Crow v. Board of Adjustment of Iowa City, 227 Iowa 324, 288 N. W. 145, a building permit issued by the building inspector for a dog hospital in an area zoned for hospitals was involved. In that case, the Board of Adjustment attempted to revoke a building permit after substantial expense had been incurred by the permit holder. The court said: "A building permit duly and legally issued by a municipality is more than a mere license revocable at the will of the licensor. We have held that when the permittee has to some extent acted thereon and thereby incurred expense such permit is not revocable on the grounds that the proposed building and business would be objectionable to residents of the

neighborhood. * * * The ruling of the building inspector was not clearly erroneous nor without basis. On the contrary the proposition was doubtful and fairly debatable and the language fairly susceptible to the interpretation given it."

The facts here involve a certificate of occupancy issued to a lessee rather than a building permit issued to an owner. The prinpicles dealing with arbitrary revocation, substantial reliance, and vested rights are equally applicable to both. Even if it be assumed that the zoning ordinance did not expressly permit retail sales of mobile homes in a C-1 zone, the practical difficulties and hardships to the lessee certificate holder should require relief under section 14-411, R. R. S. 1943.

The City contends that there has been no showing that the property cannot be used for some other fully conforming purpose, but that position treats the plaintiff as an owner rather than the tenant it is. Its business is presumably the business for which it obtained the certificate of occupancy. It is wholly unrealistic to ignore the rights of the holder of a certificate of occupancy simply because the holder of the certificate is not the owner of the property. There is evidence that plaintiff holds lease options to February 28, 1974, and that its obligations and commitments were incurred in contemplation of a 5-year period ending on that date.

We therefore hold that where a certificate of occupancy has been properly obtained in accordance with zoning statutes and ordinances, it may not be arbitrarily revoked where the certificate holder has incurred substantial expenses, commitments, and obligations in good faith reliance upon the certificate. Each case must be determined on its own facts, with the ultimate objective of fairness to both the public and the individual certificate holder. Such a rule protects the interests of a permittee who has acted under a permit in good faith but withholds protection on permits where good faith

does not appear. It thus protects the public interest in an effective regulation of land uses. See Shalvey v. Zoning Board of Review, 99 R. I. 692, 210 A. 2d 589 (1965).

The facts here clearly establish a balance of the equities in favor of the plaintiff as against the general public represented by the municipal authorities. The Board of Appeals and the City of Omaha should be restrained from revoking the certificate of occupancy here during the effective period of plaintiff's lease or valid extensions thereof. The judgment is reversed and the cause remanded to the district court for further proceedings in accordance with this opinon.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WILLARD MAAS, APPELLEE, V. A. W. SCOBODA, DOING BUSINESS AS NORFOLK FARM EQUIPMENT COMPANY, APPELLANT.

195 N. W. 2d 491

Filed March 17, 1972. No. 38112.

1. **Contracts: Sales: Property: Vendor and Purchaser.** Under section 2-601 of the Uniform Commercial Code a buyer is given a right to reject the whole if the goods fail in any respect to conform to the contract.
2. **Contracts: Waiver: Property: Vendor and Purchaser.** After rescission any use of the property by the buyer for his own benefit or convenience will waive the right to rescind.
3. **Contracts: Trial: Property: Vendor and Purchaser.** Under the provisions of a contract for the purchase of a silo with a 1-year warranty of customer satisfaction, the buyer's opinion or decision must be made with entire good faith and not captiously or capriciously, and whether he so acts is a question of fact for the jury.
4. **Contracts: Property: Vendor and Purchaser.** The law regards parties as being competent to contract as they see fit with respect to the satisfactory character of equipment sold, and the seller assumes the hazard of rendering performance according to the terms of the contract.

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

Deutsch & Hagen and Thomas H. DeLay, for appellant.

Hutton, Hutton & Garden, for appellee.

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

SPENCER, J.

This is an action by Willard Maas, appellee, to rescind or revoke the purchase of a high moisture silo and equipment, for the reason that the appellant, A. W. Scoboda, doing business as Norfolk Farm Equipment Company, was unable to make the silo operate to the satisfaction of appellee. The trial court granted rescission. We affirm.

Appellee operates a farm in Wayne county. During the summer of 1966, he became interested in a "Fiber-Tron Crop Savor," a high moisture grain storage silo, for his farm. He visited with the appellant about the equipment and was shown a silo in operation. He entered into a contract with the appellant, conditioned upon a 1-year warranty of satisfaction. The contract, so far as material herein, is for a "Fiber-Tron Crop Savor" sweep arm auger unloader and motors for a cash sale price of $5,157. The appellee was to furnish the Ready-Mixed concrete and the sand for the foundation and provide for the wiring for the motors. The contract had the following provision: "one year warranty of customer satisfaction," which was inserted as an inducement to purchase. The contract is dated September 15, 1966.

After the silo was constructed in October of 1966, appellee filled it with 9,000 bushels of corn from his fields. He had the corn tested on three different occasions and the moisture content ranged from 22 percent to 24½ percent. He had been instructed not to fill the silo with corn with a moisture content of over 28 percent or under 20 percent. Representatives of the appellant were present

at the time the silo was filled. Sometime in February 1967, appellee opened the silo to remove corn for livestock feed. In attempting to remove corn, he encountered several problems. To put appellee's difficulties in perspective, we summarize them from his testimony. The motor blew approximately 70 fuses between February and August. When the fuses on the motor blew, appellee was required to drain the corn from the augers and to replace the fuses in order to start the motor. This was done by hand. The horizontal interior building auger clogged on occasions. The silo required a daily water drainage of 5 to 10 gallons. The outside vertical auger could deliver only a portion of the corn so the corn load had to be split by having the cleanout opened, and half the corn shoveled by hand. The interior upper sweep arm broke twice, and a new one had to be installed. The interior upper sweep arm motor control box, which was wired at the factory, broke, and appellee was required to spend 2 days removing corn from the portion of the silo to permit an electrician to gain access to repair the broken wire. This was done at appellee's own expense because appellant refused to do it on the assumption that the defect was in the wiring installed by the appellee's electrician, which was not the case. The upper sweep arm failed to dig into the corn from the top, requiring the appellee or his employees to climb inside the silo and remove 3,000 bushels of corn by hand. As a result of the defects in the silo, several hundred bushels of corn completely spoiled, approximately 2 or 3 hundred bushels of which were in the silo at the time of this action.

The appellee complained to the appellant when he began experiencing difficulties, but continued to use the equipment in an attempt to obtain satisfactory operation. Appellant testified he knew appellee was experiencing problems with blowing fuses, the upper sweep auger, with moisture in the corn, and with the wiring.

Appellant also admitted that 11 other such silos sold by him had unsatisfactory upper sweep augers. Sometime in August of 1967, appellee verbally advised the appellant that he was dissatisfied with the equipment and requested return of the purchase price. On August 17, 1967, appellee, through his attorney, gave notice to the appellant that he was dissatisfied with the equipment, was invoking his right to insist upon the 1-year warranty of customer satisfaction, and was requesting appellant to forthwith remove the structure from his premises and repay the money he had paid for the equipment.

Appellant sets out five assignments of error but in his brief argues but one of them: That the appellee, after giving notice of rescission or revocation of acceptance for breach of warranty, waived his right to rescind and revoke by subsequently exercising dominion over the silo. Appellant premises his position on the following cross-examination testimony: "Q After you turned them down on the five horse motor you turned them down on the double sweep arm installation, you then had your lawyer write this letter, Exhibit 2, didn't you? A Yes. Q And you continued to use this equipment after that time? A Yes * * * Q (By Mr. Deutsch) To summarize on that point you continued to use it until the 13th of September but you still had some of your product in that bin do you not to this day? A That spoiled corn, yes. Q You never cleaned it out? A No, I did not. Q How many bushels have you got in there now? A Between two and three hundred bushel."

At the time appellee demanded the removal of the silo from his premises, there may have been as much as 3,000 bushels of spoiled or spoiling corn in the silo. By September 13, 1970, 2 days before the warranty would expire, appellee had removed all but the 2 or 3 hundred bushels of spoiled corn which still remained in the structure at the time of trial.

This is not an action to recover damages for breach

of warranty but rather is one to rescind or revoke the sale of the silo and recover back the purchase price as well as the installation expense incurred under the contract. Under section 2-601 of the Uniform Commercial Code a buyer is given a right to reject the whole if the goods fail in any respect to conform to the contract. In rescission, the law implies the revesting of the property in the seller and requires the repayment of the purchase price to the buyer.

The remedy available was under the controlling terms of the specific contract: "one year warranty of customer satisfaction." This is referred to as a satisfaction clause which is the subject of an Annotation at 86 A. L. R. 2d at p. 203, from which we quote the following: "In cases involving contracts for the sale of goods subject to their being satisfactory to the buyer, there are two general rules regarding the test of the buyer's satisfaction: (1) the rule that the test of the buyer's satisfaction is his own personal judgment, to which a majority of courts add the qualification that the buyer's personal judgment must be exercised in good faith; and (2) the reasonable man rule that the buyer is legally bound to be satisfied with the goods if a reasonable man would be satisfied with them."

It is appellant's position that when appellee gave notice of rescission, it was his responsibility to place the appellant in status quo as far as possible, and to thereafter hold the silo as a bailee, and that his subsequent use or exercise of dominion over it was a waiver of the right of rescission. The general rule may be summarized as follows: After rescission any use of the property by the buyer for his own benefit or convenience will waive the right to rescind. See Annotation, 41 A. L. R. 2d 1173. That rule, however, is not applicable to the facts herein.

Section 2-602 of the Uniform Commercial Code, requires a buyer's rejection to be made within a reasonable

time. This provision is not applicable herein because appellee by contract had 1 year to determine if the silo would be satisfactory for his purposes. In this state he would be expected to make a good faith attempt to adapt it to those purposes. We determine the following rule to be applicable herein: Under the provisions of a contract for the purchase of a silo with a 1-year warranty of customer satisfaction the buyer's opinion or decision must be made with entire good faith and not captiously or capriciously, and whether he so acts is a question of fact for the jury. Adapted from Melson v. Turner, 125 Neb. 603, 251 N. W. 172.

The law regards parties as being competent to contract as they see fit with respect to the satisfactory character of equipment sold and the seller assumes the hazard of rendering performance according to the terms of the contract.

The record indicates appellee made a diligent effort to obtain satisfactory performance from the equipment, and gave the appellant sufficient opportunity to make it perform satisfactorily. Appellant declined to do anything about the defective wiring. There was breaking of the upper sweep arm shaft, welding, replacement, constant failure of the augers to work, and wet corn in a silo supposedly designed to prevent excessive moisture. At the time of rescission, appellee had 3,000 bushels of corn still in the silo. From February to the date of rescission, appellee experienced considerable difficulty removing 6,000 of the 9,000 bushels he had put in the silo the preceding fall. On the record, no reasonable man could say that appellee had not given the equipment a fair trial. Appellee's rescission was based on reasonable grounds. The trial court properly found that the dissatisfaction expressed by appellee was an honest and a good faith judgment.

The only use of the silo after rescission was to remove the balance of the corn which, except for 2 or 3 hundred

bushels of spoiled corn, was accomplished within the warranty period. This is not a use of the equipment but rather necessary preparation for its removal by the appellant. Appellee, at the time of the rescission, requested the appellant to remove the equipment from appellee's premises. Appellant failed to do so, and contested appellee's right to rescind. The silo was set up by bolting sections together, and it undoubtedly will be removed in the same manner. If appellant had recognized appellee's right to rescind and had taken steps to remove the silo, the 3,000 bushels of corn could have been much more expeditiously removed from it. Under the facts of this case, the law of De Minimis Non Curat Lex is applicable to the small quantity of spoiled corn which remained in the silo after the expiration of the year. We do not consider this to be a sufficient use of the silo within the rule to waive the right of rescission.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALLEN REED, JR., APPELLANT.
195 N. W. 2d 503

Filed March 17, 1972. No. 38242.

1. **Criminal Law: Witnesses: Evidence: Trial.** A conviction based on eyewitness identification at trial following pretrial identification by photograph and lineup will be set aside on those grounds only if the pretrial identification procedures were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
2. **Criminal Law: Right to Counsel.** In a criminal prosecution the right of an indigent to the assistance of counsel does not encompass an unbridled right to choose his counsel.
3. ———: ———. When a competent indigent becomes dissatisfied with court appointed counsel but shows no good cause for removal of counsel, his only alternatives are to proceed with appointed counsel or to proceed pro se.
4. ———: ———. When unjustified obstreperous conduct of a

competent defendant prevents the services of appointed counsel, the accused cannot complain of lack of the services of counsel caused by such conduct.

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

Marer & Lazer and Michael L. Lazer, 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.

CLINTON, J.

The defendant was convicted by a jury on the charge of carrying a concealed weapon, a revolver or pistol, and was sentenced to a term of 2 years. On this appeal three claims are made: (1) The trial court erred in not suppressing the eyewitness identification testimony of certain witnesses because their in-court identifications were not independent of and were tainted by unduly suggestive photographic and lineup identifications; (2) the evidence is insufficient to support the verdict because it did not establish that the defendant "concealed on or about his person a certain revolver or pistol" which was a "dangerous weapon"; and (3) the defendant was deprived of his right to counsel at the time of sentencing, thus being unconstitutionally deprived of counsel at a critical stage of the proceeding.

We find the assignments are not well taken and affirm the conviction and sentence.

The trial court held a Wade-Gilbert-Stoval hearing prior to trial and at the conclusion thereof found the in-court identification had not been tainted by pretrial occurrences and was admissible. The complaints concerning pretrial identification are these: (1) Before lineup a police officer called one of the witnesses and told him he "had the fellow and . . . wanted them to come and

view him for identification"; (2) the defendant appeared alone at the pretrial identification; and (3) one of the witnesses had before the identification by chance seen a photograph of the defendant on a police officer's desk.

The record of the hearing and of course the trial itself are before us. From the evidence presented the court and jury could have found as follows: On the day of the offense a black man wearing a beard and mustache was observed by witnesses, employees of a grocery store where the incident occurred, concealing three cartons of cigarettes in his clothing. He was accosted by the witnesses and asked to come to the rear of the store and as he was apparently complying with the request he removed the cartons from his clothes and disposed of them in a grocery cart. After this he pulled from his clothing a pistol or revolver. A struggle ensued and the gun discharged apparently while pointed upward. The man then broke loose and ran from the store. As he did so he passed by an acquaintance who had previously worked with him. This acquaintance, a witness in the case, had also seen him during the struggle and immediately before it. This witness also observed the gun at the man's side as he ran from the store. The acquaintance immediately identified the man to the store employees. Later the same day the witness identified the defendant by photograph and as a result the defendant was taken into custody the next day since as a result of the identification by the acquaintance the police knew by name for whom they were looking. At the trial the acquaintance identified the defendant in court. On the afternoon of the incident the two store employees picked the defendant's photograph out of a group submitted to them and a day later identified him at the police station, at which time the defendant was clean shaven. Each witness identified him immediately and positively. One of the witnesses, who had anticipated that he would be

shown more than one man, stated immediately upon seeing the defendant that he was the man and that it was not necessary to show anyone else. The reason for the one man lineup was that there were no other black men available at the time. The defendant acknowledged at trial that he had shaved his beard and mustache on the evening of the date of the offense charged.

On the above record it clearly appears that the pretrial identification procedures were not so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. State v. Moss, 187 Neb. 391, 191 N. W. 2d 543. The record also is clearly sufficient to support a finding of guilt of the offense charged.

In order to properly consider the third assignment a statement of what occurred at sentencing is required. When brought before the court for sentencing on May 21, 1971, the defendant expressed dissatisfaction with the services of the public defender who had represented him at trial. Before the court he claimed in general terms a lack of investigation, prejudicial argument to the jury, and failure of counsel to argue that there was no proof the gun was a real gun. This last item was also the principal issue raised at a later hearing which we refer to and was coupled with a claim that his counsel should have taken pictures to show that there were no holes made by the discharge of a bullet. Because these last arguments are at least logically inconsistent with the defendant's defense of alibi and misidentification it can be seen that tactically it would have been unwise for counsel to assert or argue them.

The defendant had prior to May 21, 1971, indicated to the court that he did not wish to file a motion for new trial. At the hearing on May 21, 1971, he indicated he did and the court continued the matter to June 24, 1971. At that time the defendant orally and in writing "fired" the public defender as his counsel. The court then asked him if he was going to proceed on his own. The court

suggested to him he not proceed on his own and suggested he keep the public defender but "if you wish to discharge them, I am willing to allow you to do this." The following colloquy then occurred: "MR. REED: If he is brought up next to me, I will knock him out now. BY THE COURT: So you don't want him? MR. REED: If he comes up to me, I will knock him out right here. I want an attorney. I don't have an attorney. I want an attorney and I don't have an attorney. I want an attorney and I wish it to be plain in the record I want an attorney. BY THE COURT: I think it is plain in the record." The court then indicated he would sentence the defendant without counsel and then imposed sentence. The defendant then had a tantrum in front of the court, pounding upon the rail and repeating: "I do not want him. I do not want him. I do not want him. I do not want him. I do not want him." He then said: "I do not want him and I do not have an attorney here to represent me at the present time and if he steps up here beside me, I will knock him out."

In the light of the foregoing the assignment re the deprival of counsel at sentencing boils down to this: Is the defendant entitled without showing adequate and sufficient reason to demand change of appointed counsel? This court said no in State v. Bratton, 187 Neb. 460, 191 N. W. 2d 612. See, also, Annotation, 36 A. L. R. 3d, Public Defender Statutes—Construction, § 10, p. 1441; Annotation, 157 A. L. R., Counsel for Accused—Change of, p. 1226. In this case it is patent that the defendant's dissatisfaction with counsel had no reasonable basis. His lack of assistance by counsel at sentencing was the result of his own misconduct. If the defendant's wishes alone were the criteria to be followed he could change counsel each step of the proceeding without cause. The constitutional right to counsel does not extend this far.

AFFIRMED.

JOHN WISNIESKI, APPELLANT, V. ERNEST L. COUFAL ET AL., APPELLEES.
195 N. W. 2d 750

Filed March 24, 1972. No. 38102.

1. **Contracts: Property: Frauds, Statute of: Brokers: Sales.** Under the provisions of section 36-107, R. R. S. 1943, the contract between the broker and the owner must be in writing and signed by both parties, and it must describe the land to be sold and set forth the compensation of the broker.
2. ———: ———: ———: ———: ———. Under the provisions of section 36-107, R. R. S. 1943, the terms under which the owner is willing to sell the land need not be included in the contract between the broker and the owner.
3. **Contracts: Property: Frauds, Statute of: Evidence.** The description of the land in a contract under section 36-107, R. R. S. 1943, is sufficient if it contains data from which the land may be identified and ascertained with certainty and parol evidence is admissible to apply the description to the subject matter, if the parol evidence does not vary or contradict the written instrument.
4. **Contracts: Property: Sales: Brokers.** A broker is entitled to his commission in accordance with the terms of his listing contract and the right to compensation is not impaired by the subsequent inability or unwillingness of the owner to consummate the sale on the terms prescribed.

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

Homer E. Hurt, Jr., for appellant.

Otradovsky & Bieber, for appellees.

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

CLINTON, J.

This is an action by plaintiff, a real estate broker, to recover from the defendants, owners of a farm, a broker's commission under the terms of a listing contract. At the close of the plaintiff's case, the motion of the defendants for a directed verdict was granted. We reverse the judgment and remand the cause for further

proceedings consistent with this opinion.

We examine the evidence in the light of the following principle: A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Bradway v. Higgins, 152 Neb. 724, 42 N. W. 2d 627.

The plaintiff's evidence was that the plaintiff was a licensed real estate broker. He was approached by the defendant, Ernest L. Coufal, husband of the other defendant, and asked to find a buyer for their farm. As a result of this contact the farm listing contract was executed by all of the parties. The contract bore date of February 13, 1969, and was in part of follows: "IN CONSIDERATION of your agreement to list, and to offer for sale the property hereinafter described and to use your efforts to find a purchaser, I (we) hereby give you the sole and exclusive right until Mar 1, 1970 to sell 120 acres for the sum of Four hundred per acre (400.00) dollars and upon the following terms contract at 5%. . . . If a sale is made or a purchaser found before the expiration of this listing by myself (us) or any other person, at the above price and terms, or for any other price and terms I (we) may agree to accept, or if this agreement is revoked or violated by me . . . I (we) thereupon agree to pay you cash commission as follows: 5%. . . ."

The evidence further tended to establish that the defendants had orally agreed with the plaintiff that the sale would be made for $8,000 down, an annual payment of $1,800 for 10 years, and the balance at the end of that time. The plaintiff produced three buyers who were ready, willing, and able to purchase upon those terms. The defendants, however, rejected these purchasers, the first because the downpayment check was allegedly no good; the second because they felt he could not pay for it; and the third because he could not pay

for it. The plaintiff sold two of the purchasers other farms and the third otherwise purchased a farm.

Plaintiff then produced a fourth purchaser who the evidence showed was ready, willing, and able to make the purchase upon the above terms. When the check for the downpayment and the sales contract signed by these last purchasers were presented to the defendants they demanded $10,000 down and $2,000 per year. The plaintiff thereupon induced the purchasers to execute a purchase contract upon the new terms and make downpayment on that basis. The contract and checks were introduced into evidence. When the contract was presented to the defendants for signature they rejected it because they wanted more money for the farm and refused to sign it. The plaintiff then demanded his commission. The defendants refused to pay it and plaintiff brought this action.

At the trial the plaintiff offered the testimony of the defendant, Ernest L. Coufal, and by him established the execution by him and his wife of the listing contract; the legal description of the property which the defendants owned; that it contained 120 acres; and that at all times pertinent in this action it was the only farm owned by the defendants.

The defendants contend the listing contract does not meet the requirements of section 36-107, R. R. S. 1943, because: (1) The description of the property is insufficient; and (2) the terms of the proposed sale are not fully set forth in the listing contract and that this is a requirement of the statute. Section 36-107, R. R. S. 1943, requires that the contract between the broker and the owner must be in writing and subscribed by both parties. The last sentence of this section sets forth the required terms as follows: "Such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent." The position of the defendants essentially is that the case law applicable to section 36-105,

R. R. S. 1943, is applicable to section 36-107, R. R. S. 1943, and that this means the terms of the proposed sale must be set forth in the listing contract. Defendants cite Kubicek v. Kubicek, 186 Neb. 802, 186 N. W. 2d 923. The defendants' position on this point is not well taken. Section 36-107, R. R. S. 1943, requires that the listing contract must be in writing, signed by both parties, describe the land to be sold, and state the compensation. This is all it requires. The terms of the proposed sale need not be included in the listing contract. Massachusetts Mut. Life Ins. Co. v. George & Co., 148 F. 2d 42, 49; Svoboda v. De Wald, 159 Neb. 594, 599, 68 N. W. 2d 178; Holliday v. McWilliams, 76 Neb. 324, 107 N. W. 578; Bradley & Co. v. Bower, 5 Neb. (Unoff.) 542, 99 N. W. 490. Terms not required by the statute to be in writing may be supplied by parol. Bradley & Co. v. Bower, *supra*. We hold that the terms of sale need not be set forth in the listing contract, although it is of course the best practice for the parties to include the terms of sale.

Is the description in the contract sufficient? The case law on this point from the various jurisdictions is not uniform and the courts have varied in their determinations of how complete the description of the land must be in order to meet the requirements of the statute. Annotation, 30 A. L. R. 3d, Broker's Contract—Property Description, p. 935 at 962.

We have in this case a close question on the point, but we believe the description "120 acres" together with the parol evidence establishing that the defendants owned at all times relevant in this case just one farm and that it contained 120 acres is sufficient to satisfy the statute. This court has in early cases held descriptions such as the above which together with parol evidence not contradicting or varying that which appears in writing is sufficient to satisfy the terms of the statute as to description. Holliday v. McWilliams, *supra*, is such a case and there this court said: "'. . . In such cases

parol evidence is not used to vary, contradict or control the written contract of the parties, but to apply it to the subject matter, and thereby to render certain what would otherwise be doubtful and indefinite.' To the same effect is the holding of our own court in Ballou v. Sherwood, 32 Neb. 666, and Adams v. Thompson, 28 Neb. 53; . . . ." See, also, Powers v. Bohuslav, 84 Neb. 179, 120 N. W. 942; Ruzicka v. Hotovy, 72 Neb. 589, 101 N. W. 328.

If, of course, even after the parol evidence is supplied the court could not be certain the land is the tract referred to in the contract, the description would be insufficient. See, Howell v. North, 93 Neb. 505, 140 N. W. 779; McCarn v. London, 83 Neb. 201, 119 N. W. 251. The latter case was one for specific performance of a land contract. The description was the north . . . . . feet of a certain lot. Defendant owned the entire lot. The description was held insufficient to satisfy the statute.

The court should not have directed the verdict against the plaintiff. A broker earns his commission and becomes entitled thereto when he produces a purchaser who is ready, able, and willing to purchase at a price and upon terms specified by the principal or satisfactory to him. This right to compensation is not impaired by the subsequent inability or unwillingness of the owner to consummate the sale on the terms prescribed. Jones v. Stevens, 36 Neb. 849, 55 N. W. 251; Larson v. Syverson, 84 S. D. 31, 166 N. W. 2d 424.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

BILLY DEAN BOOTH, APPELLANT AND CROSS-APPELLEE, V. HELEN N. BOOTH, APPELLEE AND CROSS-APPELLANT.
195 N. W. 2d 744

Filed March 24, 1972. No. 38131.

Appeal from the district court for Saline County: JOSEPH ACH and ERNEST A. HUBKA, Judges. Affirmed.

Jerry L. Snyder, for appellant.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellee.

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

SMITH, J.

AFFIRMED. See Rule 20. Defendant is allowed $750 for services of her attorney in this court.

ALFRED C. GLASER ET AL., APPELLEES, V. C. E. WEINBERGER ET AL., APPELLEES, JAMES A. HENDRICKSON, HIGH BIDDER, APPELLANT.
196 N. W. 2d 113

Filed March 24, 1972. No. 38186.

1. **Partition: Sales: Courts: Appeal and Error.** Where there has been an upset bid before a final confirmation of a partition sale, the matter of confirmation of the sale is left to the judicial discretion of the trial court with due regard to the stability of judicial sales. Such discretion is a judicial one which may not be arbitrarily exercised. This court will not intervene except in the case of an abuse of such discretion by the trial court.
2. **Partition: Sales: Property.** An upset bid following a judicial sale and before a final confirmation should be considered only when it affords convincing proof that the property was sold at an inadequate price and that a just regard for the rights of all concerned and the stability of judicial sales permits its acceptance.
3. **Partition: Sales: Property: Infants: Courts.** In determining

whether to accept or reject an upset bid, the court must elect between two conflicting duties. Ordinarily it must strive to obtain the best price possible for the property sold, especially where the interests of minors are involved. On the other hand, when the sale is free of fraud and an adequate price has been realized, consideration must be given to the rights of the purchaser and the stability of judicial sales.

Appeal from the district court for Greeley County: WILLIAM F. MANASIL, Judge. Reversed and remanded.

Thomas E. Brogan and James J. McNally, for appellant.

Harold E. Connors and Robert E. Paulick, for appellees Glaser.

Raymond P. Medlin and William Keeshan, for appellees Weinberger.

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

NEWTON, J.

This is a partition action. The action was instituted by Alfred C. Glaser and wife. Plaintiffs owned adjoining land on which they had sunk an irrigation well. The 40-acre tract involved was part of a dry-land tract which had very recently sold at public auction for $134 per acre. Alfred C. Glaser, who with his wife owned an undivided one-half interest in the 40-acre tract, attended the partition sale and bid on the land which sold for $15,020, or $375.50 per acre, to appellant James A. Hendrickson. Hendrickson, whose father owns an adjoining 1,260 acres, obviously believes the irrigation well is on this tract notwithstanding a recent survey to the contrary.

Prior to confirmation, Glaser tendered an upset bid of $16,600. The court, bearing in mind the dispute as to the well location, found that the land sold for its fair and reasonable value as dry land but not as irrigated land and set aside the sale. We reverse the de-

cision of the district court and confirm the sale.

As we view the situation, plaintiffs, when they sunk the well in a location selected by them, necessarily assumed the risk that it might be on land of which they were not the sole owners. If the well is on the 40 acres in question, it has enhanced the value of that tract and resulted in a sale exceeding its dry-land value. This would, in some measure, recompense plaintiffs for the loss of the well. On the other hand, Hendrickson, who bid in excess of the dry-land value of the tract with the idea that he was also buying the well site, has taken a deliberate gamble. If the well becomes his, he has received a bargain, if it does not, he has paid a sum considerably in excess of the value of the land. Ownership of the well cannot be here resolved.

Under all the circumstances we find the partition sale to Hendrickson should be confirmed. Plaintiffs brought about the sale and one of them attended the sale and actively participated as a bidder. After suffering the land to be sold to another, Glaser now tenders an upset bid. To permit one who was not only the instigator of the sale and had ample warning that it was pending, but who also appeared and bid at the sale, to subsequently upset it would do much to destroy the stability and finality of judicial sales and to discourage bidding thereat. Had the land sold for considerably less than its reasonable value, a different picture would be presented. Such was not the case here. As a dry-land tract, it sold in excess of its value simply because one bidder was willing to gamble that he would acquire the irrigation well and could thereby irrigate the land. In view of the uncertainty attending the location of the well, it cannot be said that the land brought less than its reasonable value. The case presents an unusual situation wherein plaintiffs have had second thoughts regarding the amount they should bid.

This court held as follows in Rupe v. Oldenburg, 184 Neb. 229, 166 N. W. 2d 417: "Where there has been

an upset bid before a final confirmation of a partition sale, the matter of confirmation of the sale is left to the judicial discretion of the trial court with due regard to the stability of judicial sales. Such discretion is a judicial one which may not be arbitrarily exercised. This court will not intervene except in the case of an abuse of such discretion by the trial court."

The court also held: "An upset bid following a judicial sale and before a final confirmation should be considered only when it affords convincing proof that the property was sold at an inadequate price and that a just regard for the rights of all concerned and the stability of judicial sales permits its acceptance."

In determining whether to accept or reject an upset bid, the court must elect between two conflicting duties. Ordinarily it must strive to obtain the best price possible for the property sold, especially where the interests of minors are involved. On the other hand, when the sale is free of fraud and an adequate price has been realized, consideration must be given to the rights of the purchaser and the stability of judicial sales. This was well phrased when the court stated in Rupe v. Oldenburg, *supra:* "The rights of the highest bidder at the judicial sale whose bid has been accepted ought not to be lightly disregarded. It is true, of course, that such bid is subject to confirmation by the court. If upset bids were permitted and accepted under all circumstances, the holding of a judicial sale would be nothing more than preliminary bidding and not a method of purchasing the land. Such a practice would chill the bidding at the judicial sale by encouraging the filing of upset bids and render the judicial sale a mere formality and the elimination of the primary purpose of judicial sales. This is most harmful to the stability and true purpose of judicial sales which trial courts should not lightly disregard."

The exercise of the discretion vested in the trial court presents a close and difficult question. It must be re-

solved on the basis of the facts presented in each individual case. Under the facts presented, which duty outweighs the other? In this instance, an adequate price has been realized; all parties were competent, were present at the sale, and had every opportunity to protect their individual interests. We believe that the rights of the purchaser and the necessity of protecting the stability of judicial sales in this instance outweigh other considerations.

The judgment of the district court is reversed and the cause remanded with directions to confirm the original sale by the referee.

REVERSED AND REMANDED.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. ROBERT RAY ROBERTS, APPELLANT.
196 N. W. 2d 118

Filed March 24, 1972. No. 38194.

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.

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

Thomas D. Anderson, 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.

SPENCER, J.

Defendant, Robert Ray Roberts, pled guilty to Count

I, for possession, and Count II, for sale of marijuana. When defendant appeared for sentencing on June 4, 1971, Count I was dismissed, and defendant was sentenced for a period of 2 to 5 years in the Nebraska Penal and Correctional Complex on Count II. This was the penalty and sentence provided for a violation of section 28-472.02, R. S. Supp., 1969, which section was repealed, effective May 26, 1971. The new sections, 28-4,115(14) and 28-4,125(2), R. S. Supp., 1971, became effective May 26, 1971.

Defendant alleges two assignments of error: "1. The District Court erred in imposing a sentence which was contrary to law. 2. The District Court erred in imposing an unduly severe sentence without proper consideration and weight to the facts and circumstances in mitigation of the offense."

This court has recently ruled, in State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225 (1971), and State v. Goham, 187 Neb. 35, 187 N. W. 2d 305 (1971), 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. This rule applies herein.

We have reviewed the presentence report on the defendant and are satisfied that the trial court did not abuse its discretion in sentencing the defendant to the Nebraska Penal and Correctional Complex.

We affirm the judgment of conviction herein, but modify the sentence to 1 to 5 years in the Nebraska Penal and Correctional Complex.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS OGLESBY, APPELLANT.
195 N. W. 2d 754

Filed March 24, 1972. No. 38239.

1. **Criminal Law: Evidence: Trial: Witnesses.** A conviction may rest on the uncorroborated testimony of an accomplice.
2. **Criminal Law: Evidence: Trial: Instructions: Witnesses.** The fact an accomplice has been guilty of willful false swearing on a material matter does not automatically discredit his testimony as a matter of law in all cases. Ordinarily, his credibility is a question for the jury under a proper cautionary instruction.

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

T. Clement Gaughan, Richard L. Goos, and Paul M. Conley, 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 defendant, Thomas Oglesby, appeals from a conviction for breaking and entering a motor vehicle with intent to commit larceny. He challenges the sufficiency of the evidence to sustain the judgment.

The record shows that a truck owned by the A & W Distributing Company was broken into early on June 9, 1970, and 8 cases of beer were taken from the truck. The State produced evidence that the offense was committed by the defendant, Mickey Roach, and Benjamin R. Craig.

Both Roach and Craig were called as witnesses by the State. Craig refused to testify on the ground that his testimony might tend to incriminate him. On the motion of the State, the trial court ordered Craig to testify and granted him immunity from prosecution pur-

suant to section 29-2011.01, R. S. Supp., 1969.

Craig then testified that he had been at a party at Mike Nelson's house around June 9, 1970; that he, the defendant, and Roach left the party and went to the A & W Distributing Company where the defendant broke the lock on a beer truck and removed 8 cases of beer from the truck; and that they then returned to Mike Nelson's house where the beer was placed in an old automobile. Craig admitted he had testified at the preliminary hearing that he had stayed in the car while the defendant and Roach had committed the offense, which testimony was false. The defendant contends the testimony of Craig cannot be used to sustain the conviction because Craig, who was an accomplice, testified falsely at the preliminary hearing.

It is the rule in this state that a conviction may rest on the uncorroborated testimony of an accomplice. Jungclaus v. State, 170 Neb. 704, 104 N. W. 2d 327. The fact an accomplice has been guilty of willful false swearing on a material matter does not automatically discredit his testimony as a matter of law in all cases. Ordinarily, his credibility is a question for the jury under a proper cautionary instruction. Smith v. State, 169 Neb. 199, 99 N. W. 2d 8; Rains v. State, 173 Neb. 586, 114 N. W. 2d 399. A proper cautionary instruction was given in this case.

The conviction in this case does not rest entirely upon the testimony of Craig, and his testimony was corroborated in part by other witnesses called by the State. The defendant's contention that the evidence was not sufficient to sustain the conviction is without merit.

The defendant denied that he committed the offense, and there were other conflicts in the evidence. These were questions for the jury. It is not the province of this court to determine the credibility of witnesses or weigh the evidence in a criminal case.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT NEWELL PILGRIM, APPELLANT.
196 N. W. 2d 162

Filed March 24, 1972. No. 38293.

Post Conviction: Res Judicata. Repetitive applications for post conviction relief may be deemed an abuse of judicial process.

Appeal from the district court for Dakota County: WILLIAM F. COLWELL, Judge. Affirmed.

Robert Newell Pilgrim, pro se.

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

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

CLINTON, J.

This is the second appeal in this court by the defendant in connection with post conviction relief and relates to the same prosecution as the previous post conviction proceeding. Defendant appears pro se because, as is shown by the records of this court, he refuses to recognize court-appointed counsel.

Defendant was convicted by verdict of a jury on May 11, 1967, of second degree murder. The victim was his wife. On direct appeal this court affirmed the conviction. State v. Pilgrim, 182 Neb. 594, 156 N. W. 2d 171. The prior appeal in the previous post conviction proceeding and in which the judgment of the trial court was affirmed is State v. Pilgrim, 184 Neb. 457, 168 N. W. 2d 368.

At the time this present proceeding was pending in the district court and at the time of the hearing on the show cause order in that court and to which reference is later made, the defendant also had pending an appeal in a habeas corpus proceeding before the United States Court of Appeals, 8th Circuit. That court denied relief and affirmed the finding and judgment of the United

States District Court for Nebraska. Pilgrim v. Sigler, 440 F. 2d 788. The Supreme Court of the United States denied the defendant's petition for writ of certiorari. Pilgrim v. Wolff, 404 U. S. 937, 92 S. Ct. 279, 30 L. Ed. 2d 250 (November 9, 1971).

In this proceeding the district court ordered the prosecution to show cause why the application below should not be granted. The prosecution filed a response which we interpret to contain: (1) An allegation that the proceeding constituted an abuse of process; and (2) allegations that the court had no jurisdiction because of the proceedings for the same relief then pending before the United States courts.

A hearing was held on the order to show cause at which the defendant was represented by counsel and evidence was adduced. The district court made detailed findings based on the evidence and its examination of the files and records. It found the defendant was entitled to no relief and that an evidentiary hearing on the application was not necessary. Findings of the district court determined that the defendant's application raised no constitutional issues not previously raised and that the other grounds, constitutional and otherwise, for relief had been previously raised or were known to the defendant and could have been raised on the original appeal.

We approve the various findings of the district court and deem, just as did the district court, that the present proceedings are an abuse of judicial process. See American Bar Association Standards Relating to Post-Conviction Remedies, Approved Draft, § 6.1(c), p. 85, and § 6.2(b), p. 91.

The defendant's claims have now been considered four times, twice on the merits and twice by way of hearings on orders to show cause directed to the prosecution. The claims have been repetitive or previously known and not asserted. All litigation, including reviews of convictions for crime, must ultimately come to

an end. We now consider that all matters in connection with defendant's conviction on May 11, 1967, are res judicata.

AFFIRMED.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, A UNITED STATES CORPORATION, APPELLANT, V. DEPARTMENT OF BANKING OF THE STATE OF NEBRASKA ET AL., APPELLEES.

196 N. W. 2d 105

Filed March 31, 1972. No. 37932.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. On motion for rehearing. See 187 Neb. 562, 192 N. W. 2d 736, for original opinion. Motion for rehearing overruled.

John W. Delehant, John E. Dean, and Robert J. Huck, for appellant.

Ralph H. Gillan, for appellee Department of Banking.

James J. Fitzgerald, Jr., Lyle E. Strom, and Douglas W. Reno, for appellee Commercial Sav. & Loan Assn.

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

NEWTON, J., dissenting.

This case involves the issuance of authority, without notice to other savings and loan associations, to open a branch savings and loan association.

Article I, section 3, Constitution of Nebraska, provides that no person shall be deprived of "life, liberty, or property," without due process of law. The Fifth and Fourteenth Amendments to the Constitution of the United States contain identically the same provision. In the present case, it is readily apparent that "life or liberty" are not threatened. If the due process clause

is applicable, it must be solely on the theory that an existing savings and loan association has a "property right" in a continued monopoly of business in its area. In other words, although the association's charter is in no way affected, it has a property right in the "limitation of competition." This is the only theory upon which the finding of a violation of "due process" in the case at issue can rest and this theory is not applicable.

In Hohorst v. Greenville Bus Co., 17 N. J. 131, 110 A. 2d 122, it is stated: "Adverse effect on operators of existing bus services incidental to creation of new competing bus line may readily be justified by significant furtherance of paramount public interest and will not constitute any unconstitutional deprivation of property."

In Franklin National Bank v. Superintendent of Banks, 243 N. Y. S. 2d 507, 40 Misc. 2d 565, it is stated: "Existing licensees have no standing to maintain special proceeding to review granting of additional license to another, merely because of economic effect on them of additional competition which would result. * * *

"First bank had no legal standing to obtain judicial review of action of Banking Board of State Banking Department in approving application of second bank to open branch office in community where first bank operated two branch banking offices."

In Eastern Airlines, Inc. v. Civil Aeronautics Board, 185 F. 2d 426, it is said: "Even though no Act of Congress requires a hearing, the Administrative Procedure Act must be followed where a hearing is necessary to the protection of constitutional rights. * * * But that rule is not pertinent here. Eastern is complaining of damage by competition which it says was made possible by unauthorized administrative action. The Constitution does not guarantee protection against such damage."

In Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U. S. 118, 59 S. Ct. 366, 83 L. Ed. 543, it is held: "Where neither charters nor local franchises of public utilities granted monopoly or rendered com-

petition illegal, competition of Tennessee Valley Authority did not constitute an invasion of the utilities' charter or franchise rights, so as to give them a standing to challenge constitutionality of Tennessee Valley Authority Act. * * *

"A franchise to exist as a corporation and to function as a utility in the absence of a specific charter contract on the subject creates no right to be free of competition and affords corporation no legal cause of complaint by reason of state's subsequently authorizing another to enter and operate in same field. * * *

"Nonexclusive local franchises, while having elements of property, confer no 'contractual' or 'property right' to be free of competition either from individuals or other public utility corporations or the state or municipality granting the franchise."

In Public Service Commission v. Great Northern Utilities Co., 289 U. S. 130, 53 S. Ct. 546, 77 L. Ed. 1080, it is said: "The due process clause of the Fourteenth Amendment safeguards against the taking of private property, or the compelling of its use, for the service of the public without just compensation. * * * But it does not assure to public utilities the right under all circumstances to have a return upon the value of the property so used. The loss of, or the failure to obtain, patronage, due to competition, does not justify the imposition of charges that are exorbitant and unjust to the public. The clause of the Constitution here invoked does not protect public utilities against such business hazards."

In First National Bank v. First Federal Sav. & Loan Assn., 225 F. 2d 33, it was held that other financial institutions were without standing to challenge the granting of permission to savings and loan associations to establish branch offices.

In First National Bank of Smithfield v. Saxon, 352 F. 2d 267, dealing with the establishment of a branch bank, it was held: "Procedural due process is not of-

fended by the Comptroller's practice. The absence of a hearing provision in the Banking Act raises no Constitutional question, for the omission was within the power of Congress."

Fugazy Travel Bureau, Inc. v. Civil Aeronautics Board, 350 F. 2d 733, involved a rule-change affecting the time allowed travel bureaus to remit proceeds to airlines. The court stated: "Similarly, the economic competition made possible by the alleged unauthorized administrative action in this case does not entitle the petitioner to a hearing. * * * The petitioner has no license or exclusive franchise protected by law, and although it may be injured—or even ruined—by competition, this is lawful competition presenting a clear case of damnum absque injuria."

In Central Sav. & Loan Assn. of Chariton v. Federal Home Loan Bank Board, 293 F. Supp. 617, it was held: "Decisions with respect to applications for charters, branches, agencies and similar matters relating to federal savings and loan associations are committed to the exclusive discretion of the federal home loan bank board; the board is not required to hold an adjudicative hearing prior to exercising its authority in such matters."

In Bridgeport Fed. Sav. & Loan Assn. v. Federal Home Loan Bank Board, 307 F. 2d 580, it was held: "It was not necessary under the Administrative Procedure Act that Federal Home Loan Bank Board hold a hearing on application of a chartered federal savings and loan association's application to establish a branch office."

In Bank of Dearborn v. State Banking Commissioner, 365 Mich. 567, 114 N. W. 2d 210, on issue of establishment of a branch bank, the court stated: "Plaintiff says it was denied due process of law by secret, ex parte proceedings before the commissioner on defendant bank's application, had without notice to or opportunity to be heard in opposition by plaintiff. The statute re-

quires no notice. Plaintiff's constitutional rights of due process do not extend to a right to be free from competition. * * * The 14th amendment to the Constitution of the United States does not protect a business against the hazards of competition."

In Continental Bank v. National City Bank, 245 F. Supp. 684, it is held: "Where state bank was not shown to have an exclusive license to operate in particular area involved and where operation of national bank's branch in no manner excluded state bank from operating in that area, procedural due process did not require that state bank be given full adversary type hearing or trial on national bank's application to establish such branch."

In American Bank & Trust Co. v. Saxon, 248 F. Supp. 324, it is held: "Comptroller of currency of the United States of America was not required to grant formal adversary hearing to protestant of application by national bank for branch office."

In Citizens National Bank of Maplewood v. Saxon, 249 F. Supp. 557, it is held: "Comptroller of the Currency was not required to hold a formal hearing at which commercial banks could present objections relative to issuance of a national bank charter. * * *

"The holding of a hearing regarding issuance of charter to national bank is controlled by the discretion of the Comptroller."

In Sterling National Bank of Davie v. Camp, 431 F. 2d 514, it is stated: "Comptroller of Treasury, in determining whether to grant charter for new national bank, was not required to conduct formal adversary hearing and was entitled, without knowledge of charter opponents, to accept and consider information sent to his office by applicants."

As was eloquently stated in Cement National Bank v. Department of Banking, 425 Pa. 554, 230 A. 2d 209: "Banks often forget that they are merely creatures of a Legislature or of Congress, and have only such rights as are granted by statute or by Congressional Act, as

the case may be. The Legislature can grant such powers and impose such conditions and limitations as it desires on all banks and other bodies it creates, provided the same are not unlawful or unconstitutional; and in particular, the Legislature is not required to provide for hearings before its created bodies such as are constitutionally required in judicial proceedings. * * * the Legislature is not required to provide, * * * for hearings at the Department level. The denial of a Judicial or a public or adversary hearing before the Department of Banking or even before a Banking Board is not a violation of procedural due process or of any other Constitutional right." Similar holdings can be found in: Elizabeth Fed. Sav. & Loan Assn. v. Howell, 24 N. J. 488, 132 A. 2d 779; Peoples Bank of Van Leer v. Bryan, 55 Tenn. App. 166, 397 S. W. 2d 401; First National Bank v. First Federal Sav. & Loan Assn., 225 F. 2d 33; Bridgeport Fed. Sav. & Loan Assn. v. Federal Home Loan Bank Board, 307 F. 2d 580; First National Bank of Smithfield v. Saxon, 352 F. 2d 267; Guaranty Savings & Loan Assn. v. Federal Home Loan Bank Board, 330 F. Supp. 470; First Nat. Bank of Whippany v. Trust Co. of Morris County, 76 N. J. Super. 1, 183 A. 2d 706; First National Bank of Abbeville v. Sehrt (La. App.), 246 So. 2d 382. See, also, Davis, Administrative Law Treatise, c. 4, § 4.04, but see contra, Conestoga National Bank of Lancaster v. Patterson, 442 Pa. 289, 275 A. 2d 6.

This is basically because the statutes regulating financial institutions do not confer a vested right or interest of limited competition upon the institution but rather: "It intends in the interest of the public, to insure safe banking. It does not intend to create a monopoly nor to deter private individuals from engaging their activities in banking except insofar as a proper regulation of banks in the interest of the public has such effect. * * *

"It does not intend that one or more established banks

may keep out another because the banking facilities sufficiently take care of the banking business. Its purpose is not to deter competition or foster monopoly, but to guard the public and public interests against imprudent banking." State ex rel. Dybdal v. State Securities Commission, 145 Minn. 221, 176 N. W. 759. See, also, Moran v. State Banking Commissioner, 322 Mich. 230, 33 N. W. 2d 772; Peoples Savings Bank v. Stoddard, 359 Mich. 297, 102 N. W. 2d 777.

In Elizabeth Federal Sav. & Loan Assn. v. Howell, 24 N. J. 488, 132 A. 2d 779, the Commissioner of Banking and Insurance granted permission to the Colonial Savings and Loan Association to establish a branch office in Elizabeth through the purchase of the Excelsior Building and Loan Association in Elizabeth and move it to a substitute location. The appellant's competitors objected to any such approval and sought review. It was held: "As pointed out above, a competitor may in the public interest attack the administrative action here involved. As such, a competitor may urge the question whether the Commissioner's action exceeded his power or constituted an arbitrary exercise of it. The objecting institutions, however, urge they are entitled to notice of hearing and the status of a party to the proceeding with the broader review which that status would afford. There is no constitutional basis for this further claim; if it exists, it is only because of a statutory provision for it."

It would appear evident that the due process clause is not an issue and has not been violated in this instance.

It further appears that the Administrative Procedure Act is inapplicable. Section 84-913, R. S. Supp., 1969, requires notice and hearing *only* in contested cases. Section 84-901, R. R. S., 1943, defines a contested case as follows: "Contested case means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." The

controlling statutes, as conceded in the original opinion, do not require an agency hearing and as herein pointed out, none is constitutionally required.

The result arrived at in the opinion adopted would, however, appear to be correct. The Department of Banking had a rule requiring notice and hearing. The rule was binding upon the department and could not be ignored. See, Skeedee Independent Tel. Co. v. Farm Bureau, 166 Neb. 49, 87 N. W. 2d 715; 2 Am. Jur. 2d, Administrative Law, § 309, p. 138; 73 C. J. S., Public Administrative Bodies and Procedure, § 107, p. 428.

I disagree with the action of the majority of the court in overruling the motion for rehearing.

BOSLAUGH and SPENCER, JJ., concur in order overruling motion for rehearing.

The findings required by section 8-331, R. R. S. 1943, before a certificate of approval may be issued are adjudicative facts which can only be determined by an exercise of quasi-judicial power. Interested parties must be afforded notice and an opportunity to be heard before such a power may be exercised. School Dist. No. 8 v. State Board of Education, 176 Neb. 722, 127 N. W. 2d 458; Allen v. Omaha Transit Co., Inc., 187 Neb. 156, 187 N. W. 2d 760.

We also agree with Judge Newton that the rule of the Department of Banking, requiring notice and hearing, was binding on the department.

The motion for rehearing should, therefore, be overruled.

WHITE, C. J., took no part in the consideration or decision in this case.

IN RE PROPOSED AMENDMENT TO CHAPTER III OF THE COMMISSION RULES AND REGULATIONS.
NEBRASKA STATE RAILWAY COMMISSION, APPELLEE, V. SEWARD MOTOR FREIGHT, INC., ET AL., APPELLANTS, IMPLEADED WITH WADE BUS LINES ET AL., APPELLEES.
IN RE APPLICATION OF SEWARD MOTOR FREIGHT, INC.
SEWARD MOTOR FREIGHT, INC., APPELLANT, V. BEE LINE MOTOR FREIGHT, INC., ET AL., APPELLEES, CLARK BROS. TRANSFER, INC., INTERVENER-APPELLEE.
196 N. W. 2d 200

Filed March 31, 1972. Nos. 38067, 38055.

1. **Public Service Commissions: Motions, Rules, and Orders: Carriers.** The failure of the Nebraska State Railway Commission previous to January 1, 1968, to enunciate a rule and regulation on tacking cannot be construed to imply that the right to tack was inherent in certificates heretofore issued unless specifically restricted.
2. ———: ———: ———. The right to prohibit the tacking of regular to irregular route authorities, or irregular to irregular route authorities, is a policy determination within the inherent authority of the Nebraska State Railway Commission.
3. **Public Service Commissions: Carriers.** Common carriers cannot acquire prescriptive rights by virtue of unauthorized use of routes.
4. ———: ———. Tacking is an extension of the authorized service and must be and is under the regulation of the Nebraska State Railway Commission rather than being left to the unbridled discretion of carriers subject to regulation by the Commission.
5. **Public Service Commissions: Motions, Rules, and Orders: Appeal and Error.** On appeal from an order of the Nebraska State Railway Commission administrative or legislative in character, the only questions to be determined are whether the Commission acted within the scope of its authority and whether the order is reasonable and not arbitrarily made.

Appeals from the Nebraska State Railway Commission. Judgments affirmed.

Nelson, Harding, Marchetti, Leonard & Tate, J. Max Harding, Charles J. Kimball, David R. Parker, Gailyn L. Larsen, and Acklie & Peterson, for appellants.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee Nebraska State Railway Commission.

Einar Viren, for appellee Bee Line Motor Freight, Inc.

James E. Ryan, for intervener-appellee.

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

SPENCER, J.

Appeals Nos. 38067 and 38055 were consolidated in this court for the purposes of briefing and argument, and, because they are closely related, we shall consider them together.

Case No. 38067 involves the adoption of an amendment to Chapter III of the Rules and Regulations of the Nebraska State Railway Commission concerning the tacking or joining of motor common carrier authorities in the State of Nebraska. We affirm the right of the Commisison to adopt the amendment.

Case No. 38055 involves the application of Seward Motor Freight, Inc., hereinafter referred to as Seward, to tack its regular and irregular route authorities. Those authorities are as follows: "Commodities generally, except those requiring special equipment. Regular Route: Between Omaha and Grand Island, via US-6 to Lincoln; thence via US-34 to junction with US-281; thence via US-281 to Grand Island, serving all intermediate points and the off-route points to Bee, Tamora and Phillips.

"RESTRICTION: No local service to be performed between Omaha and Lincoln or points intermediate thereto.

"Irregular Route: Between points within a 10-mile radius of Seward, and between points within said radial area on the one hand, and, on the other hand, points in Nebraska." The application to tack the authorities was denied. We affirm.

On March 15, 1971, the Nebraska State Railway Com-

mission entered the following order: "Motor common carriers shall not tack their irregular route authorities nor shall they tack their irregular and regular route authorities. Motor common carriers may tack their regular route authorities." This order, which will be hereinafter referred to as Rule 19, was entered pursuant to notice published December 10, 1970, and hearings held on January 26, 1971, February 19, 1971, and March 5, 1971. The original published notice was broader than the order entered in that it would have prevented the tacking of regular authorities. The order as entered prohibits tacking of irregular route authorities and the tacking of irregular and regular route authorities, but specifically authorizes the tacking of regular route authorities.

The protestants and objectors are the following appellants herein: Seward Motor Freight, Inc.; Booth Transfer, Inc.; Ideal Truck Lines, Inc.; Logan Valley Transfer, Inc.; Stromsburg Motor Freight, Inc.; Nebraska City Transfer; Arrow Freight Lines, Inc.; and Young and Hay Transportation, Inc.

Appellants set out nine specific assignments of error. We notice the following: "1. The order of the Commission in the Rule and Regulation No. 19 proceeding was entered without jurisdiction or power to enter it.

"2. Said order deprives appellants of rights and property without due process of law in violation of the due process clauses of the Nebraska and U. S. Constitutions.

"3. Said order is arbitrary and unreasonable. * * *

"5. The Commission erred in finding that said order will best serve the public interest, 'protect existing certificates,' and that tacking of regular route and irregular route motor common carrier authorities or irregular route authorities should not be allowed.

"6. The Commission erred in concluding that it could not effectively and efficiently regulate the motor common carrier industry or best serve the public interest if such tacking is allowed and that tacking 'tends to elim-

inate and destroy the restrictions and limitations placed in certificates.' "

The position of the appellants is bottomed upon the erroneous assumption that before the adoption of Rule 19, they had a legal right to tack regular and irregular authorities and that it was not necessary to obtain express authorization from the Commission. In fact, their argument is predicated on the assumption that the Commission is now prohibiting a right granted by their certificates of authority. Except in instances where the right to tack has been specifically granted by the Commission, the right does not exist. It is not an implied right inherent in existing certificates.

While the Commission had granted and prohibited the tacking of authorities in the past, until 1966 it had no clearly defined tacking practice policy. Its failure previous to January 1, 1968, to enunciate a rule and regulation on tacking cannot conceivably be construed to imply that the right to tack was inherent in the certificate heretofore issued unless specifically restricted. The question is not as assumed by appellants, whether the Commission had previously indicated that tacking was not permitted, but rather has the Commission ever held that tacking was permitted unless specifically prohibited. The answer must be in the negative. We hold the right does not exist unless specifically granted.

On May 31, 1966, Romans Motor Freight, Inc., filed a petition for the institution of a general investigation and for issuance of general orders with respect to tacking of authorities. A hearing was held, "In the Matter of a General Investigation of Tacking of Authorities," on September 12, 1966. At that hearing counsel for Romans suggested the problems involved and the need for an order to clarify the issues. Another public hearing was held on March 14, 1967. Pursuant to those hearings, the Commission on October 9, 1967, entered Rule and Regulation Order No. 8, to become effective on January 1, 1968. This rule provided that motor carriers should not

tack their irregular route authorities and, unless specifically authorized by the Commission after notice and hearing, they should not tack their irregular route and regular route authorities nor tack their regular route authorities. As used in the rule, "tacking" included the terms "joining" and "combining."

On December 7, 1967, the Commission entered Rule and Regulation Order No. 10 pursuant to a public hearing held on November 29, 1967, providing that the provisions of Rule and Regulation Order No. 8, pertaining to regular route authorities, should not apply to such authorities granted on or before December 31, 1967.

We set out pertinent legislative provisions so far as material herein. Section 75-109, R. R. S. 1943, provides: "The commission shall have the power to * * * exercise a general control over, all common carriers * * *."

Section 75-110, R. S. Supp., 1969, provides: "* * * The commission shall also promulgate regulations which the commission deems necessary to regulate persons within the commission's jurisdiction. The commission shall not take any action affecting persons subject to the commission's jurisdiction unless such action be taken pursuant to a rule, regulation, or statute."

Section 75-301, R. R. S. 1943, provides: "It is hereby declared to be the policy of the Legislature to (1) regulate transportation by motor carriers in intrastate commerce upon the public highways of Nebraska in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers, in the public interest; (2) promote adequate economical and efficient service by motor carriers, and reasonable charges therefor, without unjust discrimination, undue preferences or advantages, and unfair or destructive competitive practices; (3) improve the relations between and coordinate transportation by, and regulation of, motor carriers and other carriers; (4) develop and preserve a highway transportation system properly adapted to

the needs of the commerce of Nebraska; (5) cooperate with the several states and the duly authorized officials thereof; and (6) cooperate with the Interstate Commerce Commission in the administration and enforcement of the Federal Motor Carrier Act, 1935, approved by the President on August 9, 1935. The Legislature declares that all of the available carriage service, including common carriage by rail and road, and contract carriage by road, are so interdependent that the public may not continue to have a safe, dependable transportation system unless contract carriers operating on the same roads with common carriers are brought under just and reasonable regulations bringing their service into relation with common carriers."

Section 75-309, R. S. Supp., 1969, provides: "It shall be unlawful for any common or contract carrier by motor vehicle subject to the provisions of articles 1 and 2 of this chapter and sections 75-301 to 75-322.01 to engage in any intrastate operations on any public highway in Nebraska unless there is in force with respect to such common carrier a certificate of public convenience and necessity, or a permit to such contract carrier, issued by the commission authorizing such operation."

Section 75-311, R. S. Supp., 1969, provides in part: "A certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found after notice and hearing that the applicant is fit, willing, and able properly to perform the service proposed, and to conform to the provisions of sections 75-301 to 75-322.01 and the requirements, rules, and regulations of the commission thereunder and that the proposed service, to the extent to be authorized by the certificate, whether regular or irregular, passenger or property, is or will be required by the present or future convenience and necessity; otherwise said application shall be denied."

To put the problem in proper perspective, understanding of the differences in the authorities is necessary.

For the purposes of this opinon, regular route authority covers the transportation of property in intrastate commerce by motor vehicles between fixed termini and over a specified highway or highways upon a fixed schedule. Irregular authority covers the transportation of property in intrastate commerce by motor vehicle over irregular routes at any time convenient to the carrier over any convenient highways from a base point to any place within a defined radial area, or from any place within the area to the base point, or in the case of irregular nonradial authority, between points in the area without reference to a fixed base point. Simply stated, the practice of tacking involved herein is the operation by a carrier between two or more of its irregular routes or between irregular and regular routes in order to reach a point which could not legally be served by operation over any single irregular or regular route or combination of regular routes.

Appellants have not produced any Nebraska citations to support their contention that a right to tack existed prior to the adoption of a general policy by the Commission. In fact, counsel for appellants stated at the hearing: "Now, there's never been a rule adopted by this Commission from the time the Motor Carrier Act was passed until the first rule was adopted effective January 1, 1969, that had anything at all to do with tacking or interlining. There were some representations made by Commission personnel, including myself when I worked for this esteemed body, that you couldn't tack regular and irregular authority, but there was never a regulation of any sort adopted on it until January 1, 1969." Counsel was wrong as to the date. Rule and Regulation Order No. 8 to which he refers became effective on January 1, 1968.

To permit unlimited tacking when the certificates now in effect were not issued with reference to that right, violates the intent and purpose of the law relating to common carriers. To do so expands certificated author-

ity in violation of the intent of the Commission in granting the original certificates of authority. It is the certificate which determines the terms or extent of the carrier's operations. If the right to tack is not specifically granted, it does not exist. Contrary to the contention of the appellants, we agree with the Commission that in order to best serve the public interests and to protect existing certificates of public convenience and necessity heretofore issued by the Commission, the tacking or joining of regular to irregular route authorities, as well as irregular to irregular route authorities, should no longer be allowed, and that proposed Rule 19 should be adopted.

The determination of this policy by the Commission is within its inherent jurisdiction. We respect its finding that it cannot effectively and efficiently regulate the motor carrier industry or best serve the public interest if it continues to allow such tacking of authorities. We accept its conclusion that the tacking prohibited herein tends to eliminate and destroy the limitations and restrictions placed upon such certificates of public convenience and necessity by the Commission's orders and rules and regulations. Henceforth, where there is a need for irregular service into an area or community outside the central radius of an irregular route radial authority, an application must be made to the Commission to serve such point or points as an additional base point to the carrier's irregular route authority. Likewise, if there is a need for service to an area or community on a regular basis, such areas or communities can be served by making application to the Commission to serve these points as off-route points to the carrier's existing regular route. Such applications will be granted by the Commission upon a showing of the statutory requirements of the carrier's fitness and public convenience and necessity.

To illustrate, Seward Motor Freight, Inc., has regular route authority between Omaha and Grand Island via

Lincoln and Seward, and irregular route authority between points and places within a 10-mile radius of Seward and between points and places within said radial area and points and places in Nebraska. Tacking of its regular and irregular route authorities would destroy the type of certificates under one or both of the authorities. For example, if Seward began to conduct operations regularly from Omaha to Seward, and then on its irregular route authority to the communities within that authority, it would be transforming its irregular route authority to a regular route authority to those towns. On the other hand, if it was not limited to the towns within the 10-mile radius but rather it hauled shipments from Omaha to Seward and then to various points in the State of Nebraska on an irregular basis, then it would be performing irregular route operations on the regular portion of its certificate from Omaha to Seward. In this way the granting of regular and irregular route tacking can destroy the classifications the Commission has made through its rules and regulations on one or both of the authorities. It is no answer to assert that the Commission has power to control abuses. The feasibility and propriety of this expansion of the certificates has never been considered by the Commission. It has had no opportunity to consider the public convenience and necessity of the expanded authority.

To find prescriptive rights to tack would expand the scope of the authorities tacked without giving the Commission the opportunity to determine the necessity for such expansion under section 75-311, R. S. Supp., 1969. Seward argues that denial of its right to tack will deprive some towns of the service it is able to perform. We appreciate that in the interest of effective and efficient regulation of motor carriers there will be some such problems. As the record discloses, the towns listed by Seward as being adversely affected are not totally without remedy.

Appellants contend that Rule 19 was entered without

jurisdiction or power to enter it. Section 75-110, R. S. Supp., 1969, specifically requires the Commission to adopt rules and regulations which it deems necessary to regulate persons within its jurisdiction. Section 75-118.01, R. S. Supp., 1969, gives the Commission original, exclusive jurisdiction to determine the validity of a rule or regulation and the scope and meaning of a certificate.

There can be no question that Rule 19 is within the ambit of authority granted to the Commission by section 75-109, R. R. S. 1943, and sections 75-110, 75-310, and 75-311, R. S. Supp., 1969. To hold otherwise would destroy the effectiveness of those sections. There may be instances where tacking could be permitted without undue interference with other certificates of authority, but these are policy questions within the jurisdiction of the Commission.

There is no merit to appellants' contention that the order deprives them of rights and property without due process of law. As suggested heretofore, the order is not a limitation, revocation, change, or modification of any authority previously granted, as contended by appellants in claiming the Commission is acting retrospectively so as to restrict or reduce valuable rights. Section 75-313, R. R. S. 1943, so far as material herein, requires that: "Each certificate shall specify the service to be rendered, the routes, the fixed termini, if any, and the intermediate and off-route points, if any, and in case of operations not over specified routes or between fixed termini, the territory within which such carrier is authorized to operate. Each permit shall specify the business of the contract carrier covered thereby and the scope thereof." Seward has no rights other than those specifically granted by its present certificates of authority.

Unless tacking was specifically authorized by the Commission, Seward had no right to tack its regular and irregular route authority. The fact that it may have performed unauthorized operations under the im-

pression that it had such right does not create a property right or a right to tack. Common carriers cannot acquire prescriptive rights by virtue of unauthorized use of routes. Interstate Common Carrier Council of Maryland, Inc. v. United States, 84 F. Supp. 414, affirmed, 338 U. S. 843, 70 S. Ct. 91, 94 L. Ed. 516.

Appellants argue that most states permit tacking but cite no statutory or case authority for it in Nebraska. Our observation is that in those jurisdictions which permit it, the original certificates were probably issued in the light of that practice and the certificating agency had an opportunity, in the light of the practice, to attach conditions to the certificates where the public interest would not be served. In any event, tacking is an extension of the authorized service and must be and is under the regulation of the Commission rather than being left to the unbridled discretion of the carriers subject to regulation by the Commission.

Rule 19 was adopted by the Commission pursuant to an informal, nonadvisory type proceeding had by the Commission on its own initiative. Notice of the hearing was published and a copy of the notice was sent to those who could be affected. This proceeding was within the ambit of the Commission's jurisdiction and we find no fault with the procedure adopted. The order adopted is of a legislative nature, with general application to all carriers within a certain class. We have frequently said that on an appeal from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the Commission acted within the scope of its authority and whether the order is reasonable and not arbitrarily made. Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

The Seward application was largely predicated on its claim that for several years it had tacked its regular and irregular route authorities at the common point of

Seward. As heretofore suggested, this operation was conducted under the erroneous assumption by the appellant that it was permitted to do so. It did not have that right, and the evidence of such operation cannot be used to invoke a prescriptive right to tack. Consequently, the denial of the right is not unreasonable or arbitrary. The fact that tacking, herein prohibited, may have previously been permitted after hearing in some instances, does not change that situation. In view of our holding on the amended rule and regulation herein, the action on the Seward application is affirmed. The relief available to Seward is the filing of applications for the amendment of its authority, as suggested above.

JUDGMENTS AFFIRMED.

McCOWN, J., dissenting.

I respectfully dissent.

The majority opinion holds the "tacking" of unrestricted authorities is illegal and in violation of the intent of the Commission in granting the original certificates. It also states: "If the right to tack is not specifically granted, it does not exist." There is no authority for those statements and they are flatly contradicted by repeated holdings of the Interstate Commerce Commission and federal courts as applied to interstate carriers.

In Aetna Freight Lines, Inc., Interpretation of Certificate, 48 M. C. C. 610 (1948), the Interstate Commerce Commission said: "The right of the motor common carrier to tack separate grants of unrestricted authorities is well settled regardless of whether the authorities involve regular routes, irregular routes, or a combination of both." To the same effect, see M. I. O'Boyle & Son, Inc. v. E. Brooke Matlack, Inc., 81 M. C. C. 201 (1959). As to the type of situation involved here, see Malone Freight Lines, Inc. v. United States, 107 F. Supp. 946 (1952), affirmed, Per Curiam, 344 U. S. 925, 73 S. Ct. 497, 97 L. Ed. 712 (1953).

It should be noted also the evidence discloses that

from the very beginning of motor carrier regulation in Nebraska, tacking of regular and irregular route segments of authority, as well as tacking of two irregular route segments, was permitted except where specifically prohibited. Until 1966, the Commission had no rule or regulation prohibiting or limiting carriers' right to tack generally and there had never been any statutory prohibition against operations involving tacking of any kind. The record here does not show any specific findings of fact which will support the Commission's general prohibitory order applied retroactively as it was. The findings constitute statements of opinion of the Commission, reflecting the policy decision involved without the requisite factual support for such retroactive effect.

In addition to the overall issues involved in the general order prohibiting tacking, the majority opinion here affirms the order of the Commission denying the application of Seward Motor Freight, Inc., for the right to tack its own specific certificates. The only evidence in the record demonstrated that its services involving tacking on its own routes is needed by many shippers and some entire communities who would otherwise have no service or very inadequate service. There is no evidence that any other existing carrier could serve the need as well as the applicant. No carriers opposed the application. The evidence was clear that the operations provided by the tacking of authorities by Seward Motor Freight, Inc., and covered by the application had been conducted over a long period of time under color of authority. The test in such circumstances was set down in Black Hills Stage Lines, Inc. v. Greyhound Corp., 174 Neb. 425, 118 N. W. 2d 498. The test is (1) whether the operation will serve some useful purpose responsive to a public demand or need; (2) whether the purpose can or will be served as well by existing carriers; and (3) whether it can be served by applicant without endangering or impairing the operations of existing carriers contrary to the public interest.

Even if it be conceded that the Commission had authority to determine a general tacking policy, at least prospectively, there are no specific findings of fact to support the general order prohibiting tacking conducted over a period of years under color of authority and with the full knowledge and tacit consent of the Commission. Neither is there evidence in the record to support the specific denial of the application of Seward Motor Freight, Inc. The action of the Commission in both instances was arbitrary and unreasonable and should have been set aside.

STATE OF NEBRASKA, APPELLEE, V. DENNIS G. RADCLIFF, APPELLANT.
196 N. W. 2d 119

Filed March 31, 1972. No. 38119.

1. **Constitutional Law: Ordinances: Trial: Evidence: Appeal and Error.** The question of the constitutionality of a city ordinance may not be considered by this court unless it is properly presented or offered in evidence in the district court.
2. **Trial: Evidence: Appeal and Error.** Photographs are admissible in evidence if shown to be true and correct representations of the places or subjects they purport to represent at times pertinent to the inquiry. Admission of photographs is largely within the discretion of the trial court and unless an abuse of discretion is shown, error may not be predicated thereon.

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

Johnston, Grossman & Johnston, for appellant.

Richard C. Wood, Jerry C. Nelson, Hugh S. Atkins, and Norman Langemach, Jr., for appellee.

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

WHITE, C. J.

This is an appeal from two convictions after a trial

de novo in the district court for Lancaster County, before a jury, for violations of an ordinance of the City of Lincoln, Nebraska. On appeal, the defendant contends (1) that the ordinance under which he was prosecuted is unconstitutional, and (2) that the evidence was insufficient to support the verdict. We affirm the judgment of the district court.

The defendant was convicted under complaints which charged that the defendant unlawfully permitted a non-operating motor vehicle to remain on property which he has charge of for more than 30 days contrary to the ordinance. It appears from the record that the defendant was prosecuted under section 10.30.040 of ordinance No. 8664, of the City of Lincoln, Nebraska. The primary thrust of defendant's argument is that ordinance No. 8664 is unconstitutional. A review of the record in this case reveals that the ordinance (No. 8664), which is recited in the defendant's brief, is nowhere contained in the evidence in the bill of exceptions or otherwise presented in the record. It therefore appears that the assignment of error as to the constitutionality of the ordinance, in whole or in part, is not before us for consideration. State v. Novak, 153 Neb. 596, 45 N. W. 2d 625; State v. Hohensee, 164 Neb. 476, 82 N. W. 2d 554; Maxwell v. Steen, 93 Neb. 29, 139 N. W. 683; Steiner v. State, 78 Neb. 147, 110 N. W. 723; Dell v. City of Lincoln, 168 Neb. 174, 95 N. W. 2d 336. Perhaps the best statement of the rule precluding consideration of the constitutionality in the situation presented to the court in this case is contained in State v. Novak, *supra*. In that case it was argued that the city ordinance under which the defendant was prosecuted was violative of constitutional provisions. The ordinance, as here, was not before the court. There this court said as follows: "* * * failure to properly present an ordinance that is being attacked precludes our consideration of it here. * * * '* * * A party relying upon such matters must make them a part

of the bill of exceptions, or in some manner present them as a part of the record.' * * *

"Under the foregoing holdings the district court * * * could take judicial notice of an ordinance * * *, but if it took judicial notice of an unconstitutional ordinance it was the duty of the defendant to offer evidence of that fact if the error is to be preserved. *Recitals contained in objections or motions purporting to set forth portions of the ordinance do not meet the requirement.* * * * We cannot indulge in a presumption that the district court erred in this respect; it must be shown by the record." (Emphasis supplied.)

It therefore appears clear, under the authorities cited, that the failure to properly present an ordinance as a part of the record in the district court precludes the consideration of its constitutionality or validity in this court.

The defendant next attacks generally the sufficiency of the evidence to sustain the finding that the defendant was storing or parking a nonoperating vehicle on his property beyond a period of time permitted by the ordinance. We consider this question in the light of the court's instruction with reference to the term "nonoperating vehicle" as used in the ordinance. The instruction was as follows: " * * * a vehicle that because of some lack, fault, or defect, or some other substantial reason related to said vehicle can not be immediately used for the purposes for which it was intended. A vehicle stopped or parked because of some wholly temporary failure or the occurrence of an emergency relating to the vehicle or the operator thereof is not included in the prohibition." It is not assigned as error or contended that this instruction defining the meaning of the term "nonoperating vehicle" was in error.

We evaluate the evidence briefly under the definition as given in the court's instruction. The evidence is somewhat conflicting but generally is almost undisputed. The evidence of the city sustains a finding of the following facts: Behind his house in the residential sec-

tion of Lincoln, at 5000 North Cotner Boulevard, the defendant owned and had parked a 1955 Dodge and a 1958 white and pink DeSoto automobile. Pictures of these vehicles were identified and presented to the jury for its consideration. Both cars were unlicensed in Nebraska and the 1955 Dodge had an Illinois license on it. He brought both cars with him when he moved to Nebraska in 1964. He was driving neither car. He was driving a 1961 Chrysler for his personal use. The defendant himself stated that he planned on moving the vehicles out into the country. The police observation of the cars continued for a period of over 2 months, from October 16, 1969, until the middle of December 1969. Defendant refused to start the vehicles, giving as an excuse that he did not have a battery. The vehicles remained in the same location during the period of observation. The Dodge had no front seat, inside it was a small cultivator type garden tractor and four old tires, and it bore an out-of-state license plate. An anchor line ran from a clothesline post on the defendant's lot into the 1955 Dodge, apparently attached to the steering wheel. The wire attached to the Dodge was for the purpose of securing a clothesline pole in use by Mrs. Radcliff, the defendant's wife. The DeSoto contained no license plates on it at all.

A contention is made that the evidence is insufficient to sustain the conviction and this is based primarily on the question that the term "nonoperational" as used in the ordinance is unconstitutional, vague, indefinite, and uncertain. We do not discuss this question in the abstract. No question of constitutionality is present before us as we pointed out. The question of whether the term "nonoperating" was properly submitted to the jury is answered by the giving by the court of instruction No. 9 as heretofore recited. We observe further that the court in another instruction cautioned the jury that the word "immediately" did not mean at once or instantaneously, but was to be construed as within such

time as would appear reasonable to an ordinary or prudent person under the circumstances shown to exist. This language is almost identical to the defendant's requested instruction No. 2.

The court gave the above-mentioned instructions pursuant to the pertinent section of the Lincoln Municipal Code, section 10.30.040 (being a subsection of ordinance No. 8664) stating in substance as follows: "No person in charge or control of any property * * * shall allow any partially dismantled, *nonoperating*, wrecked, junked, or discarded vehicle to remain on such property longer than thirty days; * * *." (Emphasis supplied.)

We think it appears clear that the provisions of the subsection of the ordinance under which the defendant was prosecuted adequately inform the public and those persons governed by it as to the prohibitions contained therein, and that the court's instructions spell out a precise and meaningful definition of the term "nonoperating." It is clear, contrary to the defendant's contention, there is nothing in the subsection of the ordinance or the construction put on it by the trial court which would permit the jury to be misled into assuming that a vehicle must be in operation at all times under the terms of the ordinance.

From what we have said the evidence was ample to sustain the verdict of the jury and to find, under the definition of "nonoperating" given by the court, that the defendant was in violation of the ordinance as construed by the court. Assuming that the defendant's testimony was in conflict with what has been recited herein, the question of guilt or innocence in a criminal case is one to be determined by the jury, and it is the jury's function to pass on the credibility of witnesses and to weigh the evidence; and a jury verdict will not be disturbed unless clearly wrong, or the result of passion or prejudice. State v. Bundy, 181 Neb. 160, 147 N. W. 2d 500; Beranek v. Petracek, 184 Neb. 516, 169 N. W. 2d 275.

It is contended that the photographs introduced in evidence so enflamed the passion and prejudice of the jury as to require reversal of the case. This is a misdemeanor case. It is difficult to imagine, considering the precise nature of the offense charged, a case in which photographs would be more relevant in aiding the jury in understanding the facts as testified to by the witnesses and in resolving the basic issues before it under the court's instructions. Photographs are admissible in evidence if shown to be true and correct representations of the places or subjects they purport to represent at times pertinent to the inquiry. Their admission is largely within the discretion of the trial court and unless an abuse of discretion is shown, error may not be predicated thereon. Beranek v. Petracek, *supra*.

The judgments of the district court in both cases are correct and are affirmed.

AFFIRMED.

CLINTON, J., concurring.

This case points out an apparent anomaly and lack of logic in the case law of this state with reference to the circumstances under which this court and the district court may take judicial notice of municipal ordinances.

Where there is an *appeal from a municipal* court from a conviction for an ordinance violation we and the district court may take judicial notice of the ordinance for the purpose of determining defendant's guilt or innocence but not for the purpose of considering an attack on the constitutionality of the ordinance. We ought to adopt a rule that is logically consistent.

I concur in the result because it is not clear beyond a reasonable doubt that the ordinance in question is unconstitutional. Dwyer v. Omaha-Douglas Public Building Commission, *ante* p. 30, 195 N. W. 2d 236.

Nothing that is here said is intended in any way to refer to the usual rules requiring the pleading and proof of municipal ordinances in other situations.

JUDITH NEWTON, APPELLEE, V. WAYNE D. NEWTON, APPELLANT.

196 N. W. 2d 116

Filed March 31, 1972. No. 38135.

1. **Divorce: Trial: Appeal and Error.** A divorce action is for trial de novo in this court. However, we cannot ignore the fact that the trial court had an opportunity to observe the parties.
2. **Divorce: Alimony: Trial: Appeal and Error.** A judgment of a trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown.
3. **Divorce: Alimony: Property.** The amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into its determination.

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

Ryan & Scoville, Robert G. Scoville, and P. F. Verzani, for appellant.

Olds & Reed, for appellee.

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

SPENCER, J.

In this divorce action by Judith Newton, plaintiff, against Wayne D. Newton, defendant, the appeal is predicated on the sole fact that plaintiff was given all of the property acquired while the parties lived together, as well as $1,800 alimony, payable $50 a month.

The marriage of the parties was of 5 years duration. During that time, plaintiff contributed substantially more to the support and maintenance of the parties than the defendant. Defendant issued several insufficient fund checks which plaintiff made good. The property of the parties, which had not been repossessed by creditors, consisted of a 1969 Mercury, a color television set, and other household goods, subject to an encumbrance of $1,999.50. These were assigned to the plaintiff. The

defendant acquired a 1970 automobile and a color television set after the separation. These were encumbered for $3,880. Defendant also had a diamond ring purchased during the marriage for $372.30, supposedly for the plaintiff, but of which she had no knowledge and which was never given to her. There is strong inference in the testimony that the defendant was interested in another woman.

Considering the encumbrance on the property transferred, it seems evident that the $1,800 alimony was intended to help plaintiff pay off the encumbrance.

A divorce action is for trial de novo in this court. However, we cannot ignore the fact that the trial court had an opportunity to observe the parties. Dodendorf v. Dodendorf, 186 Neb. 144, 181 N. W. 2d 438.

We have said that the judgment of a 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.

In Prosser v. Prosser, 156 Neb. 629, 57 N. W. 2d 173, we held the amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into its determination.

AFFIRMED.

STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLEE, V. LAWRENCE D. LESSERT, APPELLANT.
196 N. W. 2d 166

Filed March 31, 1972. No. 38154.

1. **Administrative Law: Motor Vehicles.** The Director of Motor Vehicles acts ministerially in revoking a driver's license for point violations under sections 39-7,129 and 39-7,130, R. R. S. 1943.
2. **Administrative Law: Motor Vehicles: Evidence: Trial: Appeal and Error.** On an appeal to the district court from an order of the Director of Motor Vehicles revoking a driver's license for

point violations, completely void judgments, erroneous or fraudulent records, and abstracts of convictions may be challenged at the evidentiary hearing and the necessary foundational facts must support the validity of the order of revocation.

3. **Trial: Judgments: Res Judicata.** Under the rule of res judicata, the conclusiveness of a prior judgment extends not only to matters actually determined but also to matters that could have been raised or were necessarily adjudicated or implied in the final judgment, whether raised or not.
4. **Constitutional Law: Ordinances: Statutes: Courts.** Ordinances and statutes are presumed to be constitutional. Unconstitutionality must be clearly established and courts will not pass on a question of constitutionality if the issue may be disposed of on other grounds.
5. **Constitutional Law: Ordinances: Statutes: Trial: Motor Vehicles.** Unless a particular traffic ordinance or statute has been judicially declared unconstitutional, a motorist convicted of a violation of that ordinance or statute cannot challenge its constitutionality in a collateral proceeding to revoke his driver's license under the point system provided by sections 39-7,128 through 39-7,130, R. R. S. 1943.

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

Laurice M. Margheim and Bump & Bump, 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 Department of Motor Vehicles revoked the driver's license of the plaintiff, Lawrence D. Lessert, on November 25, 1970. The basis for the revocation was the accumulation of 12 or more points for traffic violations under the provisions of sections 39-7,128 and 39-7,129, R. R. S. 1943. The plaintiff appealed to the district court and was granted a stay of revocation. Thereafter the district court found generally for the Department of Motor Vehicles, denied plaintiff's claims for relief,

and dismissed the action. We affirm.

On November 21, 1970, the plaintiff was convicted of careless driving under an ordinance of the City of Gordon, Nebraska. The plaintiff pleaded no contest to the charge nor did he take any direct appeal from the conviction. The conviction of November 21 resulted in a 4-point assessment. When added to plaintiff's previous convictions, this resulted in an accumulation of 13 points within a 2-year period. The Department of Motor Vehicles revoked the driver's license of plaintiff on November 25, 1970, and notification of the revocation was received by the plaintiff on November 30, 1970. The district court stayed the order of revocation and it remains suspended.

The plaintiff's appeal rests on the contention that the November 21 conviction was void because it was based on an ordinance which was unconstitutionally vague. He also asserts that he was denied procedural due process required by Bell v. Burson, 402 U. S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90, because of the lack of notice or hearing prior to the order of revocation by the Department of Motor Vehicles. He also contends that the scope of review in the district court is impermissibly restricted.

This court has very recently considered the due process issues under the point system statutes as affected by Bell v. Burson and determined them adversely to the plaintiff. See Stauffer v. Weedlun, *ante* p. 105, 195 N. W. 2d 218. That case specifically held that the Director of Motor Vehicles acts ministerially in revoking a driver's license under the point system and that the appeal procedures provided under section 39-7,130 and section 60-420, R. R. S. 1943, contemplate a full evidentiary hearing which meets the due process requirements of both the federal and state Constitutions.

The plaintiff indirectly asserts also that Bradford v. Ress, 167 Neb. 338, 93 N. W. 2d 17, may be construed as limiting the hearing on an appeal to the district court

to an error proceeding strictly confined to a review of the records of the Director of Motor Vehicles. Such an interpretation would restrict judicial review to the sole issue of whether the records of the Director sustain his final order. We think it clear that this was not the legislative intent and that conclusion is now reinforced and compelled by Bell v. Burson, *supra*. In Stauffer v. Weedlun, *supra*, we indicated that completely void judgments, erroneous or fraudulent records, and abstracts of convictions may be challenged at the evidentiary hearing provided for in the district court de novo review of the order revoking a driver's license. We now specifically affirm that holding. The necessary foundational facts must support the validity of the order of revocation. To the extent that Bradford v. Ress, 167 Neb. 338, 93 N. W. 2d 17, may be in conflict, it is overruled. We point out also that the notice and hearing available to a motorist in connection with the trial and appeal of each conviction which may contribute to an ultimate point system revocation of his driver's license is an obvious and integral part of constitutional due process.

Fundamentally, plaintiff's appeal rests on the contention that the city ordinance of Gordon under which he was convicted on November 21, 1970, is unconstitutionally vague. That issue was not raised in the city court of Gordon, and there was no appeal from that conviction. The claim of unconstitutionality rests on the assertion that the ordinance was in some respects similar to a state statute which was declared unconstitutional by this court. They were not the same. There is no evidence that any court anywhere has ever declared ordinance No. 259 of the City of Gordon or any identical statute or ordinance unconstitutional.

The plaintiff's theory of unconstitutionality by reason of resemblance or similarity is an application of the "guilt by association" technique. It runs aground for several reasons. The issue of constitutionality becomes

res judicata because the constitutionality of the ordinance was an integral part of the judgment of the city court of Gordon when it convicted the plaintiff of a violation of ordinance No. 259. See Norlanco, Inc. v. County of Madison, 186 Neb. 100, 181 N. W. 2d 119. In that case, this court determined that a failure to raise an issue of constitutionality in the trial court in effect waived any claimed defense subsequently on that ground. This court said: "The phase of the doctrine of res judicata precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other matters which could properly have been raised and determined therein." The judgment of conviction here was not only not void, it was not even voidable.

Plaintiff's theory also founders under the well-established rule that ordinances and statutes are presumed to be constitutional. Unconstitutionality must be clearly established; and courts will not pass on a question of constitutionality if the issue may be disposed of on other grounds. Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N. W. 2d 397; Norlanco, Inc. v. County of Madison, *supra*.

Unless a particular traffic ordinance or statute has been judicially declared unconstitutional, a motorist convicted of a violation of that ordinance or statute cannot challenge its constitutionality in a collateral proceeding to revoke his driver's license under the point system provided by sections 39-7,128 through 39-7,130, R. R. S. 1943.

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

AFFIRMED.

PATRICIA E. FINK, APPELLANT, V. DONALD K. MEISTER ET AL., APPELLEES.

196 N. W. 2d 122

Filed March 31, 1972. No. 38156.

1. **Negligence: Motor Vehicles.** Generally it is negligence, as a matter of law, for a motorist to drive so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights.
2. ———: ———. Exceptions to the general rule that a motorist who cannot stop his automobile in time to avoid a collision with an object within the range of his vision is negligent as a matter of law embrace those situations where reasonable minds might differ as to whether the motorist was exercising due care under the particular circumstances.

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

Robert R. Gibson, for appellant.

Cline, Williams, Wright, Johnson & Oldfather, for appellees.

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

BOSLAUGH, J.

This action arises out of an automobile accident. The trial court dismissed the action at the close of the plaintiff's evidence. The sole question before us is whether the plaintiff's evidence presented a question for the jury.

The accident happened at about 9:15 p. m., on January 6, 1970, on State Highway No. 50 approximately 3.4 miles south of Syracuse, Nebraska. It was a dark night but the weather was clear. The surface of the highway was dry.

The highway at that point runs straight north and south and is a 2-lane highway paved with concrete, 22 feet wide. There was some snow on the shoulders of the highway and there were piles or ridges of snow

near the ditch formed by snow which had been removed from the highway.

The defendant, David Meister, had been driving a 1967 Chevrolet automobile owned by his father, Donald K. Meister, south on Highway No. 50. He was in the process of making a U-turn on the highway when his automobile stalled. The record is not clear as to the exact position of the Meister automobile at the time of the accident, but apparently it extended across parts of both lanes and was headed somewhat to the northeast. There is no evidence as to why the automobile stalled; how long it had remained in that position; or whether any efforts were made to remove it from the traveled portion of the highway. The specifications of negligence alleged against the defendants were failure to keep a proper lookout; failure to maintain reasonable control; and turning from a direct course upon a highway when the movement could not be made with reasonable safety.

The plaintiff, Patricia E. Fink, was driving her 1963 Dodge automobile south on Highway No. 50 at about 60 miles per hour. The headlights on her automobile were turned on but the evidence does not show whether they were on high beam. The plaintiff was not wearing glasses at the time of the accident although she is nearsighted and her driver's license was then restricted to require glasses while driving.

The plaintiff testified that as she came over a hill she saw something in the road in front of her; the defendant's automobile seemed to be only 2 to 4 car lengths away; she told her sister who was riding in the rear seat to hit the floor; the collision occurred; and the car went through the ditch and then stopped.

The impact occurred in the west or southbound lane of the highway. The left front part of the plaintiff's automobile struck the left rear fender of the Meister automobile. After the impact the plaintiff's automobile entered the ditch on the west side of the highway,

struck a mailbox and telephone pole, and traveled approximately 310 feet through the snow before coming to rest. There were no skid marks, and the evidence indicates that the plaintiff did not apply her brakes before the impact.

The accident was investigated by Charles L. Griffith, a state patrolman. He testified that the impact area was located in the southbound lane, 500 to 600 feet south of the crest of the hill. The photographs which are in evidence corroborate his testimony in this regard.

Lester Feurer was the first person to arrive after the collision. The plaintiff had passed Feurer about ½ mile south of Syracuse, Nebraska. Feurer was then traveling about 50 miles per hour. Feurer stopped when he noticed some movement in the highway approximately 100 yards in front of him. This proved to be one of the passengers from the Meister automobile who was then 10 to 15 yards north of the Meister automobile and waving his arms to stop traffic.

Generally it is negligence, as a matter of law, for a motorist to drive so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights. Bartosh v. Schlautman, 181 Neb. 130, 147 N. W. 2d 492. The rule is not applicable where the object struck could not ordinarily be observed by the exercise of ordinary care in time to avoid a collision or reasonable minds might differ as to whether the motorist was exercising due care under the circumstances.

The plaintiff argues that the rule should not be applicable in this case because the color of the Meister automobile was such that it tended to blend in with the pavement. The record does not show the color of the Meister automobile and the photographs which are in evidence do not support this contention. There is nothing in the record to avoid the application of the rule. If the plaintiff had maintained a proper lookout and

control of her automboile the accident would not have happened.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES HENRY MATHEWS, JR., APPELLANT.
196 N. W. 2d 162

Filed March 31, 1972. No. 38226.

Criminal Law: Sentences: Homicide. A sentence of not less than 4 nor more than 7 years for manslaughter is not excessive.

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

Clayton H. Shrout of Shrout, Lindquist, Caporale, Brodkey & Nestle, 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.

SPENCER, J.

Defendant, James Henry Mathews, Jr., is appealing from a sentence of not less than 4 nor more than 7 years in the Nebraska Penal and Correctional Complex on a conviction for manslaughter.

The only question presented is the excessiveness of the sentence. We have reviewed the record and the presentence report and conclude that a sentence of not less than 4 nor more than 7 years, which is well within the statutory range for manslaughter, is not excessive.

Judgment affirmed.

AFFIRMED.

WILMER G. JOHNSON, APPELLEE, V. HAHN BROTHERS CONSTRUCTION, INC., A CORPORATION, APPELLANT.
196 N. W. 2d 109

Filed March 31, 1972. No. 38284.

1. **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.
2. **Workmen's Compensation: Master and Servant: Evidence.** The test usually employed in this state to determine whether the relationship of master and servant exists is whether the alleged employer has the control of the workman and of the details, mode, and manner of doing the work.
3. **Workmen's Compensation: Words and Phrases.** The words "arising out of" refer to the origin or cause of the accident and are descriptive of its character, while the words "in the course of" refer to the time, place, and circumstances of the accident.
4. **Workmen's Compensation: Evidence.** Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved.
5. **Workmen's Compensation: Master and Servant: Evidence.** In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard.
6. **Workmen's Compensation: Trial: Intoxicating Liquors.** In a workmen's compensation case the burden of proof on the defense of intoxication is on the employer.

Appeal from the district court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Pilcher, Howard & Dustin, for appellant.

Nelson, Harding, Marchetti, Leonard & Tate and Kermit A. Brashear, II, for appellee.

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

CLINTON, J.

The defendant, Hahn Brothers Construction, Inc., appeals from a workmen's compensation award made to the plaintiff by the district court for Douglas County, Nebraska, which followed an appeal to and trial de novo in that court after a denial of recovery by a single judge of the Workmen's Compensation Court.

On this appeal the following three assignments of error are made, viz., the district court erred in finding: (1) That a contract of hire existed which gave rise to an employee-employer relationship between the parties; (2) that the plaintiff was acting in the course of his employment at the time of his injury; and (3) that the injuries arose out of the employment. Included within the above assignment is the contention that the plaintiff's injuries were caused by his being in a state of intoxication at the time. We affirm the judgment of the district court.

There are some substantial conflicts in the evidence presented to the district court on the basis of which it made its findings. In the case of Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285 (1971), this court recently called attention to the provisions of section 48-185, R. R. S. 1943, pertaining to review by this court of judgments of the district court in workmen's compensation cases, and said: "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." So far as is pertinent to this case the relevant portions of section 48-185, R. R. S. 1943, are: "A judgment, order, or award of the district court may be modified

or set aside only upon the grounds that . . . (3) the findings of fact are not supported by the evidence as disclosed by the record and, if so found, the cause shall be considered de novo upon the record."

We accordingly have reviewed the record here to determine whether the findings of fact are supported by the record. After such review we cannot say that the district court's findings are not supported by the evidence.

We briefly summarize the record. It establishes without dispute that on the evening of February 10, 1970, the plaintiff, Johnson, a bricklayer, met Harry Hahn, president and manager of the defendant, at the Omaha Bricklayer's Union Hall, where Hahn had gone for the apparent purpose of attempting to employ a bricklayer. Johnson's desire for employment was there made known to him. At that time Hahn told Johnson to report at the defendant's work site near 114th and Maple Streets in Omaha, Nebraska, at 8 o'clock a.m. the following morning.

There is substantial conflict in the testimony as to some of what occurred the following morning. Both Hahn and Johnson agree that Johnson reported at the site about an hour late. Johnson's testimony was that he reported on time at a site which he thought was the defendant's project. After waiting for quite some time and after no one showed up, he telephoned one Kisicki, a union representative through whom he had met Hahn the previous evening, and obtained information from him as to another possible place of employment. When leaving this first site to go to the other location Johnson stated he discovered he had been at 108th Street instead of 114th Street and he then proceeded to the defendant's construction site. Kisicki verified the telephone conversation and stated he had received it before 9 o'clock a.m.

Johnson testified that when he reached the defendant's work site he met Harry Hahn and attempted to

explain to him why he was late and was told by Hahn to report to Helmut Hahn, the foreman at the project; and that he then went over to the scaffolding where Helmut was working and started to climb it to talk to Helmut in order to get instructions as to where he was to work.

It is undisputed that he fell about 12 feet from the scaffolding at that time and before he reached the platform where Helmut was working. He there suffered the injuries which give rise to this litigation.

Hahn's testimony was that when Johnson arrived he was intoxicated, he stumbled several times, and he talked incoherently; that Hahn then told Johnson he could not go to work that morning and he sent Johnson home; and that Johnson had taken his tools out of the car, but put them back when he was told he could not go to work. Hahn then started to leave but observed Johnson crossing the street to the construction site and as Johnson did so he stumbled several times.

Homer Smith, an employee of the defendant who was about 20 or 30 feet away when the conversation between Hahn and Johnson took place, testified he heard Hahn tell Johnson in a loud voice to put his tools away, that he was not going to work that day, and also that Johnson at that time put the tools back in the car. Johnson did not remember whether he had taken the tools out of the car or not.

Helmut testified that he saw Johnson when Johnson's head came over the scaffold and Helmut shouted: " 'Look out, Bill.' " Then he testified: ". . . away he went." No one present including Johnson could testify as to the cause of the fall. There was no communication from Johnson to Helmut except that Helmut testified that before Johnson began the climb he repeated one or more times: " 'Helmut, I did a stupid thing.' "

With reference to the issue of intoxication the only testimony in addition to that of Hahn was Johnson's denial that he had consumed any alcoholic beverage that

morning; Kisicki's testimony that the telephone conversation with Johnson was normal in all respects; and the testimony of Johnson's former wife, a licensed practical nurse at the hospital where Johnson was taken after his injury, who testified that she helped undress him and smelled no alcohol on his breath. Homer Smith did not testify on the issue of intoxication and neither did Helmut.

Hahn testified further that following the accident he locked Johnson's car so that the tools would not be stolen and that he took the key to the hospital and gave it to the former Mrs. Johnson. Mrs. Johnson testified that when she thanked Hahn for the key and locking the car he stated: " 'It's just part of my job as his employer.' " She also testified that he said: " 'Don't worry about anything. We have insurance that will cover all of this.' " Hahn denied making these last two statements.

Evidence was introduced to establish that it was the usual thing for a bricklayer reporting for work for the first time to go to the foreman for assignment. Helmut testified that it was his duty to assign workmen to their place of work. Hahn testified that only he could hire and fire workmen.

It clearly appears that there is in the record reasonable competent evidence to support the district court's findings. On the issue of the employee-employer relationship the test "usually invoked in this state is whether the alleged employer has the control of the workman and of the details, mode and manner of doing the work." Williams v. City of Wymore, 138 Neb. 256, 292 N. W. 726. Without dispute, Johnson was told by Hahn on the evening prior to the injuries to report for work the following morning. If Johnson's version is to be believed then when he reached the work site he was told by Hahn to report to the foreman for assignment. This evidence is clearly sufficient to establish a contract of hire and control in the employer.

On the issue of whether the injury arose out of and in the course of employment this court has said the words "arising out of" refer to the origin or cause of the accident and are descriptive of its character, while the words "in the course of" refer to the time, place, and circumstances of the accident. Appleby v. Great Western Sugar Co., Inc., 176 Neb. 102, 125 N. W. 2d 103. Also: "Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved." Oline v. Nebraska Nat. Gas Co., 177 Neb. 851, 131 N. W. 2d 410. " 'In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard.' " Simon v. Standard Oil Co., 150 Neb. 799, 36 N. W. 2d 102.

The evidence without dispute supports a finding that Johnson was on the work premises at the time of his injury; there is reasonable competent evidence to support a finding that at the time of his injury he was in the act of reporting to the foreman for the purpose of obtaining his work assignment. This brings him within the ambit of the rules just stated. Cases similar in principle to this one are: Fidelity & Casualty Co. v. Kennard, 162 Neb. 220, 75 N. W. 2d 553, where a woman employee of a hotel slipped and suffered injury just as she was arriving at the outside of the hotel door to report for duty, but before she had actually undertaken any work; and McDonald v. Richardson County, 135 Neb. 150, 280 N. W. 456, where an employee, leaving the premises of her employer in the usual and customary way after her work was ended, slipped and fell outside the building where she worked but while still on the grounds of her employer.

Whether Johnson was intoxicated at the time of his injury was a disputed question of fact. We need not decide whether the evidence is sufficient to support a finding that intoxication was the cause of his injury. The district court by its findings that the injuries arose out of and in the course of the employment has determined the defense of intoxication favorably to Johnson. The burden of proof on this defense is on the employer. §§ 48-107, 48-127, and 48-151 (7), R. R. S. 1943; Parson v. Murphy, 101 Neb. 542, 163 N. W. 847, overruled on other grounds in Meyer v. Nielsen Chevrolet Co., 137 Neb. 6, 287 N. W. 849.

The judgment of the district court awarding compensation and medical expense to the plaintiff is affirmed. The plaintiff is awarded an attorney's fee of $750 for services of his attorney in this court.

AFFIRMED.

KENNETH WULF, APPELLEE, V. FARM BUREAU INSURANCE COMPANY OF NEBRASKA, APPELLANT.
196 N. W. 164

Filed March 31, 1972. No. 38377.

1. **Statutes.** All statutes relating to the same subject should be construed and considered together for the purpose of giving effect to the legislative intention. All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision.
2. **Appeal and Error: Judgments.** In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority nor jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed.
3. **Appeal and Error: Motions, Rules, and Orders: Limitations, Statute of: Trial.** An order entered denying a plea of the statute of limitations, after a separate hearing on that issue, is not a final or appealable order.

Appeal from the district court for Nuckolls County: ORVILLE COADY, Judge. On motion to dismiss appeal. Dismissed without prejudice.

Luebs, Tracy, Huebner & Dowding, James A. Beltzer, and E. Steven Leininger, for appellant.

Downing & Downing, for appellee.

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

NEWTON, J.

This is an action on an insurance policy brought to recover windstorm damages. As a defense, defendant pleaded the statute of limitations and a separate trial was requested on that issue as provided for in section 25-221, R. S. Supp., 1971. The trial court resolved the issue in favor of plaintiff and defendant appeals without awaiting trial of other issues or the entry of final judgment.

The case is now before us on plaintiff's motion to dismiss the appeal grounded on the fact that a final judgment or determination of the case has not been entered. We sustain the motion.

The statute above referred to provides: "If the issue raised by the statute of limitations is finally determined in favor of the plaintiff the remaining issues shall then be tried. If the issue raised by the statute of limitations is finally determined in favor of the defendant the action or actions barred by the statute of limitations shall be dismissed." Defendant contends that the words "finally determined" import such a final determination of the issue presented on the statute of limitations that an immediate appeal is required if the right to a determination of the issue in the Supreme Court is to be preserved. We do not believe that this is the legislative intent. The statute itself indicates that if the defendant's plea is upheld, a further *order of dismissal* must be entered. This indicates the determination of the issue is interlocutory in nature and not to be considered as a final order warranting an appeal.

We have repeatedly held that: "All statutes relating

to the same subject should be construed and considered together for the purpose of giving effect to the legislative intention. All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision." State ex rel. Retchless v. Cook, 181 Neb. 863, 152 N. W. 2d 23.

Section 25-1911, R. R. S. 1943, provides for appeal *only* on "judgment rendered or final order made." "In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority nor jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed." Busboom v. Gregory, 179 Neb. 254, 137 N. W. 2d 825. Section 25-1911, R. R. S. 1943, has not been amended and the two statutes must be construed together and reconciled if possible. In so doing, it seems clear that section 25-221, R. S. Supp., 1971, intends that an order entered denying relief on a plea of the statute of limitations is to be treated as an interlocutory order and that any error in the ruling made may be presented in an appeal taken after final disposition of the case. It is in the same relative position as is faced when the court overrules a demurrer, a plea in abatement, a motion to amend, or a motion to dismiss.

The defendant's appeal is dismissed without prejudice.

DISMISSED WITHOUT PREJUDICE.

IN RE APPLICATION OF WALTER A. OHMART, JR., ET AL. WALTER A. OHMART, JR., ET AL., APPELLEES, V. S. E. DENNIS ET AL., APPELLANTS.

196 N. W. 2d 181

Filed April 7, 1972. No. 38133.

1. **Administrative Law: Time: Motions, Rules, and Orders.** The statutory requirement that the State Oil and Gas Conservation Commission enter its order within 30 days after hearing is directory, not mandatory.

2. **Actions: Parties: Judgments.** Indispensable parties to a suit are those who have such an interest in the controversy that the court cannot render judgment without affecting their interest.
3. **Administrative Law: Judgments.** The preclusive effect of an administrative decision depends upon many factors.
4. **Administrative Law: Oil and Gas: States: United States: Property.** State law applies to leasehold interests under the Mineral Leasing Act for Acquired Lands where no important threat to any identifiable federal policy or interest appears.
5. ———: ———: ———: ———: ———. A favorable determination by the Secretary of the Interior is essential under the Mineral Leasing Act for Acquired Lands to inclusion of federal lands with non-federal lands in a State pooling order.
6. **Administrative Law: Oil and Gas: States: United States: Time: Property.** The State Oil and Gas Conservation Commission possesses power in a pooling order concerning federal and non-federal lands to make the order retroactive to the date of first production.

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

Lyman & Meister and Howard P. Olsen, for appellant.

Van Steenberg, Winner & Brower, for appellee Ohmart.

Shino Kashiwa, Richard A. Dier, Robert Becker, Jacques B. Gelin, Larry G. Gutterridge, and V. McDonald, for appellee United States of America.

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

SMITH, J.

On appeal from the State Oil and Gas Conservation Commission the district court pooled interests in a 1/16th section, approximately 40 acres, of oil-producing land. The interests were held by S. E. Dennis, and his lessee, Banner Oil Company, and the United States of America, and its lessee, Walter A. Ohmart, Jr.

Dennis and Banner appeal from district court. They assert five errors: (1) The pooling order of the commission from which they appealed to district court was void in that more than the 30 days allowed by statute

had elapsed between submission and decision of the controversy; (2) an indispensable party received no notification respecting the proceeding; (3) a mineral lease from the United States to Walter A. Ohmart, Jr., without competitive bidding was void; (4) a judgment of dismissal by the district court in a prior proceeding precluded the present claim of the United States and Ohmart for compulsory pooling; and (5) the United States and Ohmart in justice and equity possessed no right to share in production prior to the date they applied to the commission in this proceeding for a pooling order.

The United States in 1924 and 1927 acquired a fee simple absolute title from William Hartley to 7.71 per cent of the land in the spacing unit for location of wells. The tract was governed by the Mineral Leasing Act for Acquired Lands, now 30 U. S. C., §§ 351 to 359 (1970). On May 24, 1963, Banner commenced drilling a well on the acreage leased from Dennis. On June 20 it reported the completion of a producing oil and gas well, Dennis No. 1, on the leasehold acreage at a depth of 5,082 feet on June 5. Production began June 6. Dennis No. 1 stopped producing in May 1970. Banner then drilled Dennis No. 2 which was producing from October 1970 at least to December 1, 1970, the date of trial in district court.

More than 30 days elapsed between submission of the controversy to the commission and the entry of the commission order. The Legislature required the commission to enter its order within 30 days after the hearing. § 57-911(6), R. R. S. 1943. The subsection also authorized the commission to act on its own motion. The Legislature provided for the appeal to the district court which was to hold a trial de novo and independently to determine issues of fact and conclusions of law. See § 57-913(1), R. R. S. 1943. The 30-day requirement is directory, a rule of practice, and not mandatory. The delay did not constitute prejudicial error.

The indispensable party is said to be Gering-Fort

Laramie Irrigation District which received a quitclaim deed, dated December 1, 1932, from Hartley and wife to approximately 1.24 acres which was to form part of the spacing unit designated by the commission in 1959 for location of wells. Dennis testified the deed related to an easement that the district had abandoned, no one having used it for the past 10 or 12 years. His petition on appeal alleged that he and Nina Dennis owned the entire 1/16th section and that he and Banner were the only owners of any oil or gas leasehold, mineral or royalty interest in the 1/16th section.

Indispensable parties to a suit are those who have such an interest in the controversy that the court cannot render a final decree without affecting their interests. See Cunningham v. Brewer, 144 Neb. 218, 16 N. W. 2d 533 (1944) (supplemental opinion). The testimony of Dennis and the nature of the deed lead us to conclude that the district was not an indispensable party. See Smith v. Berberich, 168 Neb. 142, 95 N. W. 2d 325 (1959).

The alleged invalidity of the lease to Ohmart rested mainly on the assertion that the tract lay within a known geologic structure. Under such circumstance the law required competitive bidding. See 30 U. S. C., §§ 226(b), 351, and 352 (1970). Dennis and Banner unsuccessfully litigated the validity of the lease in intermediate administrative proceedings within the Department of the Interior. They failed to perfect an appeal to the Secretary of the Interior who dismissed the appeal on February 28, 1966. See 43 C. F. R., § 1840.0-7 and former 43 C. F. R., § 1844.3.

The United States presses claim preclusion on the validity of its lease. The law is not settled, especially when an administrative body made the first decision. The preclusive effect of an administrative decision depends upon many factors. It is important that the fact-finding process of the administrative body approximate that of a court, that the body observe fair standards of

evidence, that the facts be adjudicative, and that the process not deprive a party of his right to a jury trial. Those criteria are not exclusive, but they assist us in outlining the applicability of preclusion. See, 2 Davis, Administrative Law, §§ 18.01, 18.03, 18.08, and 18.12, pp. 545 to 547, 557 to 568, 597 to 605, and 625 to 628 (1958); Vestal, Res Judicata/Preclusion, V-223 to V-225 (1969). The administrative decision against Dennis and Banner precluded them from challenging the validity of the lease in this proceeding. See, generally, Henriques, "The Impact of Recent Decisions and Administrative Procedures of the Department of the Interior on Oil and Gas Leasing by the Bureau of Land Management," 14 Rocky Mt. Min. L. Inst. 33 (1968).

The claim preclusion asserted by Dennis and Banner grew out of a prior application by Ohmart to pool these interests. The commission on March 17, 1964, ordered compulsory pooling effective April 10, 1964. Dennis and Banner appealed to district court. The United States under Title 28 U. S. C., § 2410 (1969), moved to dismiss the Department of the Interior for lack of jurisdiction over the person and the subject matter. The Secretary of the Interior had not determined that such pooling would be in the public interest. Dennis and Banner then moved for summary judgment. The district court on August 8, 1966, found that neither it nor the commission had acquired jurisdiction over the United States. It accordingly dismissed Ohmart's application and vacated the order of the commission. The brief of counsel for the United States offers no clue to the reason for the position of the Secretary of the Interior, and we discover none in inspecting an unnecessarily voluminous record.

Congress possesses power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. United States Constitution, Art. IV, § 3, para. 2. The police power of the State extends over federal lands in the ab-

sence of a preempting federal interest. See Texas Oil & Gas Corp. v. Philipps Petroleum Co., 277 F. Supp., 366 (D. C., W. D. Okla., 1967), affirmed, 406 F. 2d 1303 (10th Cir., 1969). State law applies to leasehold interests like that of Ohmart under the Mineral Leasing Act for Acquired Lands where no important threat to any identifiable federal policy or interest appears. See Wallis v. Pan American Petroleum Corp., 384 U. S. 63, 86 S. Ct. 1301, 16 L. Ed. 2d 369 (1966).

Much language in the federal statutes tends to point to the absence of any federal control in the presence of a conservation act like that of Nebraska. Without specifying the signs we conclude that a favorable determination by the Secretary of the Interior is essential to inclusion of federal lands with non-federal lands in a state pooling order. See, Title 30, U. S. C., §§ 226(j), 351 to 359 (1971); Texas Oil & Gas Corp. v. Phillips Petroleum Co., *supra;* cf. Wallis v. Pan American Petroleum Corp., *supra.* It follows that the judgment of the district court in the first proceeding did not preclude the United States or Ohmart from applying for the pooling order under review.

The district court ordered the pooling respecting production retroactive to June 5, 1963. It reserved for later hearing, however, issues concerning costs of drilling completion and of operating wells, and allocation of operating, drilling, and completion expenses.

The Legislature has empowered the Oil and Gas Conservation Commission to suspend the operation of the conservation act to federal lands in certain situations. The power is subject to the requirement that conservation and prevention of waste be accomplished. See § 57-920, R. R. S. 1943. The definition of waste embraces abuse of a correlative right resulting in an owner in the pool producing more than his just and equitable share of the oil from the pool. § 57-903(1) (c), R. R. S. 1943. See, also, § 57-909, R. R. S. 1943. The opposition of the United States in the prior proceeding confounds us, for

even a temporary national policy against pooling seems doubtful.

Assuming an analogy to a carried-owner's share of cost, we see an arguable advantage to the United States and Ohmart in the delay, although pooling is ordinarily a low-risk enterprise. The advantage may be lessened, perhaps offset, by allowance of a cost item for risk of capital. See, §§ 57-910.03(5) (c) and 57-910.10, R. R. S. 1943; Smith, "The Kansas Unitization Statute; Part II," 17 Kan. L. Rev. 133, 145 (1968); Meyers and Williams, "Petroleum Conservation in Ohio," 26 Ohio St. L. J. 591, 622 (1965). A review of the fairness of an order relating to shares of production but not costs is difficult. Notwithstanding strong doubts on the equity of retroactivity, we affirm the judgment of the district court.

AFFIRMED.

CLINTON, J., dissenting in part.

For the reasons set forth in my dissenting opinion in Farmers Irr. Dist. v. Schumacher, 187 Neb. 825, 194 N. W. 2d 788, I dissent from that part of the opinion approving the retroactivity of the commission order and the complete disregard of the statutory requirement of the establishment of a spacing unit prior to pooling and the disregard of the necessity of compliance with commission Rule 338 requiring notice and hearing to establish a spacing unit.

NEWTON, J., dissenting.

I respectfully dissent. Under the criteria laid down in Farmers Irr. Dist. v. Schumacher, 187 Neb. 825, 194 N. W. 2d 788, the Oil and Gas Conservation Commission order should not be retroactive. Appellees voluntarily withdrew from the first proceedings instituted to obtain a pooling order. They should not now be permitted recovery of oil produced prior to the institution of the second proceeding now on appeal to this court.

CITY OF PARKVIEW, STATE OF NEBRASKA, A CITY OF THE SECOND CLASS, ET AL., APPELLANTS, V. CITY OF GRAND ISLAND, STATE OF NEBRASKA, A CITY OF THE FIRST CLASS, ET AL., APPELLEES.

196 N. W. 2d 197

Filed April 7, 1972. No. 38137.

1. **Trial: Statutes: Evidence.** The burden is on one who attacks a statute valid on its face to prove facts to establish its invalidity.
2. **Annexation: Municipal Corporations: Statutes.** The requirement in section 16-122, R. S. Supp., 1969, that the annexing city have "sewer treatment facilities" with capacity to serve the city annexed, was intended to insure that the residents of the annexed city would be able to receive sewage treatment service from the annexing city.
3. **Annexation: Municipal Corporations: Administrative Law.** A city of the first class is not required to obtain a recommendation from the planning commission before proceeding with annexation matters.

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

Sam Grimminger, John Wagoner, and Stephen T. McGill, Lyle E. Strom, William J. Brennan, Jr., and C. L. Robinson, of Fitzgerald, Brown, Leahy, McGill & Strom, for appellants.

Richard L. DeBacker, Duane A. Burns, and William Howland, for appellees.

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

BOSLAUGH, J.

This is an action to determine the validity of the annexation of the City of Parkview, Nebraska, by the City of Grand Island, Nebraska. The plaintiffs are the City of Parkview and officials and residents of that city. The defendants are the City of Grand Island, officials and residents of that city, and the Attorney General. The trial court found the annexation was valid. The plaintiffs have appealed.

Parkview is a city of the second class entirely surrounded by Grand Island, a city of the first class. The annexation was by ordinance pursuant to section 16-122, R. S. Supp., 1969. The statute authorizes a city of the first class to annex a city of the second class if certain conditions exist.

The plaintiffs contend that section 16-122, R. S. Supp., 1969, is unconstitutional because it is so limited in its application that it will never apply to any city or village other than Parkview. A similar argument was made and rejected in Campbell v. City of Lincoln, 182 Neb. 459, 155 N. W. 2d 444.

The statute is not invalid on its face. The class is not closed and it is possible that other first-class cities in Nebraska may eventually surround adjacent villages and cities of the second class which will be subject to annexation under the statute. So far as the record is concerned, there is no factual showing to support the plaintiffs' contention. The burden is on one who attacks a statute valid on its face to prove facts to establish its invalidity. Campbell v. City of Lincoln, *supra*.

One of the conditions specified in section 16-122, R. S. Supp., 1969, is that the annexing city shall have "sewer treatment facilities" with capacity to serve the city annexed. The plaintiffs' principal contention in this case is that the sewer treatment facilities of the City of Grand Island did not have sufficient capacity to serve the City of Parkview on December 29, 1969, the date the annexation ordinance was enacted.

The record shows that Grand Island has a modern sewage treatment plant which was completed in October 1965. The plant is described as a complete mixing activated sludge plant. It was designed to receive and treat all of the sewage, both domestic and industrial, originating in the City of Grand Island.

Much of the record consists of testimony concerning the "design capacity" of the plant as compared to its operating experience. There is evidence that the plant

can treat satisfactorily a volume of sewage far in excess of its design capacity. However, it has been necessary frequently to discharge partially treated sewage into the outfall ditch in order to reduce a temporary condition of excess activated sludge in the final clarifiers. Apparently, this condition results when a large volume of sewage, especially grease, is received in a short time from the Swift & Company packing plant nearby. The plaintiffs argue that this condition, termed "overloading," establishes that Grand Island did not have sewer treatment facilities with capacity to serve Parkview.

The purpose of the statutory provision is to insure that, if Parkview is annexed, its residents will be able to receive sewage treatment service from Grand Island. The test is whether there are facilities available to serve the area that is to be annexed. The record shows there are existing mains which can be extended into the annexed area to collect the sewage from Parkview and convey it to the treatment plant. The estimated additional sewage from Parkview which would be received at the treatment plant would be around 1 percent of the plant's present volume or capacity. The expert witnesses called by the defendants testified the plant facilities were adequate to treat the additional sewage that would be received from Parkview.

The additional sewage would be but a very small fraction of the hourly flow received at the plant. It would be such a small part of the volume received by the Grand Island plant, it would have no appreciable effect upon the operation of the plant. Under these circumstances, we think the condition of the statute is satisfied and the record supports a finding that Grand Island has sewer treatment facilities with capacity to serve Parkview.

The plaintiffs further contend that the annexation is invalid because Grand Island did not obtain a prior recommedation from the regional planning commission for Hall County, Nebraska. The regional planning com-

mission is an advisory body established to assist Hall County and the municipalities in Hall County in planning matters.

Section 18-1306, R. R. S. 1943, provides that a municipal governing body shall not take action on matters relating to "the comprehensive development plan, capital improvements, building codes, subdivision development, or zoning" until it has received the recommendation of the planning commission. There is no requirement that a recommendation be obtained in regard to annexation matters.

The judgment of the district court is affirmed.

AFFIRMED.

JAMES N. WRIGHT, APPELLANT, V. ARTHUR F. HAFFKE, DOING BUSINESS AS WEST LAKE GROCERY STORE, APPELLEE.
196 N. W. 2d 176

Filed April 7, 1972. No. 38150.

1. **Appeal and Error: Trial: Evidence.** A jury verdict based upon conflicting evidence will not be set aside unless it is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record.
2. ———: ———: ———. In reviewing the evidence where a jury has returned a verdict for the defendant, the defendant must have the benefit of any and all reasonable inferences deducible from the proof.
3. **Criminal Law: Conspiracy: Evidence: Trial.** 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 defendant's conduct subsequent thereto.
4. **Criminal Law: Weapons and Firearms.** Ordinarily, a firearm may be used if reasonably necessary to prevent the commission of a felony or to arrest a felon after a felony has been committed.
5. **Criminal Law: Weapons and Firearms: Trial: Evidence: Instructions.** When a firearm is used, the question always is whether the force used exceeded permissible limits and is a question for the jury under proper instructions.

6. **Appeal and Error: Trial: Instructions.** **Instructions to the jury must be considered as a whole, and when thus considered, if the law is correctly stated and the case fairly submitted, and the jury could not have been misled, a claim of prejudicial error in the instructions is not available.**

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

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.

SPENCER, J.

This action involves personal injuries inflicted by a gunshot. The jury returned a verdict for the defendant. Plaintiff perfected this appeal. We affirm.

Plaintiff and an individual later identified as Evans entered the store of the defendant, Arthur F. Haffke, at the same time. Plaintiff was wearing a black jacket and Evans an off-white trench coat. One of them asked, "Where's the milk," and was directed to the northwest corner of the store. When the question was asked they were right next to each other. They both immediately headed to the northwest corner. Defendant did not know either man but assumed they were together. He was suspicious of them and secured a gun he had handy and placed it in his pocket. Defendant watched them in a mirror and saw the men conversing back and forth at the dairy box. The defendant signalled his son Warren, who was at the meat counter, to watch also. The two men came back to the checkout stand together. There is a dispute in the evidence as to which one had a carton of milk. Defendant testified it was Evans; plaintiff insists it was he. One of them set the milk down and asked for cigarettes. Defendant placed the cigarettes on the counter and opened the cash register, then was pushed

on the shoulder and knocked off balance into the cigarette case. He then noticed two hands going into the cash register. One of the hands in the cash register had a light cover, the other a black cover. As defendant turned around, he pulled his gun and fired a shot. The whole incident happened very fast.

As the defendant pulled his gun, the men were turning south toward the door. Plaintiff had moved from 5 to 7 feet from the counter and was about 3 feet from the door. Evans was to the side and slightly behind him. Defendant's first shot hit the plaintiff in the back. A second shot was fired at Evans but missed. Evans slipped and fell after the second shot was fired, but got up and ran rapidly toward the west. The entrance and exit to the store was through two doors, side by side, one opening in, the other opening out. The testimony is that Evans headed for the door opening out; the plaintiff for the door opening in. Defendant did not realize at the time he shot that plaintiff was heading for the door which opened in.

The only currency found inside the building was a bloody $10 bill, which plaintiff testified was his and which was near his hand. Defendant testified that this bill had been pushed behind a broom near some shelving at the entrance to the incoming door, where plaintiff fell. Another $10 bill was found under some broken glass outside the door. The first policeman on the scene testified that plaintiff gave his name as "James Green," and that he saw plaintiff pushing the bloody $10 bill behind the broom previously identified.

Plaintiff sets out nine specific assignments of error, and for his tenth assignment alleges seven errors involving instructions. We discuss only those which we deem merit consideration. Plaintiff's principal assignment of error, his first, pertains to the overruling of his motions for a directed verdict. Plaintiff predicates this assignment on his contentions: (1) That the crime was not his but that of Evans; (2) that he could not escape

because he was headed for the door which would not open from the inside; and (3) that the force used by defendant as a matter of law was unduly excessive to protect or recapture property.

As to plaintiff's contention (1), the following principles of law are applicable: "A jury verdict based upon conflicting evidence will not be set aside unless it is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record." Satterfield v. Watland, 180 Neb. 386, 143 N. W. 2d 124.

"In reviewing the evidence where a jury has returned a verdict for the defendant, the defendant must have the benefit of any and all reasonable inferences deducible from the proof." Vacanti v. Montes, 180 Neb. 232, 142 N. W. 2d 318.

"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 defendant's conduct subsequent thereto." State v. Walker, 187 Neb. 482, 191 N. W. 2d 817.

The evidence, while conflicting, was ample to permit the jury to determine that plaintiff was a participant in the robbery, and no purpose will be served by further reviewing the 737 pages of the bill of exceptions herein.

We may summarily dispose of plaintiff's contention (2) by the observation that the jury undoubtedly found that a reasonable man in defendant's predicament would have acted as he did. Defendant testified that he did not realize at the time he shot that plaintiff was headed for the door which opened in. The door, however, immediately adjoined the one opening out, and the action occurred so fast that Haffke did not have time to weigh the various possibilities. The jury undoubtedly found the shooting to be an instantaneous reaction to the assault and robbery.

Plaintiff's contention (3) is the crucial question in

this action. Was the situation such that the defendant was privileged to use a gun to protect or recapture his property? On the record, defendant had been assaulted and the perpetration of a robbery was in progress. Money had been taken and defendant's instantaneous reaction was to stop the felons and retain it. Paraphrasing the Restatement rule, use of force is privileged when property is tortiously taken from the owner's possession and it reasonably appears that the felon is about to remove the property from the owner's premises. Restatement, Torts 2d, § 101 (1) (a) and (b), p. 175.

A person may use reasonable force in defense of his property. The issue under consideration is whether the force defendant used exceeded permissible limits and subjected him to civil liability. It is plaintiff's contention that the use of a firearm in view of the circumstances herein constituted the use of unreasonable force as a matter of law. With this we do not agree. We do not believe that a person must docilely submit to robbery and the spiriting away of his property by a felon. To hold otherwise would seriously hamper the right of law-abiding individuals to peacefully enjoy their property; would encourage felons in the pursuit of their nefarious activities; and would make a farce of our criminal law. Ordinarily, a firearm may be used if reasonably necessary to prevent the commission of a felony or to arrest a felon after a felony has been committed. We do not disagree with plaintiff that the law generally places a higher value upon human life than mere rights of property. When a firearm is used, the question always is whether the force used exceeded permissible limits and is a question for the jury under proper instructions.

In the early case of Fosbinder v. Svitak (1884), 16 Neb. 499, 20 N. W. 866, which involved a firearm, this court held: "A person may, with reasonable force, defend his property or premises, as well as his person, when invaded, and the fact that an injury is inflicted

upon the invading or attacking party will not make the resisting party liable for damages resulting from such injury, if inflicted in the reasonable defense of one's house, lands, or goods."

There is a conflict among the various jurisdictions as to whether one may resort to a firearm to prevent a theft of property. See Annotation, 100 A. L. R. 2d 1012. The conflict, however, is in most instances one of degree. For minor thefts the use of a firearm would not be justified, but for more serious felonies, such as robbery, the use may be justified. In this case, the shooting occurred after the participants had committed an assault and while they were attempting to commit a robbery. Defendant owed plaintiff no duty of affirmative care, and had the right to resist the attempted robbery and to use whatever means lay within his power, necessary to that end, even to the extent of using a firearm to retain his property. It was for the jury to determine, however, whether the plaintiff was actually engaged in an attempt to commit a robbery or, if not, whether defendant had reasonable grounds to so believe.

Plaintiff's second assignment of error is that the court erred in overruling his motion for a mistrial. Defendant called the police file clerk to the witness stand. He elicited the fact that she was employed by the Omaha police department; that she had charge of certain records; that she was subpoenaed to bring two of those records with her; and that they referred to two different individuals. The record then continues: "Q. Mrs. Stone, do the records which you have brought with you today indicate the names and the addresses of the individuals to which these records pertain? A. Yes. Q. Do you have with you a record for James — MR. CANNON: Just a moment, I object to any reference to these records at all at this time, Your Honor. THE COURT: Sustained."

Plaintiff's motion for a mistrial is based on his premise that defendant was attempting to show plaintiff had a

police record. Defendant's offer of proof is directed to the fact that he was only attempting to show both plaintiff and Evans at the time in question lived at the same address, and he had no intention of introducing the records in evidence. The trial court sustained the objection to the testimony, overruled the motion for a mistrial, and at the request of the plaintiff gave the following written instruction: "You are instructed to disregard the testimony of Mrs. Ida Stone of the Omaha Police Department, and you are admonished not to draw any inferences or conclusions from the fact that she was called as a witness." Additionally, the court instructed the jury as follows: "You are instructed that this is a civil action for damages only. You are advised that there are no criminal charges pending, either against the plaintiff or the defendant and that no criminal responsibility can possibly flow from your verdict for or against either party hereto, and your deliberations should not be affected in any way by concern that such results might follow. You are to determine and consider only the issues in this case as explained to you in these instructions."

We do not agree with plaintiff that the testimony adduced was obviously prejudicial. The jury knew the police had been called and interviewed the plaintiff. It would also know the police would have some record of the robbery. Even though Mrs. Stone's testimony was withdrawn from the consideration of the jury by a specific instruction, if defendant's counsel had gone no further than to show that the address of both the plaintiff and Evans at the time of the robbery was the same but did not put the files in evidence, there could be no prejudice. The motion for a mistrial was properly overruled.

Plaintiff's third assignment of error relates to the sustaining of 14 different objections on cross-examination that the question does not reflect the evidence. In the only instance where there could be any possible doubt,

the question was rephrased and answered, so there could be no prejudice. Plaintiff's fourth assignment of error referred to other objections falling in the same category. The rulings in each instance were correct or nonprejudicial.

Plaintiff's fifth assignment of error complains of the sustaining of an objection to the reading of a newspaper article to defendant on cross-examination. From his offer of proof we assume plaintiff was attempting to impeach defendant's trial testimony. If so, he had not made a proper record for that purpose. The objection was properly sustained on the record.

The balance of plaintiff's assignments of error are clearly without sufficient merit to warrant a detailed discussion of them. As to the plaintiff's tenth objection involving instructions, the jury was properly instructed relative to plaintiff's theory of the case, as well as the defendant's. Instructions to the jury must be considered as a whole, and when thus considered, if the law is correctly stated and the case fairly submitted, and the jury could not have been misled, a claim of prejudicial error in the instructions is not available. Beranek v. Petracek, 184 Neb. 516, 169 N. W. 2d 275.

Considered in the light of the above rule, plaintiff's seven specific assignments of error as to instructions are without merit.

For the reasons given, the judgment is affirmed.

AFFIRMED.

JOSEPH DEMONT, BY AND THROUGH HIS FATHER AND NEXT FRIEND, DONALD M. DEMONT, APPELLEE, V. STEVEN MATTSON ET AL., APPELLANTS.
196 N. W. 2d 190

Filed April 7, 1972. No. 38178.

1. **Trial: Negligence: Evidence: Motor Vehicles. An issue of gross negligence is for the jury if the evidence relating thereto is**

conflicting and from which reasonable minds might arrive at different conclusions.

2. ———: ———: ———: ———. When the evidence is resolved most favorably to the existence of gross negligence and thus the facts are determined, the inquiry of whether they support a finding of gross negligence is one of law.
3. ———: ———: ———: ———. More than one act of negligence may in combination amount to gross negligence under the guest statute and the several acts should be weighed as a whole.
4. ———: ———: ———: ———. Whether a particular act or omission may be termed gross depends upon all the facts and circumstances, including other negligent acts or omissions, which may affect the quality of the conduct in the particular case. What would amount to slight negligence under certain circumstances, might under different circumstances be gross negligence.
5. **Trial: Negligence: Motor Vehicles.** Where the head of a family owns or maintains a car for family use and a family member is using the car with the express or implied consent of the owner, the negligence of the family member driver is imputed to the head of the family.
6. **Trial: Assumption of Risk.** Where reasonable minds might differ as to whether a risk was assumed a jury question is presented.
7. **Trial: Negligence: Evidence: Motor Vehicles.** Before contributory negligence of a guest passenger presents a jury question there must be evidence that it proximately contributed to the accident and injuries.
8. **Trial: Instructions.** Instructions must be considered and construed together.

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

Harold W. Kauffman and Eugene P. Welch of Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellants.

Warren C. Schrempp, J. William Gallup, and Richard J. Dinsmore of Schrempp & Bruckner, for appellee.

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

CLINTON, J.

Plaintiff Joseph Demont brought this action to re-

cover damages for personal injuries suffered on December 2, 1966, while a guest passenger in an automobile driven by the defendant Steven Mattson. The accident occurred about 10:30 p.m., on a road in Sarpy County, Nebraska, called Camp Gifford Road but known locally as Roller Coaster Road. It was alleged the accident and injuries were caused by the gross negligence of the defendant Steven Mattson. The defendant Harris Mattson is the father of Steven Mattson and it is alleged that the negligence of Steven is imputed to him by virtue of the family purpose doctrine. At the time of the accident Steven was 18 years of age and a senior in high school. The plaintiff was 15 years of age and a freshman in high school and had never driven a car. Three other boys were in the car, two age 15 and one age 13, and two of these testified in the case. The plaintiff occupied the front seat with Steven. The jury returned a verdict for the plaintiff and the defendants appeal.

The errors assigned on appeal involve the following issues: (1) Was the evidence sufficient to permit the submission to the jury of the question of Steven's gross negligence; (2) did Joseph as a matter of law assume the risk of injury; (3) was the trial court correct in not submitting to the jury the question of Joseph's contributory negligence; (4) was the trial court correct in imputing as a matter of law the negligence of Steven to Harris Mattson; and (5) were there errors in the instructions to the jury.

The main question presented is the sufficiency of the evidence to support a jury verdict of gross negligence on the part of Steven. This court has always recognized that the statutory concept of gross negligence can be expressed only in abstract terms. Boismier v. Maragues, 176 Neb. 547, 126 N. W. 2d 844. It has not always defined gross negligence as that term is used in section 39-740, R. R. S. 1943, in the same way. Gross negligence within the statute is not necessarily wanton, willful, or intentional disregard for a guest's safety. Sterns

v. Hellerich, 130 Neb. 251, 264 N. W. 677. It has been said that the term means "the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others." Larson v. Storm, 137 Neb. 420, 289 N. W. 792. The definition which has now been settled upon and approved by the court in Nebraska Jury Instructions is: " 'Gross negligence' within the meaning of the automobile guest statute is great and excessive negligence, or negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty." NJI No. 7.51. See, also, Olson v. Shellington, 167 Neb. 564, 94 N. W. 2d 20. Where several acts of negligence are supported by the evidence "no one act is to be segregated and weighed separately to determine whether or not it constituted gross negligence. Instead the several acts are to be considered as a whole." NJI No. 7.51. See, also, Olson v. Shellington, *supra;* Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184; Carley v. Meinke, 181 Neb. 648, 150 N. W. 2d 256.

This court has frequently reiterated in slightly varying language that whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule. Boismier v. Maragues, *supra.* In case of doubt or where reasonable minds might differ the evidence must be resolved in favor of the existence of gross negligence, in which case it is a question for the jury. Boismier v. Maragues, *supra;* Thorpe v. Zwonechek, 177 Neb. 504, 129 N. W. 2d 483; Olson v. Shellington, *supra.* Where evidence has been submitted to the jury and the guest plaintiff receives a verdict then this court in determining whether the evidence supports the finding must resolve the evidence most favorably to the existence of gross negligence and when the facts are thus determined the inquiry whether they support the finding is one of law. Olson v. Shellington, *supra;* Paxton v. Nichols, *supra;* Holliday v. Patchen, 164 Neb. 53, 81

N. W. 2d 593. Whether given acts of negligence are gross or slight may depend upon the circumstances under which the acts or omissions occur. Paxton v. Nichols, *supra*. In accordance with the last two cited principles we summarize the facts which the jury could have found resolving them in the light most favorable to the findings of gross negligence. When we do this we conclude that the minds of reasonable men might differ as to whether the facts constitute gross negligence and therefore we find as a matter of law that the jury question was made.

The jury could have found: The trip to Roller Coaster Road was suggested by Steven because "It was different." The road itself is just what the term suggests, very hilly, very winding, and narrow. It is completely unlighted and made darker by surrounding woods. Immediately adjacent to the road edges were embankments or ravines. Some of the curves are very sharp and the hills very steep. It would be difficult for two cars to pass on the road and in places impossible. The road is completely unmarked by traffic control signs. The surface of the road was dirt, gravel, and crushed rock and in places washboardy. The surface of the road afforded an unsuitable base for quick stopping. The driver's view ahead was at times severely restricted by the hills and curves. Steven had driven over this road two or three times in daylight hours previously and was familiar with the general nature and condition of the road, but did not know it well enough to remember where all the curves were and had no very good idea how far ahead the beam of his headlights extended. The accident occurred after the trip down the road had proceeded for about a mile when Steven failed to see a curve and the car left the road, went into a ravine, and hit an embankment. The last 1,000 feet or 2 blocks preceeding the curve where the accident happened the road was straight but downhill. When the car passed the crest of the hill it was going 35 to 40 miles per hour and the

speed increased to about 50 miles per hour as it went down the hill. As it proceeded down the hill, "Stewart in the back seat told Steve that he had better slow down, that there was a curve up ahead." Steven replied he "had been down there before and that he knew what he was doing." The above exchange occurred about half way down the hill or 1 block to 500 feet before the curve. Steven later applied his brakes but not in time to make the curve. He had no real knowledge of how far he could see ahead but the headlights shone ahead for 150 to 200 feet. Pictures of the damaged vehicle were presented in evidence. These show an impact of severe degree. The medical evidence of the plaintiff's injuries also gave some indication of the severity of the impact.

The trial court was correct in submitting to the jury the question whether Steven was guilty of gross negligence proximately causing the accident and the plaintiff's injuries.

We now discuss the matter of the plaintiff's possible assumption of risk and contributory negligence. The evidence showed that the plaintiff had been on the road on one previous occasion and that the reason for going there on the night the accident occurred was because it presented a challenging and thrilling ride. In the light of the plaintiff's age and the fact that he did not drive a car we do not believe it can be said as a matter of law that the plaintiff "assumed the risk." The court properly submitted this question to the jury.

The court did not err in refusing to submit the question of whether the plaintiff was guilty of contributory negligence proximately causing his injuries. A passenger is not required to maintain the same lookout as the driver. There is nothing in the evidence to show that he was made aware of the particular danger before Steven was aware of it or that anything he could have done would or might have been effective in preventing the accident.

The evidence showed that the automobile in question was owned by the defendant Harris Mattson and his wife, that Steven resided with them and was a student, and that he was using the car on this occasion with his father's specific permission. There was no contradicting evidence on these points. The father is the head of the household as a matter of law. The trial court correctly instructed the jury that Steven's gross negligence if any was imputable to Harris Mattson. Piechota v. Rapp, 148 Neb. 442, 27 N. W. 2d 682; Thoren v. Myers, 151 Neb. 453, 37 N. W. 2d 725.

The defendants assert that instruction No. 9 was erroneous and that it conflicted with instruction No. 8 and would confuse the jury. We find no error in these instructions and they are in fact consistent with the principles we previously set forth in connection with the gross negligence issue. Instruction No. 8 is the standard gross negligence instruction. NJI No. 7.51. Instruction No. 9 is a stock instruction, NJI No. 2.03-I, on burden of proof in which the court inserted the adjective gross before the word negligence and the adverb grossly before the word negligent, and also in the instruction described the allegations of negligence which it found supported by the proof. The defendants' special complaint is that part of the instruction is "grossly negligent in *one or more* of the following particulars." (Emphasis supplied.) They claim it permits a finding of gross negligence on one of the alleged items alone. This is true but not erroneous. Instructions Nos. 8 and 9 must be construed together and with the other instructions. Whether gross negligence exists depends upon the facts and circumstances. Boismier v. Maragues, *supra*. One act of negligence may constitute gross negligence depending upon the circumstances. Some of the circumstances which may be considered are other negligent acts. Paxton v. Nichols, *supra*.

The defendants complain of instructions Nos. 13, 14, and 15. These are NJI Nos. 7.02, 7.03, and the first

paragraph of 7.03A absent the words "and he is negligent if he fails to do so." There was no error in these instructions. The jury was still required to find Steven grossly negligent. Instructions must be construed together.

There being no error in the record, the judgment is affirmed.

AFFIRMED.

CHARLES EUGENE BREED, APPELLEE, V. INTERSTATE GLASS COMPANY AND NATIONAL UNION INSURANCE COMPANIES, APPELLANTS AND CROSS-APPELLEES, IMPLEADED WITH GLASS CONTRACTORS, INC., AND EMPLOYERS COMMERCIAL UNION INSURANCE GROUP, APPELLEES AND CROSS-APPELLANTS.

196 N. W. 2d 169

Filed April 7, 1972. No. 38189.

1. **Workmen's Compensation.** Where there have been two injuries to an employee, the question of whether the disability sustained by him should be attributable to the first or to the second depends on whether or not the disability sustained was caused by the original injury or by an independent intervening cause.
2. ———. Where the first injury is not the proximate cause of the disability, the second injury constitutes an independent intervening cause.
3. **Workmen's Compensation: Trial: Evidence.** The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee, arising out of and in the course of his employment.

Appeal from the district court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed in part, and in part reversed and remanded with directions.

Haney, Wintroub & Haney, for appellants.

Charles E. Kirchner and Oliver O. Over, Jr., for appellee Breed.

Cassem, Tierney, Adams & Henatsch, for appellees Glass Contractors, Inc., et al.

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

SPENCER, J.

The issue involved in this appeal is whether apportionment of workmen's compensation benefits between successive employers is permitted in Nebraska. There is now no Nebraska statute or case authorizing or providing any formula for the apportionment of compensation benefits. The compensation judge and the district court apportioned the benefits between the two employers. Interstate Glass Company perfected this appeal. We reverse in part.

The plaintiff injured his back while working for Interstate Glass Company in 1964. He was paid some benefits at that time. On April 20, 1969, plaintiff again injured his back while working for Glass Contractors, Inc. The second injury was an aggravation of the first. Apportionment has been permitted in a few jurisdictions.

This is essentially a case of first impression in Nebraska. The applicable rule in the past is well delineated in Towner v. Western Contracting Corp. (1957), 164 Neb. 235, 82 N. W. 2d 253, and Snowardt v. City of Kimball (1962), 174 Neb. 294, 117 N. W. 2d 543. The rule deduced from these cases is that where there have been two injuries to an employee, the question of whether the disability sustained by him should be attributable to the first or to the second depends on whether or not the disability sustained was caused by the original injury or by an independent intervening cause. Where the first injury is not the proximate cause of the disability, the second injury constitutes an independent intervening cause.

The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained

by the employee, arising out of and in the course of his employment. In this case, plaintiff's disability, as distinguished from his physical condition, resulted from the second injury. Consequently, the first injury was not the proximate cause of the disability. The second injury therefore constitutes an independent intervening cause, and the judgment as to Interstate Glass Company and National Union Insurance Companies should be reversed and the action dismissed.

The other question presented by Charles Eugene Breed, plaintiff, is the allowance of attorneys' fees in the district court, which had also been apportioned between the two employers. Section 48-125, R. R. S. 1943, provides, so far as material herein: "Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed the employee by the court. In the event the employer appeals to the district court from the award of the compensation court, or any judge thereof, and fails to obtain any reduction in the amount of such award, the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court."

Plaintiff *pro se* filed the action against both employers in the workmen's compensation court and did not secure counsel until the appeal was taken to the district court. The appeals herein were perfected by Interstate. Glass Contractors' Inc., offered no evidence in the compensation court, and in the action on appeal to the district court alleged that the award was correct and should be affirmed. The sole subject of its cross-appeal herein is the assessment of an attorneys' fee against it in the district court. On the record herein, the allowance of attorney's fees was improper and is reversed. In all other respects, the judgment for the plaintiff is affirmed

against Glass Contractors, Inc., and Employers Commercial Union Insurance Group.

Judgment reversed and dismissed as to Interstate Glass Company and National Union Insurance Companies. Allowance of attorneys' fees reversed. Judgment affirmed in all other respects against Glass Contractors, Inc., and Employers Commercial Union Insurance Group.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. DON L. MEADOWS, APPELLANT.
196 N. W. 2d 171

Filed April 7, 1972. No. 38254.

1. **Trial: Continuances.** The granting of a continuance is a matter within the sound discretion of the trial judge and a denial of a motion for a continuance will not be disturbed in the absence of an abuse of discretion.
2. **Criminal Law: Trial: Evidence.** The problem concerning the admissibility of evidence of other offenses is a special aspect of the broad general problem of relevancy, and generally the test of admissibility of such evidence is whether the evidence is relevant and material to any issue on the trial, or whether it fairly tends to prove the particular offense charged or an essential element thereof.

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

Thomas H. DeLay and Deutsch & Hagen, 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, Don L. Meadows, was convicted and sen-

tenced for assault with intent to inflict great bodily harm and carrying concealed weapons. Appellant contended he was actually assaulted by the arresting officer, Robert G. Block, of the Plainview police department, and any resistance he made was in defense of his person. We affirm.

Appellant had several brushes with Block on occasions prior to March 20, 1971, when the present offenses were committed. Block testified that about 2 a.m. on the day in question he drove past appellant's home. A block past the home he noticed headlights coming behind him. He speeded up and the other vehicle did likewise. Block recognized appellant's automobile. When Block approached the main highway he saw a state trooper and blinked his lights to attract the trooper's attention. When he reached the highway he slammed on his brakes and ran back to the appellant's car. Block testified that the appellant raised a shotgun and said " 'You are all done,' " or " 'This is all for you.' " Block grabbed the barrel of the shotgun; drew his own gun, a .45-caliber pistol; fired a shot in the air; and then hit the appellant on the head with the gun. The trooper arrived after the shot. They subdued appellant and searched him. They discovered two bayonets in the pockets of his field jacket. Neither of these bayonets was visible before the search. Appellant's shotgun was loaded with 12-gauge slugs.

Appellant testified that when he was stopped, Block said " 'You're not going to follow me tonight,' " then flipped the latch on his pistol, grabbed the barrel of a shotgun which appellant was attempting to push down under the front dash, hit the appellant across the side of the head with the .45, fired a round into the air, then placed the muzzle of the .45 into appellant's throat and stated, " 'You move, you * * *, and I'll shoot you.' "

The trooper testified that he heard the gun shot; came to the scene where officer Block and the defendant were stopped; drew his pistol; ordered appellant out of his

car; frisked him; and found two bayonets in the coat pockets of the field jacket worn by appellant. Appellant was then arrested and charged with assault with intent to inflict great bodily harm and carrying concealed weapons.

Appellant in the cross-examination of Block developed the fact that Block had stopped appellant on three occasions prior to March 20, 1971. On redirect examination it was revealed that two of these encounters with appellant had resulted in arrests and convictions for misdemeanors. Appellant testified that he had been harassed and followed by Block on a number of occasions including December 14, 1970, January 1, 1971, and January 10, 1971. He testified that on the first occasion Block pointed a carbine at him when checking his driver's license; that Block would stop by the appellant's home and follow him; that he was in fear of Block; and on the morning of March 20, 1971, he was assaulted by officer Block.

Appellant alleges 11 assignments of error but does not discuss some of them in his brief. We refer only to those we deem merit discussion.

Appellant complains of the overruling of his motion for a continuance. This was made because the appellant was appealing the two misdemeanor convictions to the district court. These convictions arose out of encounters previously mentioned. This court has repeatedly stated that the granting of a continuance is a matter within the sound discretion of the trial judge and a denial of a motion for a continuance will not be disturbed in the absence of an abuse of discretion. See State v. Peterson, 183 Neb. 826, 164 N. W. 2d 649. The disposition of the misdemeanor charges was not material to the question of defendant's guilt or innocence. The State could not have introduced those convictions in the first instance for any purpose. The trial court did not abuse its discretion in overruling the motion for continuance.

Appellant argues that the court erred in overruling his objection to Block's testimony on redirect examination as to the misdemeanor convictions. Appellant in his cross-examination of Block opened up the subject in developing his defense of harassment. The issue for the prosecution then became whether on these prior occasions the officer had reasonable cause to believe appellant had violated the law. Even the dismissal of the convictions in the district court would not necessarily suggest that the officer did not have reasonable cause to believe that appellant had violated the law. The testimony complained of is as follows: "Q Was he arrested that time also? A Yes, sir. Q Have either one of those cases, has the trial been held on them? A Yes, sir. Q What was the outcome of them? MR. DELAY: I object to the question, incompetent, irrelevant, immaterial, calling for incompetent evidence. THE COURT: Overruled, you may answer. A Found guilty. Q (By Mr. Webster) On both occasions? A Yes, sir. Q What Court was that in? A County. Q In Pierce County? A Yes. MR. WEBSTER: That's all."

The problem concerning the admissibility of evidence of other offenses is a special aspect of the broad general problem of relevancy, and generally the test of admissibility of such evidence is whether the evidence is relevant and material to any issue on the trial, or whether it fairly tends to prove the particular offense charged or an essential element thereof. Here, the evidence could only be received for the purpose of indicating that Block had reasonable grounds for stopping the appellant and did not do so merely for the purposes of harassment. It was appellant and not the prosecution who injected the issues of the December 14, 1970, and January 1 and January 10, 1971, incidents into the case.

In the context in which this case was tried, no one could consider appellant's guilt or innocence of the offenses as having a bearing on his propensity or disposi-

tion to commit the crimes of assault and carrying concealed weapons. The real question in connection with these other occasions was whether Block had harassed the appellant to the point that appellant was put in fear of his life and believed it necessary to carry weapons for his own defense. In this context we find the evidence was admissible on the issue of harassment.

There is no question in our minds as to appellant's guilt. The evidence is undisputed that he was following Block's car at 2 o'clock in the morning, without any reasonable explanation for being on the streets of Plainview at that hour. Nor is there any reasonable explanation why appellant had a loaded shotgun in his car and two bayonets in the pockets of his field jacket. Appellant testified the gun and the bayonets were not in his car earlier in the evening. He put them there at approximately 1:30 that morning. The most plausible inference is that he was looking forward to a showdown with Block.

The last assignment we consider is appellant's complaint on the refusal of the trial judge to permit him to testify about an encounter with Block some 7 weeks after the incidents involved herein. This assignment is without merit. The reason the court permitted testimony about the previous encounters was that appellant was trying to convince the jury he was acting in self defense, and, because of the previous incidents, he had reason to be afraid of Block. Such justification is entirely lacking with respect to any incident taking place after the incidents resulting in the present criminal charges. This subsequent episode could have no relevance to the crimes of which appellant was convicted, and the objection to such evidence was properly sustained.

For the reasons given, the judgment is affirmed.

AFFIRMED.

CLINTON, J., concurring.

I concur in the result only. The majority opinion

might be taken to approve the proof of convictions of crime by oral and hearsay testimony. I do not believe it should be so construed. Records of conviction may be proved only by the records themselves with proper foundation or certified copies as provided by statute. However, here there was no prejudicial error because the convictions were involved only collaterally (see McCormick on Evidence, § 200, p. 412), and because the appellant was later permitted to show, also by oral evidence, that the convictions were not final and were then pending on appeal.

The majority opinion speaks of the appellant's "defense" of harassment as related to the incidents of December 14, 1970, and January 1 and January 10, 1971. There was nothing in the incidents of those dates which would have justified the appellant in arming himself to the teeth and following Block. Likewise there was nothing in those incidents which would justify Block in harassing the appellant. Block's justification for stopping appellant on March 20 arose out of hearsay reports that appellant was out to get him. Apparently the reports had some foundation.

It seems apparent that both parties introduced evidence of the incidents of December 14, January 1, and January 10 for the purpose of supporting *the truth* of their respective versions of the alleged assaults of March 20, 1971, and for the purpose of attacking the emotional stability of the other. For the most part evidence of what was said and done on the prior occasions were simply self-serving declarations on behalf of each. While the incidents were relevant on the issue of truth telling, I seriously doubt they were competent and admissible for that purpose. For this reason the trial court was correct in keeping out the evidence of the subsequent incident. It too was designed only to support the appellant's version of the truth of the incident of March 20. Had proper objection been made the trial court would probably have kept out most of the extraneous

incidents save that pertaining to other threats which were claimed to have been made by the appellant.

McCOWN, J., dissenting.

The majority opinion approves the admission of oral testimony by a witness that defendant had been found guilty of other completely separate misdemeanors. The action is justified upon the ground that one of the defenses here was based on a claim of prior harassment by the arresting officer in the misdemeanor cases. The officer was also the intended victim of the assault here. He was also the witness who testified to the prior convictions. Apparently this method of establishing conviction of another crime by oral testimony was approved on the theory that it established the officer's reasonable cause to believe that the defendant was guilty of the misdemeanors.

As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. See State v. Casados, *ante* p. 91, 195 N. W. 2d 210. Section 25-1214, R. R. S. 1943, provides: "A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof." Even in the case of a felony, the court is required to instruct that evidence of previous convictions can be considered only as affecting credibility. See Vanderpool v. State, 115 Neb. 94, 211 N. W. 605. NJI No. 14.62 is specifically to that effect. Neither that instruction nor anything similar to it was given here. It seems strange indeed, where a statute requires that proof of a felony conviction is only competent by establishing "the record thereof," that conviction of a misdemeanor which generally is not even admissible at all may be established by the hearsay testimony of an arresting officer.

While it may be true that the involvement of the misdemeanors was only collateral here, it is impossible to determine that there was no prejudicial error. The majority opinion as to evidence of other convictions

might be compared to establishing a new medical classification of partial pregnancy which is then declared not to be pregnancy because it is only termed partial. No such assumption should be indulged here.

STATE OF NEBRASKA, APPELLEE, V. JOHN B. THUNDER HAWK, APPELLANT.
196 N. W. 2d 194

Filed April 7, 1972. No. 38262.

1. **Criminal Law: Right to Counsel.** In a criminal prosecution the right of an indigent to the assistance of counsel does not encompass an unbridled right to choose his counsel.
2. ———: ———. When a competent indigent becomes dissatisfied with court-appointed counsel but shows no good cause for removal of counsel, his only alternative is to proceed pro se.
3. **Trial: Evidence.** Whenever the point is reached at which a trier of fact is being told that which it is entirely equipped to determine without a witness' aid, the testimony is superfluous.
4. **Appeal and Error: Sentences: Evidence.** This court may reduce a sentence when in its opinion the sentence is excessive, and it is under a duty to render such sentence against the accused as in its opinion may be warranted by the evidence.

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

Charles F. Fitzke and James T. Hansen, 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.

A jury has found John B. Thunder Hawk guilty of assault with intent to commit rape. He appeals. Assignments of error relate in part to (1) the denial of a motion by Thunder Hawk for appointment of substitute counsel, (2) the admission of a lay opinion into

evidence, and (3) the sentence imposed by the court.

The evidence that Thunder Hawk assaulted his victim with intent to commit rape is overwhelming. Late at night on the occasion in question he ran his vehicle into a ditch. He subsequently stopped an automobile being operated on a dirt road by the victim, a college student and a stranger to Thunder Hawk. She was alone and homeward bound. He forced his way into her automobile and they began to struggle. He then drove her automobile into a nearby bean field and became mired down. The struggle continued in the car and then in the field. While the father of the victim was operating a pickup truck in a search, he found his daughter and Thunder Hawk. In the encounter the latter was struck many times with the fists of the father. The interval of fisticuffs was short, for the father quickly attended to his daughter whom he transported to the hospital. An officer of the State Patrol subsequently arrested Thunder Hawk.

At the scene of the assault in the field a patrol officer found a scrap of cloth. He testified over objection to "portions of what appeared to be pantyhose or similar material." In subsequent testimony on photographs of the scrap he referred to pantyhose. Both the part of the pantyhose taken home by the victim and the scrap were admitted into evidence. The officer possessed no expertise on pantyhose, stockings, or other cloths.

Thunder Hawk testified as follows. He had been intoxicated. He lost consciousness, with one exception, during a long period. The period began prior to the assault and ended subsequent to written admissions by him to a patrol officer. The one lucid interval during the period was recollection of blows struck by a man in a pickup truck.

After the preliminary hearing Thunder Hawk moved for discharge of his appointed counsel, the public defender, and for appointment of a designated lawyer. Among the alleged grounds were lack of confidence and

inadequate investigation in that the public defender had conferred with him only for 5 minutes. The motion was overruled.

In a criminal prosecution the right of an indigent to the assistance of counsel does not encompass an unbridled right to choose his counsel. When a competent indigent becomes dissatisfied with court-appointed counsel but shows no good cause for removal of counsel, his only alternative is to proceed pro se. State v. Bratton, 187 Neb. 460, 191 N. W. 2d 612 (1971). See generally A. B. A., Standards Relating to Providing Defense Services, Approved Draft 1968, § 5.2, Commentary b, p. 48 (1967).

The ruling on the motion of Thunder Hawk was correct. The short visit with him was fully justified. Thunder Hawk with his assertion of loss of consciousness over the critical period of time could not help counsel much in an investigation. The public defender obtained an order for examination of Thunder Hawk by a psychiatrist to be chosen by the defense.

Respecting the nature of the scrap of cloth the testimony of the patrolman was that of a lay witness. Not only the scrap but also the pantyhose worn by the victim were in evidence. The jury possessed an equal opportunity of personal observation. Whenever the point is reached at which a trier of fact is being told that which it is entirely equipped to determine without a witness' aid, the testimony is superfluous. Sears v. Mid-City Motors, Inc., 179 Neb. 100, 136 N. W. 2d 428 (1965), quoting 7 Wigmore on Evidence, § 1918, p. 11 (3d Ed., 1940). See, also, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F. R. D. 315, Rule 701, at 402 (1971). Admission of the testimony in question was erroneous, but the error was harmless.

The statutory minimum and maximum periods of imprisonment for assault with intent to commit rape are 2 and 15 years. § 28-409, R. R. S. 1943. The court sen-

tenced Thunder Hawk to imprisonment for an indeterminate period of 13 to 15 years less credit for jail time.

Evidence pertaining to the sentence is summarized as follows. Thunder Hawk, age 24 at the time of the sentencing hearing in August 1971, had attended the Porcupine School on the Pine Ridge Reservation. His formal education ceased after the 8th grade. He was married and the father of a child 75 days old. A farm laborer, he was not steadily employed.

A psychiatrist examined Thunder Hawk in July 1971, to determine his mental condition at the time of the alleged offense. He elicited the following history. Thunder Hawk had served 2 months in the Marine Corps, receiving a general discharge. During his limited service he made a suicidal gesture by plunging into water on an obstacle course. He subsequently blacked out and struck his drill instructor, who was exerting pressure on him.

The psychiatrist concluded that Thunder Hawk's impulse control was fair but affected by immature thinking and social naivete. He diagnosed dissocial behavior, emphasizing the cultural, educational, and pecuniary handicaps in adjustment to adult life.

Thunder Hawk had no record of prior convictions. During the confinement in county jail, the sheriff named him a trusty. Thunder Hawk at no time violated that trust.

This court may reduce a sentence when in its opinion the sentence is excessive, and it is under a duty to render such sentence against the accused as in its opinion may be warranted by the evidence. See § 29-2308, R. R. S. 1943.

The sentence of Thunder Hawk is reduced to 5 years, less jail time. The judgment, so modified, is affirmed.

AFFIRMED AS MODIFIED.

BOSLAUGH, J., dissenting.

I dissent from that part of the opinion of the court which reduces the sentence of the accused. The offense

was one of extreme violence. I find no basis in the record for eliminating the indeterminate feature of the sentence or for reducing the upper limit fixed by the trial court.

CLINTON, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. GARY DEAN BITTNER, APPELLANT.
196 N. W. 2d 186

Filed April 7, 1972. No. 38304.

1. **Constitutional Law: Witnesses: Evidence: Self-Incrimination.** The Constitutions of Nebraska and of the United States provide that no person shall be compelled to give evidence against himself of an incriminating nature.
2. **Statutes: Witnesses: Self-Incrimination.** By statute, a witness cannot ordinarily be compelled to answer when to do so would expose him to public ignominy.
3. **Courts: Witnesses: Self-Incrimination.** The trial court, in the exercise of a sound discretion, must determine whether a witness' claim of privilege is justifiable.
4. **Criminal Law: Trial: Witnesses: Evidence: Self-Incrimination.** The credibility of a witness in a criminal case cannot be impeached by showing that his reputation for morality is bad, but such an attack must be addressed directly to his reputation for truth and veracity.
5. ———: ———: ———: ———: ———. When chastity is not an issue, evidence of general reputation that a female witness is, or has been, not law-abiding, unchaste, or a prostitute, is inadmissible for the purpose of impeaching the witness either upon cross-examination or by way of rebuttal; nor can these facts be shown for the purpose of impeachment by evidence as to specific acts or instances.
6. **Criminal Law: Trial: Witnesses: Constitutional Law.** The right to confrontation provided by the Sixth Amendment to the Constitution of the United States is not violated when a witness' claim of privilege restricts cross-examination on collateral matters bearing only on credibility and not on facts brought out on direct examination or pertaining to a defendant's guilt or innocence.
7. **Criminal Law: Trial: Witnesses: Instructions.** Ordinarily the

uncorroborated testimony of an accomplice who has been guilty of a conscious falsehood may sustain a conviction if a proper cautionary instruction is given.

8. **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, 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.

The defendant was convicted of possession of a forged instrument. He was sentenced to serve not less than 2 nor more than 4 years in the Nebraska Penal and Correctional Complex and to pay a fine of $250 and costs. On appeal defendant presents three assignments of error, namely: Prejudicial restriction of his right to cross-examine the State's principal witness; conviction on the uncorroborated testimony of an accomplice; and the imposition of an excessive sentence. We affirm the judgment of the district court.

The defendant and one Rachael Ann Williams had driven from Omaha, Nebraska, to North Platte, Nebraska, where she cashed one forged instrument and where they were apprehended when she tried to cash another. The witness pled guilty to a similar charge but had not been sentenced at the time of defendant's trial. She was represented, when testifying, by a court-appointed attorney and upon his advice, refused to answer certain questions propounded on cross-examination on the ground that the answers would tend to incriminate her. No possible prejudice appears except in regard to the question of whether the witness was a prostitute. Objection to the question and witness' claim to privilege

was based upon Article I, section 12, Constitution of Nebraska, and upon section 25-1210, R. R. S. 1943. Both provide that a witness cannot be required to incriminate himself and the cited statute further provides that a witness cannot be compelled to answer when to do so would "expose him to public ignominy." Although generally forbidden by city ordinance, to be a prostitute or to engage in prostitution does not constitute a crime under state or federal law. This being true, it is difficult to see how answering the question would tend to incriminate the witness unless she had been guilty of some sexual offense, such as adultery, where, in the event of prosecution, such an admission might be damaging. As usual in such cases, the record fails to throw any light on the situation of the witness in this respect. In Hoffman v. United States, 341 U. S. 479, 71 S. Ct. 814, 95 L. Ed. 1118, it is said: "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself--his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, * * * and to require him to answer if 'it clearly appears to the court that he is mistaken.'" It was further held that the guarantee against compulsory self-incrimination "must be accorded liberal construction in favor of the right it was intended to secure." On the record before us, this court cannot say that the trial court was guilty of an abuse of discretion. It is entirely possible that such an admission could constitute a link in a chain of evidence required to convict her of some other offense.

The courts are divided upon the question of whether or not impeachment on moral grounds is permissible. In State v. Cox (Mo.), 352 S. W. 2d 665, a prosecution for murder, defendant asked a prosecution witness if she was a prostitute and an objection to the question was sustained. The court stated: "The credibility of a witness in a criminal case cannot be impeached by showing that his reputation for morality is bad, but such

an attack must be addressed directly to his reputation for truth and veracity." Of similar import are People v. Vatek, 71 Cal. App. 453, 236 P. 163; People v. Brown, 136 Cal. App. 2d 244, 288 P. 2d 984; State v. Gress, 250 Minn. 337, 84 N. W. 2d 616; State v. Peele, 67 Wash. 2d 893, 410 P. 2d 599. Generally speaking Nebraska follows this rule and it has been promulgated by statute. See § 25-1210, R. R. S. 1943.

In Pricer v. Lincoln Gas & Electric Light Co., 111 Neb. 209, 196 N. W. 150, it was held: " 'When the matter sought to be elicited would tend to render him (the witness) criminally liable, or to expose him to public ignominy, he is not compelled to answer, * * *.' "

In Daggett v. State, 114 Neb. 238, 206 N. W. 735, it was held: "Evidence of general reputation that a female witness is, or has been, not law-abiding, unchaste, or a prostitute, is inadmissible for the purpose of impeaching the witness either upon cross-examination or by way of rebuttal; nor can these facts be shown for the purpose of impeachment by evidence as to specific acts or instances."

In State v. Wilson, 174 Neb. 86, 115 N. W. 2d 794, it was held: "Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded." See, also, Swogger v. State, 116 Neb. 563, 218 N. W. 416.

There is a recognized exception to the Nebraska rule in cases involving sexual offenses where chastity is an issue. See Redmon v. State, 150 Neb. 62, 33 N. W. 2d 349.

Defendant insists that his right to confrontation was denied by the restriction of cross-examination in the area above mentioned. We cannot agree. The restricted questioning dealt only with a collateral matter bearing solely on the credibility of the witness, not upon facts brought out on direct examination, and not on facts pertaining to the guilt or innocence of the de-

fendant. In United States v. Cardillo, 316 F. 2d 606 (2d Cir., 1963), and in Smith v. United States, 331 F. 2d 265 (8th Cir., 1964), cert. den., 379 U. S. 824, it is stated: "'* * * reversal need not result from every limitation of permissible cross-examination and a witness' testimony may, in some cases, be used against a defendant, even though the witness invokes his privilege against self-incrimination during cross-examination. In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him."

From a practical standpoint, it is difficult to see how prejudice could result in the present instance.

Defendant protests that his conviction is dependent upon the uncorroborated evidence of an accomplice who had previously given false or contradictory statements. Examination of the statements previously given discloses a complete lack of any false or contradictory statement. The witness is corroborated in part. The evidence of others discloses that defendant was driving the automobile when a stop was made at a filling station and a forged money order cashed by the accomplice. Also, a stop was then made at a Safeway Store where an attempt was made to cash a second forged money order and on being refused, the accomplice ran to the automobile, spoke to the defendant, and he attempted to hastily drive away. The present rule in this state governing situations of this character may be found in Smith

v. State, 169 Neb. 199, 99 N. W. 2d 8, and Rains v. State, 173 Neb. 586, 114 N. W. 2d 399, cert. den., 371 U. S. 967, 83 S. Ct. 549, 9 L. Ed. 2d 538, wherein it is stated: " 'The fact that an accomplice has been guilty of wilful false swearing on a material matter is a circumstance that may possibly, in a particular instance and situation, make his testimony unworthy of belief on its face, if it lacks corroboration. In the ordinary case, even though the accomplice may have been guilty of a conscious falsehood on a material matter, and even though his testimony is lacking in corroboration, it may not be utterly unworthy of belief on its face, and, in such a situation, the rights of an accused will be adequately protected if the jury are instructed that the testimony of an accomplice should be scrutinized closely for possible motives for falsification, and that where he has wilfully sworn falsely in regard to a material matter they should be hesitant to convict upon his testimony, without corroboration, and that in no case should they convict unless they are satisfied from the evidence, beyond a reasonable doubt, of the guilt of the accused.' " See, also, Jahnke v. State, on rehearing, 68 Neb. 181, 104 N. W. 154. Such instruction was given.

In regard to the contention that the sentence is excessive, the record discloses that although this was defendant's first felony conviction, he had been convicted of a great many misdemeanors and had, on two occasions, spent quite a little time in the county jail. 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. Gamron, 186 Neb. 249, 182 N. W. 2d 425.

The judgment of the district court is affirmed.

AFFIRMED.

PAUL PHILLIPPE ET AL., APPELLANTS, V. ALVIN HORNS ET AL., APPELLEES.

196 N. W. 2d 382

Filed April 14, 1972. No. 38129.

1. **Deeds: Property: Boundaries: Parties.** Where conveyances from a common grantor to adjoining landowners describe the premises conveyed by lot numbers, but adjoining owners purchase with reference to a boundary line then marked on the ground, the boundary line, as marked on the ground by the common grantor, is binding upon such adjoining landowners and all persons claiming under them irrespective of the length of time which has elapsed thereafter.
2. **Deeds: Property: Boundaries.** Fixed monuments and surveys staked out on the ground control over field notes showing the courses, distances, and quantities; or a description of a survey in words; or a picturization of a survey in a plat.

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

Healey, Healey, Brown & Burchard, for appellants.

Wellensiek, Morrissey & Davis, for appellees.

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

MCCOWN, J.

This is a residential boundary line dispute. The district court found for the defendants, fixed the location of the boundary line, and dismissed plaintiffs' petition.

Williams Addition to Syracuse, Otoe County, Nebraska, was surveyed by the county surveyor in 1959, and dedicated in early 1960. The lots involved here are in Block 3 of that addition. The county surveyor at the time he surveyed and platted Williams Addition also staked out the lots, marking the corners with wooden stakes. Iron pipes were also driven in at the same locations as the wooden stakes. Thereafter the boundaries of particular lots were pointed out to prospective purchasers with reference to the iron pipes. C. R.

Williams was the common grantor who conveyed to both the plaintiffs and defendants. The plaintiffs purchased Lot 1 in September 1961, and Lot 2 in August of 1964. The defendants acquired Lot 4 in September 1963. Lot 4 was a triangular-shaped lot. Its easterly boundary was the westerly boundary of Lots 1 and 2. This line is the disputed boundary line.

The plaintiffs built their home on Lot 1 in 1961 or 1962. The defendants completed the construction of their home on Lot 4 in early 1964. In June 1964, the contractor for the defendants did some excavating and grading along the east boundary line of Lot 4. The lot corners were then staked. He used a string and excavated on the line between the stakes. The excavating came very close to a line of trees the plaintiffs had planted. The contractor had some conversations with the plaintiffs as to the boundary line and the plaintiffs then moved the trees several feet to the east. The defendants then erected a rock wall along the excavated line between Lot 2 and Lot 4.

There was no controversy until 1967 or 1968. In 1968, plaintiffs employed two surveyors who separately retraced the survey from the original plat. One testified that the boundary line was some 5 feet west of the stone wall erected by the defendants. The other found the line to be substantially the same and within 1 foot of that shown on the recorded plat. A third surveyor, Darrel W. Simonds, with the assistance of a contractor who had worked in the addition since 1961, made a survey in 1970. He located one stake set in concrete at the northwest corner of Lot 6. This surveyor also located an iron pipe at the southwest corner of Lot 3 and a 1¼ inch hole covered by a clay tile slab at the southeast corner of Lot 3. He also found an iron pipe at the northeast corner of Lot 2 and the southeast corner of Lot 1. Using these monuments and the lot line measurements and information given on the recorded plat, he then completed his survey. He determined

that the boundary line was 8.2 feet east of the boundary line as shown on the plat. He agreed that if reliance were placed solely on the plat without reference to the monuments he located, the other surveys would be substantially correct. His survey indicated that the entire block had been staked and located on the ground approximately 8.2 feet east of the location shown in the recorded plat.

The City of Syracuse and the Lincoln Telephone and Telegraph Company, using joint poles, set them in 1960 in Block 3 of Williams Addition. These poles were set on a north-south line between plaintiffs' and defendants' lots and in accordance with the lot stakes that were then present. The poles have not been moved since and they confirm the Simonds survey. The trial court, after viewing the premises, accepted this survey as the correct one and fixed the boundary line in accordance with it.

The plaintiffs assert that a survey based upon the original plat and survey establishes the boundary line as against miscellaneous stakes not shown to establish a consistent and accepted boundary line. The defendants assert that the original monuments fixed by the county surveyor during the survey and platting of an addition to a city will control the boundaries even though they are at a place different from that shown in the plat.

The difference is primarily in the interpretation of the facts. At this point it should be noted that the trial court found that the conveyances to the plaintiffs and defendants were from a common grantor and that the plaintiffs and defendants purchased their lots with reference to the boundary line as marked and staked on the ground by the common grantor and as surveyed and staked by the county surveyor; and that at the time of the purchases it was the intention of the common grantor and the grantees that such stakes marked the common boundary line of the lots on the ground purchased by

the plaintiffs and the defendants. That finding is supported by the evidence.

Where conveyances from a common grantor to adjoining landowners describe the premises conveyed by lot numbers, but adjoining owners purchase with reference to a boundary line then marked on the ground, the boundary line, as marked on the ground by the common grantor, is binding upon such adjoining landowners and all persons claiming under them irrespective of the length of time which has elapsed thereafter. See Thiel v. Damrau, 268 Wis. 76, 66 N. W. 2d 747. This principle was indirectly approved in Lunzmann v. Yost, 182 Neb. 101, 153 N. W. 2d 294, although in that case the facts did not support the application of the principle.

This court has consistently held that fixed monuments and surveys staked out on the ground control over field notes showing the courses, distances, and quantities; or a description of a survey in words; or a picturization of a survey in a plat. The general rule is: Since plats are merely a picturization of courses and distances, the statements as to conflicts between monuments and plats apply also to conflicts between the monuments marking a surveyed line and the description thereof in a course and distance description. The monuments prevail over calls for courses and distances. Hoke v. Welsh, 162 Neb. 831, 77 N. W. 2d 659.

The determination of the issues here rests primarily upon the facts. The trial court viewed the premises and saw and heard the witnesses. The record supports his determination. The judgment is affirmed.

AFFIRMED.

MIDWEST LUMBER COMPANY, APPELLANT, V. DWIGHT E. NELSON CONSTRUCTION COMPANY, APPELLEE.

196 N. W. 2d 377

Filed April 14, 1972. No. 38143.

1. **Contracts: Parties.** A contract should be so construed as to give effect to the intention of the parties rather than defeat the purpose for which it was executed.
2. **Contracts: Insurance: Buildings.** In the absence of some contractual provision to the contrary the risk of loss or damage by windstorm, fire, etc., to a new building in the course of construction is normally on the builder.
3. **Contracts: Insurance: Building: Parties.** A building contractor as well as the owner has an insurable interest in the building in the course of construction.
4. **Contracts: Insurance: Parties.** An owner who contracts to procure insurance to cover the contractor and fails to do so or who procures such insurance and fails to have the contractor named as an insured becomes the insurer of the contractor.
5. **Contracts: Insurance: Subrogation: Parties.** An insurer cannot recover by right of subrogation from his own insured nor can the rights of a subrogated insurer rise higher than the rights of its insured against the third party.

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

Kenneth Cobb and J. S. Berry, for appellant.

Knudsen, Berkheimer, Endacott & Beam and Larry D. Langdale, for appellee.

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

CLINTON, J.

This is an appeal from an order of the district court sustaining the motion of the defendant Dwight E. Nelson Construction Company for judgment on the pleadings and the subsequent order of dismissal of the petition of the plaintiff Midwest Lumber Company. We affirm. The parties hereafter will be referred to as contractor and owner respectively. They entered into a construction contract under the terms of which the contractor agreed

to construct three lumber storage buildings under what was essentially a cost plus contract with the owner furnishing most of the materials. Under the terms of the contract the owner agreed to pay the contractor for certain reimbursable items as defined in the contract plus an amount equal to 10 percent of the reimbursable costs. The present action is described as an action by the owner to recover damages alleged to have been sustained when some of the building framing blew down during the course of construction and had to be replaced. The owner in this action claims the damage was caused by the negligence of the contractor in not bracing the framing, but the owner appears also to rely upon a contractual provision as follows: "Contractor agrees to use his best skill and judgment in erecting such Buildings. . . ." It is uncertain whether the action sounds in contract or tort but that is immaterial in the view we take of the case. The amount sought to be recovered is $5,416.44. The admissions in the pleadings show and it is likewise admitted in this court that this is in fact a subrogation claim by the insurance carrier hereinafter referred to.

The contract contained the following provision: "Contractor shall provide public liability insurance which shall be a non-reimbursable item. *Builders risk or fire and extended insurance coverage shall be provided and paid for by the Owner.*" Emphasis supplied.) The answer of the contractor alleges and it is judicially admitted by failure to deny that the owner procured the required builders risk or fire and extended coverage insurance and has collected from the carrier the sum of $5,416.44. A copy of the "loan receipt" is included in the admissions. It appears that the contractor was not named as an insured in this policy.

The sole question involved is the construction of the contractual provision requiring builders risk or fire and extended coverage insurance to be paid for by the owner. Did the parties intend that the builders risk or

the fire and extended coverage insurance cover only the risks of the owner or of both the owner and the contractor? We conclude that the parties intended to cover the risks of both and therefore the owner cannot recover from the contractor because the risks of both contractor and owner were intended by the parties to the construction contract to be covered by insurance. In determining this intention a contractual provision must be interpreted in light of the other provisions of the contract, and the rights and liabilities which the law imposes upon the parties as a result of the contract. Contracts should be so construed as to give effect to the intention of the parties. Gallagher v. Vogel, 157 Neb. 670, 678, 61 N. W. 2d 245; General Motors Acceptance Corp. v. Blanco, 181 Neb. 562, 149 N. W. 2d 516; Ely Constr. Co. v. S & S Corp., 184 Neb. 59, 165 N. W. 2d 562.

The specific terms of the contract of insurance are not before us, but the undenied allegations of the defendant's answer show that this contract did cover at least the specific risks which in fact caused the loss and it is acknowledged by the parties in this court that a builders risk policy is the one involved. It is not necessary for us to know all the hazards insured against, but it is common knowledge of course that builders risk and fire and extended coverage insurance include much more than windstorm damage and also that a builders risk policy commonly covers material, normally the contractor's property, not yet incorporated in the building. In this case under the terms of the construction contract both the contractor and the owner were to furnish materials, but the only specific provision on the point was that the owner would furnish most of the materials.

In the absence of some contractual provision to the contrary the risk of loss by windstorm, fire, etc., to a new building in the course of construction is normally on the builder, that is, he is obligated to restore the

building damaged or detroyed. Annotation, Building Contract—Destruction, 53 A. L. R. 105; Board of Education v. Kane Acoustical Co., Inc., 51 N. J. Super. 319, 143 A. 2d 853. A building contractor who makes a contract to construct a building has during the course of construction an insurable interest in the building. Annotation, Insurance—Builder's Risk, 94 A. L. R. 2d 226, 234; German Fire Ins. Co. v. Thompson, 43 Kan. 567, 23 P. 608; Sammons & Bishop v. American Fire Ins. Co., 94 S. C. 366, 77 S. E. 1108. The owner, of course, also has an insurable interest in the building under construction. Lititz Mut. Ins. Co. v. Lengacher, 248 F. 2d 850; Annotation, Insurance—Builder's Risk, 94 A. L. R. 2d 227, 237. Both interests can be and sometimes are insured in the same policy. Annotation, Insurance—Builder's Risk, 94 A. L. R. 2d 229, 260. It is apparent therefore that when the parties entered into the contract both had interests to protect against loss. It is evident that if each was interested only in protecting himself from loss each could have purchased his own insurance and he need not have consulted the other about it. The reason for including a specific provision for "Builders risk or fire and extended coverage insurance . . . paid for by the Owner" could be only to protect the separate interest of both parties and to determine how the cost thereof was to be paid. Under the terms of this construction contract the cost of the insurance was to be paid by the owner rather than included in the costs of the contractor and then charged back to the owner as part of the contract price.

We now turn to the question of why the owner or his insurer cannot recover in this action. An owner who contracts to procure insurance to cover the contractor and fails to do so is the insurer of the contractor. Connor v. Thompson Constr. & Develop. Co. (Iowa), 166 N. W. 2d 109; Aetna Casualty & Surety Co. v. Hensgen, 22 Ohio St. 2d 83, 258 N. E. 2d 237. The failure of the owner to cause the contractor to be named as

an insured in accordance with the intent of the parties as is implicit in the construction contract, causes the owner to become the insurer of the contractor. Connor v. Thompson Constr. & Develop. Co., *supra;* Aetna Casualty & Surety Co. v. Hensgen, *supra.* The rights of a subrogated insurer can rise no higher than the rights of its insured against the third party. Board of Education v. Kane Acoustical Co., Inc., *supra;* Louisiana Fire Ins. Co. v. Royal Indemnity Co. (La. App.), 38 So. 2d 807; Connor v. Thompson Constr. & Develop. Co., *supra.* An insurer cannot recover by right of subrogation from his own insured. Connor v. Thompson Constr. & Develop. Co., *supra.*

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

AFFIRMED.

IN RE ESTATE OF JOSEPH COOK, DECEASED.
FRANCIS B. HAIAR, APPELLANT, V. E. J. KESSLER, ADMINISTRATOR OF THE ESTATE OF JOSEPH COOK, DECEASED, APPELLEE.
196 N. W. 2d 380

Filed April 14, 1972. No. 38149.

1. **Statutes: Words and Phrases.** Referential and qualifying words in a statute, where no contrary intention appears, refer solely to the last antecedent.
2. **Statutes: Actions: Torts: Time.** An amendment to the dead man's statute governed any civil action or proceeding, other than those arising upon unintentional tort after the effective date of the amendment. The antecedent of the date of the amendment is occurrence of the tort, not commencement of the action or proceeding.

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

Robak & Geshell, for appellant.

Ray C. Simmons, for appellee.

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

SMITH, J.

A petition on appeal against the estate of a deceased alleged negligent damage in a tractor-automobile collision at a controlled intersection. During the trial the district court dismissed the petition at the close of petitioner's case-in-chief. Petitioner appeals. He asserts that he satisfied the burden of producing evidence and that the court in excluding evidence misconstrued an amendment to the dead man's statute.

The intersection, located in the Village of Humphrey, was controlled by 4 stop signs, one at each corner. One street ran north-south, the other east-west. Each was approximately 28 feet wide and carried two-way traffic.

A witness heard the collision. She looked and saw petitioner Francis B. Haiar, fall from his tractor. She also saw a Chevrolet automobile owned by Joseph Cook, the deceased, move away from the tractor.

A village police officer found the back wheels of the tractor in a damaged condition on the terrace at the southeast corner of the intersection. The same day he interviewed Cook, age 81, at Cook's home. Cook admitted having run a stop sign, having cut a corner short, and having turned too quickly. The officer noted damage to the lamp on the left front fender of Cook's Chevrolet automobile.

The evidence is insufficient to imply (1) the existence or nonexistence of movement of the tractor or (2) the direction of movement of either vehicle. It did not satisfy the burden of Haiar to produce evidence.

The controversy over the meaning of the amendment to the dead man's statute resulted from these circumstances. Prior to 1969 this court had decided that a motor vehicle collision was a transaction within the meaning of the dead man's statute. See Bowers v. Maire, 179 Neb. 239, 137 N. W. 2d 796 (1965). In 1969

the Legislature enacted L.B. 377, which amended the statute to read: "No person having a direct legal interest in the result of any civil action or proceeding, other than those arising upon unintentional tort after the effective date (December 25, 1969) of this act . . . shall be permitted to testify . . .." § 25-1202, R. S. Supp., 1969; Laws 1969, c. 184, § 1, p. 776.

The collision between Haiar and Cook had occurred September 7, 1966. Haiar filed his claim against the estate on April 9, 1970. The district court construed the phrase "after December 25, 1969," to refer to occurrence of the tort. Haiar asserts that the phrase refers to commencement of the action or proceeding.

Referential and qualifying words in a statute, where no contrary intention appears, refer solely to the last antecedent. 2 Sutherland, Statutory Construction, § 4921, p. 448 (3d Ed., 1943); Nebraska State Railway Commission v. Alfalfa Butter Co., 104 Neb. 797, 178 N. W. 766 (1920). A statutory amendment relating to procedure is ordinarily applicable to pending cases that have not been tried. Cf. Happy Hour, Inc. v. Nebraska Liquor Control Commission, 186 Neb. 533, 184 N. W. 2d 630 (1971).

We see no reason to adopt a construction contrary to syntax. The antecedent of the date of the amendment is occurrence of the unintentional tort, not commencement of the action or proceeding.

The district court construed the amendment correctly. The judgment is affirmed.

AFFIRMED.

DOROTHY RAMOLD, APPELLANT, V. QUINTIN RAMOLD, APPELLEE.

196 N. W. 2d 372

Filed April 14, 1972. No. 38162.

Divorce: Alimony: Trial. The fixing of the amount of alimony rests, in each case, within the sound discretion of the court.

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

Edward E. Hannon of Cronin & Hannon, for appellant.

Robert T. Finn, for appellee.

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

NEWTON, J.

This is a divorce action. Plaintiff, Dorothy Ramold, has appealed. The only question presented is with reference to permanent alimony and a division of property. We affirm the judgment of the district court.

The parties were married in March of 1962 and lived together for a little over 7 years. At the time of the divorce plaintiff was 52 and defendant 53 years of age. Plaintiff had been previously married and had seven children by her first marriage, five of whom were still living at home. It was defendant's first marriage. Plaintiff operated a restaurant which she sold subsequent to the marriage, but she continued to work outside the home. She owned 720 acres of land subject to a mortgage of $7,800 which was reduced during the marriage by approximately $4,000. She also owned her home. Defendant was a cattle speculator and, at the time of his marriage, owned 1,040 acres of land and two city lots. During the marriage he acquired an additional 400 acres of land. Most of the land is encumbered but its value has increased due to inflation and the installation of irrigation systems. Evidence of property values is contradictory and somewhat incomplete. Evidence of contributions of the parties during the marriage is very contradictory and nebulous due largely to the fact that both parties were in the habit of paying for purchases made, and bills accruing, in cash rather than by check.

The trial court awarded to each party the real estate owned by each. Plaintiff received all household goods

and a joint bank account in an undisclosed amount. She was also awarded permanent alimony in the sum of $20,000, payable at the rate of $2,000 per year.

A review of the record fails to indicate an abuse of discretion by the trial court. "The fixing of the amount of alimony rests, in each case, within the sound discretion of the court." Neeman v. Neeman, 183 Neb. 105, 158 N. W. 2d 236.

The judgment of the district court is affirmed. Plaintiff is awarded the sum of $500 for the services of her attorney in this court.

AFFIRMED.

KATHLEEN OBERG, APPELLANT, V. ROLAND OBERG, APPELLEE.
196 N. W. 2d 371

Filed April 14, 1972. No. 38163.

Divorce: Parent and Child: Appeal and Error: Evidence. The discretion of the district court respecting custody and support of minor children is subject to review. The determination of the trial court, however, ordinarily will not be disturbed unless there has been a clear abuse of discretion or it is clearly against the weight of the evidence.

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

Kelly & Kelly, for appellant.

Person, Dier & Person, for appellee.

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

SMITH, J.

The district court granted an absolute divorce to defendant, Roland Oberg, on the ground of adultery committed by plaintiff, Kathleen Oberg. It generally awarded custody of the minor children to Roland. Kathleen appeals. She asserts that her misconduct without more

is inconsequential when the welfare of the children is at stake.

The petition for divorce was filed in March 1970, and trial was held in March 1971. The decree awarded custody of both children to Roland and reasonable visitation to Kathleen. Each parent alternately was to possess the children on holidays and birthdays. The court also awarded Kathleen possession from June 1 each year to 1 week prior to the commencement of the next school term.

Roland emigrated to the United States from Sweden. He and Kathleen were married in June 1962. Two children were born of the marriage; Ann Britt, April 23, 1963; and Nels Eric Roland, April 15, 1969.

Roland was a tenant near Holdrege on a farm of 400 acres, of which more than 300 acres was irrigated. The share basis was 40 percent - 60 percent. He had earned additional small amounts at custom work and carpentry. He was industrious, temperate respecting liquor, religious, and self-controlled. He participated actively in the rearing of the children. Ann attended a relatively new, modern school with 4 or 5 teachers in an R-6 district.

Kathleen, holder of an A.B. degree, taught school approximately 5 years. While the family was together she was a good mother apart from the effect of her misconduct. She engaged in extramarital sexual relations both before and after the separation of the parties and the filing of the petition for divorce. She possessed a reputation in the community for clandestine association with other men.

During the interval between the filing of the petition and the trial Kathleen moved to the home of her parents in Des Moines, Iowa. She had temporary custody of both children. There she resumed teaching school. In 1971 her father, Dr. William H. Coppock, was retired head of the Chemistry Department at Drake University,

and he retained the classification of Professor of Chemistry.

Roland is financially able to provide a home for both children on the farm that has been their home. His industry and high moral and religious standards, as well as his love for the children, are beyond serious question. Under the decree Ann would resume attendance at her R-6 school.

While the family was together, Kathleen was a good mother apart from the effect of her infidelity. After the separation, the children did not become pawns in a struggle for power between the parents. The district court reasonably may have made the foregoing findings.

The discretion of the district court respecting custody and support of minor children is subject to review. The determination of the trial court, however, ordinarily will not be disturbed unless there has been a clear abuse of discretion or it is clearly against the weight of the evidence. See Hanson v. Hanson, 187 Neb. 108, 187 N. W. 2d 647 (1971).

There is no axiology of variables in comparing the positions of the Coppock family and Roland. The financial circumstances of the Coppocks probably are better. They also may offer superior educational opportunities. On the other hand the misconduct of Kathleen has not been limited to one or two occasions. Its continuance constitutes a potential source of harm to the moral welfare of the children; free love is not a way of life everywhere. Under the decree Ann would return to her home, school, and friends.

The judgment of the district court was not prejudicially erroneous. It is affirmed.

AFFIRMED.

STATE OF KANSAS, APPELLANT, V. N. J. HOLEB, ALSO KNOWN AS N. J. HOLUB, APPELLEE.
196 N. W. 2d 387

Filed April 14, 1972. No. 38168.

1. **Bills and Notes: Words and Phrases.** Issue means the first delivery of an instrument to a holder or a remitter.
2. ———: ———. Delivery means voluntary transfer of possession.
3. **Bills and Notes: Agency: Postal Service.** When a person is the first party to a transaction to make use of the mails and thereby effects delivery of an instrument, he has made the postal service his agent.
4. **Criminal Law: Pleadings: Extradition.** It is immaterial that the complaint did not specifically allege the commission of acts in this state intentionally resulting in a crime in Kansas when the requisition makes such facts clear.
5. **Criminal Law: Parties: Extradition: Statutes: Constitutional Law.** Substantial rights of citizens must be protected, but constitutional and statutory provisions relating to interstate extradition must be liberally construed to effectuate their purpose, and courts of one state must avoid a view of their duties so narrow as to afford permanent asylum to offenders against laws of another state.
6. **Criminal Law: Parties: Extradition: Pleadings.** One who commits an act in one state intentionally resulting in a crime in another state may be extradited, and the statement in the Governor's warrant that accused is a fugitive from justice from Kansas and has taken refuge in Nebraska must be disregarded as surplusage.

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

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

Nye, Wolf & Hove, for appellee.

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

NEWTON, J.

This is a habeas corpus proceeding instituted by appellee for the purpose of resisting extradition to the

State of Kansas. The Kansas requisition papers disclose that Holub was charged with having knowingly, in the State of Kansas, drawn, made, uttered, issued, and delivered an insufficient fund check. The record further discloses that the check was drawn on Holiday Markets, Inc., d/b/a Kearney Packing Company, signed by Holub as treasurer, and mailed to Chandler Livestock Auction, Inc., in Kansas. The Kearney Packing Company was a Nebraska concern and the check was drawn and mailed in Nebraska in payment of cattle purchased after receipt of word from the company's purchasing agent in Kansas as to the amount due Chandler Livestock Auction. The cattle were sold on September 10, the check dated September 11, the cattle loaded out on September 14, and the check received on either September 14 or 15. The district court entered judgment for appellee. We reverse that judgment.

The pertinent Kansas statutes are as follows: "(1) Giving a worthless check is the making, drawing, issuing or delivering or causing or directing the making, drawing, issuing or delivering of any check, order or draft on any bank or depository for the payment of money or its equivalent with intent to defraud and knowing, at the time of the making, drawing, issuing or delivering of such check, order or draft as aforesaid, that the maker or drawer has no deposit in or credits with such bank or depository or has not sufficient funds in, or credits with, such bank or depository for the payment of such check, order or draft in full upon its presentation.

"(2) In any prosecution against the maker or drawer of a check, order or draft payment of which has been refused by the drawee on account of insufficient funds, the making, drawing, issuing or delivering of such check shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or on deposit with, such bank or depository, * * *." K.S.A. 1971 Supp. 21-3707.

"(1) An individual who performs criminal acts, or causes such acts to be performed, in the name of or on behalf of a corporation is legally responsible to the same extent as if such acts were in his own name or on his own behalf." K.S.A. 1971 Supp. 21-3207.

Appellee contends that he committed no crime in Kansas. It is true that the check was drawn and made in Nebraska, not Kansas. However, the drawing, making, and mailing of the check in Nebraska resulted in its issuance and delivery in Kansas which is a violation of the Kansas statute. " 'Issue' means the first delivery of an instrument to a holder or a remitter." § 3-102(1)(a), U.C.C. " 'Delivery' * * * means voluntary transfer of possession." § 1-201(14), U.C.C. When a person is the first party to a transaction to make use of the mails and thereby effects delivery of an instrument, he has made the postal service his agent. See, First Nat. Bank v. Ernst, 117 Neb. 34, 219 N. W. 798; Fairchild v. Fairchild, 176 Neb. 95, 125 N. W. 2d 191.

Appellee attacks the extradition proceedings on the ground that there is some variance between the complaint and the facts shown in the requisition papers. As mentioned above, the check was actually drawn and made in Nebraska rather than in Kansas as alleged. The requisition does reveal the true facts and is sufficient to apprise appellee of the true nature of the offense charged. It clearly appears that appellee is charged with doing certain acts in Nebraska which resulted in a crime in Kansas. The variance is not fatal. It is immaterial that the complaint did not specifically allege the commission of acts in this state intentionally resulting in a crime in Kansas when the requisition makes such facts clear. See, In re Cooper, 53 Cal. 2d 772, 3 Cal. Rptr. 140, 349 P. 2d 956; Self v. People, 133 Colo. 524, 297 P. 2d 887. In People ex rel. Robert v. Warden of New York City Prison, 114 N. Y. S. 2d 13, it was held: "Substantial rights of citizens must be protected, but constitutional and statutory provisions relating to inter-

state extradition must be liberally construed to effectuate their purpose, and courts of one state must avoid a view of their duties so narrow as to afford permanent asylum to offenders against laws of another state."

Appellee also urges that the extradition warrant issued by the Governor of Nebraska is defective in that it states appellee is a fugitive from justice. Historically, to be a fugitive from justice, one had to be in the state where the crime was committed at the time of its commission. Prior to the adoption of provisions contained in the Uniform Criminal Extradition Act, status as a fugitive was essential to extradition. This is no longer the case. One who commits an act in one state intentionally resulting in a crime in another state may now be extradited. See § 29-734, R. R. S. 1943. Although not within the formerly adhered to strict definition of a fugitive, one who thus seeks to evade the administration of justice in the state where the offense was perpetrated is, in essence, a fugitive from the justice of such state. Under similar circumstances it was held in Clayton v. Wichael, 258 Iowa 1037, 141 N. W. 2d 538, that: "The statement in the Governor's warrant that plaintiff is a fugitive from justice from Oregon and has taken refuge in Iowa in view of the record before us must be disregarded as surplusage." Of similar import are People ex rel. Brenner v. Sain, 29 Ill. 2d 239, 193 N. E. 2d 767; Harrison v. State, 38 Ala. App. 60, 77 So. 2d 384.

We conclude that the extradition proceeding is valid and the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

EDWARD HAFFKE, BY AND THROUGH HIS FATHER AND NEXT FRIEND, CARL HAFFKE, APPELLANT, V. EDWARD H. GRINNELL, APPELLEE.

196 N. W. 2d 390

Filed April 14, 1972. No. 38177.

1. **Motions, Rules, and Orders: Judgments: Trial: Evidence.** In determining whether a motion for judgment notwithstanding the verdict should have been sustained, the evidence must be considered in the light most favorable to the party who obtained the verdict.
2. **Motor Vehicles: Negligence.** A motorcyclist who observes a turning signal on an automobile preceding him but fails to maintain control over his vehicle sufficient to enable him to avoid a collision with the automobile when the movement indicated is made, is guilty of contributory negligence as a matter of law which is more than slight and sufficient to bar his recovery.

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

Burbridge & Burbridge, for appellant.

Fraser, Stryker, Marshall & Veach, for appellee.

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

BOSLAUGH, J.

This case arose out of a collision between a motorcycle and an automobile. The jury returned a verdict for the plaintiff in the amount of $22,500. The trial court sustained the defendant's motion for judgment notwithstanding the verdict and dismissed the action. The plaintiff appeals.

The accident happened at about 5 p.m., on May 20, 1969, at the intersection of Forty-seventh and Lafayette Streets in Omaha, Nebraska. Forty-seventh Street at that point is a part of the Northwest Radial Highway and runs generally north and south. The 3 southbound lanes are separated from the northbound lanes by a center median. Each lane is 10 feet wide. Lafayette Street

forms a T-intersection with Forty-seventh Street and runs to the west. Saddle Creek Road runs to the northwest from the same intersection.

Hamilton Street intersects with Forty-seventh Street approximately 363 feet north of Lafayette Street. A Ginn Oil Company service station is located on the west side of Forty-seventh Street between Hamilton and Lafayette Streets. The south exit from the filling station is 169 feet south of Hamilton Street.

The plaintiff was operating his 1968 Riverside motor bike, which he described as medium-sized with a 20-horsepower engine. The plaintiff was proceeding south on Forty-seventh Street in the right lane and had stopped for a traffic light on the north side of the Hamilton Street intersection. After the light changed to green, and as the plaintiff was starting forward, he saw the defendant's automobile leave the south exit of the Ginn Service Station and turn south on Forty-seventh Street. The defendant's right turning signal was turned on as the defendant was coming out of the service station. The defendant turned south on Forty-seventh Street with his right wheels on the lane marker between the curb lane and the center lane or 1 foot west of the lane marker.

The defendant was driving his 1956 Oldsmobile automobile south on Forty-seventh Street at between 10 and 20 miles per hour, intending to turn at the Lafayette-Saddle Creek intersection. The defendant testified that he had turned on his right turn signal light as soon as he was on Forty-seventh Street. The defendant saw there were other vehicles behind him but did not see the plaintiff at any time before the impact. The defendant testified that as he approached the intersection he applied his brakes and commenced his turn, and that the impact occurred when the front half of his automobile was in the area where the streets came together.

The plaintiff proceeded south on Forty-seventh Street, traveling about 4 feet east of the west curb on Forty-

seventh Street. He accelerated to a speed of 30 to 35 miles per hour until he was within 6 to 8 feet of the rear of defendant's automobile. The plaintiff then "stopped accelerating" or began "decelerating" because he was uncertain what the defendant's actions would be. When defendant's automobile was very close to the Lafayette-Saddle Creek intersection and the plaintiff was about 6 feet behind the defendant's automobile, the defendant's brake lights came on and the defendant commenced his turn. The plaintiff sounded his horn, applied his brakes, and the impact occurred. The plaintiff was thrown from the motorcycle and injured.

The jury could find that the defendant was negligent in failing to maintain a proper lookout and in failing to approach the intersection in the right traffic lane when intending to turn to the right as required by an ordinance of the City of Omaha. The question presented is whether the evidence established as a matter of law that the plaintiff was guilty of contributory negligence which was more than slight and sufficient to bar his recovery. In determining that question the evidence must be considered in the light most favorable to the plaintiff. Mills v. Bauer, 180 Neb. 411, 143 N. W. 2d 270.

The answer alleged that the plaintiff was negligent in failing to maintain a proper lookout and reasonable control over his motorcycle; in traveling at an excessive speed; and in traveling too close to the defendant's automobile.

The plaintiff admits that he observed the defendant's right turn signal and that he was uncertain as to what the defendant's actions would be. He testified that he did not intend to pass the defendant's automobile but was intending to wait and see if the defendant was going to make a lane change.

The plaintiff had no right to disregard the defendant's turn signal and was obligated to maintain control over his motorcycle sufficient to avoid a collision if the defendant made the movement indicated by his signal.

By approaching to within 6 or 8 feet of the rear of the defendant's vehicle and at a relative speed much greater than that of the defendant, the plaintiff placed himself in a position in which he was unable to avoid the collision. See Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669. This was contributory negligence as a matter of law which was more than slight and sufficient to bar his recovery.

The plaintiff argues that he was not required to anticipate the defendant's negligence and was only required to have such control as would enable him to avoid a collision with other vehicles which were being operated with due care. It is true that complete control such as will only prevent a collision by anticipation of negligence or illegal disregard of traffic regulations, *in the absence of notice, warning, or knowledge* is not required. Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., *supra*. Here there was notice of an impending movement by the defendant's automobile, which the plaintiff observed, but the plaintiff failed to maintain sufficient control to enable him to avoid a collision when the movement was made.

The judgment of the district court is affirmed.

AFFIRMED.

GARY L. VAN OSTRAND, APPELLANT, V. MELVIN L. BECCARD, APPELLEE.

196 N. W. 2d 385

Filed April 14, 1972. No. 38187.

1. **Motor Vehicles: Negligence.** A motorist is under a duty to keep a proper lookout and watch where he is driving, although he has the right-of-way. When in a place of relative safety he sees, or in the exercise of reasonable care, should have seen, the approach of a moving vehicle in close proximity, and he moves from the place into the path of the approaching vehicle and is struck, his conduct constitutes negligence.
2. ———: ———. Bright sunlight ordinarily is a condition that

does not excuse the duty of a motorist to look and see approaching vehicles operated without negligence within the radius that denotes the limit of danger.

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

Herbert J. Friedman, for appellant.

Michael W. Brown of Healey, Healey, Brown & Burchard, for appellee.

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

PER CURIAM.

A negligence claim by Gary L. Van Ostrand against Melvin L. Beccard resulted from a collision between crossing automobiles in a controlled urban intersection. A jury returned a verdict for Beccard. Van Ostrand appeals. He asserts that no reasonable man could fail to find for him on issues of liability.

The intersection, located in Lincoln, was formed by Forty-fifth Street for north-south traffic and Vine Street for east-west traffic. Stop signs on both sides of Forty-fifth Street protected motorists on Vine Street. Our examination of the record indicates no evidence of the prima facie lawful speed limit on Vine Street at the time and place in question. See § 39-7,108, R. R. S. 1943. The parties seem impliedly to concur that the limit was 35 miles an hour.

The collision occurred on November 14, 1969, at 4 p.m. Parts of streets were wet, but the temperature was 25 degrees F. The sun was shining. Van Ostrand was eastbound in a 1969 Volkswagen, and Beccard was southbound in a 1963 Mercury equipped with a stickshift.

Van Ostrand at a speed of 35 miles an hour and at a short distance east of Forty-fourth Street saw the Mercury begin to move south from the stop sign. He tapped his brakes. The Mercury then momentarily stopped

so that it occupied most of the traveled part of Vine Street for westbound traffic. It occupied no part of the lanes for eastbound traffic. Van Ostrand released his brake in the belief that Beccard was waiting for him to cross. The interval of the stop was a second. The Mercury then suddenly darted ahead. Van Ostrand in his inside lane of travel laid down skid marks 23 feet long. The front of the Volkswagen struck the right front fender of the Mercury. Damage to the automobiles was heavy.

Beccard had parked his Mercury in the parking lot of the Richman-Gordman store 1½ hours. He intended to proceed across the street to K-Mart on the other side of the intersection. He backed out of the stall, drove 30 feet to Forty-fifth Street, turned left to go south, proceeded south about the length of the car, waited for two automobiles in front of him to leave, and then moved a car length to the stop sign.

After traffic on Vine Street cleared, Beccard entered the intersection. The engine sputtered, and in low gear the Mercury stopped. Beccard immediately obtained sufficient engine r.p.m. for normal movement. He saw no approaching westbound traffic, but he saw a knoll somewhere east of the intersection. He feared that a westbound motorist with limited visibility would collide with him. He testified to the knoll vaguely. He admittedly was anxious to clear the intersection in a hurry. He looked westward for approaching traffic, however, prior to moving. Bright sunlight limited his vision to 150 feet. He saw no traffic. He darted ahead in low gear. He first saw the Volkswagen when it was 15 feet away.

Beccard testified to mechanical failure that had not occurred previously. There was no evidence that the parking lot had been open, enclosed, heated, or not heated; or that the temperature of the Mercury engine had fallen below normal for efficient operation. An inference that Beccard wore no sunglasses is compelling.

A motorist is under a duty to keep a proper lookout and watch where he is driving, although he has the right-of-way. When in a place of relative safety he sees, or in the exercise of reasonable care should have seen, the approach of a moving vehicle in close proximity, and he moves from the place into the path of the approaching vehicle and is struck, his conduct constitutes negligence. Cf. Heavican v. Holbrook, 187 Neb. 814, 194 N. W. 2d 208 (1972); Hayes v. Anderson Concrete Co., Inc., 186 Neb. 771, 186 N. W. 2d 477 (1971); Thomas v. Owens, 169 Neb. 369, 99 N. W. 2d 605 (1959). Bright sunlight ordinarily is a condition that does not excuse the duty of a motorist to look and see approaching vehicles operated without negligence within the radius that denotes the limit of danger. Sunglasses are offered for sale at moderate prices. See, generally, Schmeling, "The Range of Vision Rule in Nebraska," 49 Neb. L. Rev. 7 (1969).

Van Ostrand and another motorist testified to Van Ostrand's speed of 35 miles an hour and to a flow of traffic on Vine Street at that speed. We assume that a prima facie lawful speed limit governing Van Ostrand and exceeding 34 miles an hour existed. Notwithstanding the existence of the knoll and Beccard's fears, a reasonable trier of fact must find that Beccard was negligent. The evidence was insufficient to support a finding of contributory negligence on the part of Van Ostrand unless a prima facie speed limit governing him was nonexistent or less than 35 miles an hour. See § 39-7,108, R. R. S. 1943.

The judgment is reversed and the cause remanded for a new trial. Should the evidence prove that a prima facie lawful speed limit governing Van Ostrand exceeded 34 miles an hour, the only issue for the trier of fact would be that of damage. Otherwise the new trial should be general.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. FREDDIE MINOR, APPELLANT.
195 N. W. 2d 158

Filed April 14, 1972. No. 38204.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. On motion for rehearing. See *ante* p. 23, 195 N. W. 2d 155, for original opinion. Motion for rehearing overruled.

J. William Gallup of Schrempp & Bruckner, 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., dissenting.

I concur in the order overruling the defendant's motion for rehearing, but the sentence should be reduced to imprisonment for not less than 1 year nor more than 2 years in accordance with the rule announced in State v. Roberts, *ante* p. 209, 196 N. W. 2d 118, decided March 24, 1972. See § 28-4,125 (3), R. S. Supp., 1971.

MCCOWN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. JAMES L. FERGUSON, JR., APPELLANT.
196 N. W. 2d 374

Filed April 14, 1972. No. 38294.

1. **Criminal Law: Rape: Witnesses: Evidence.** Under the law of Nebraska, an accused charged with rape cannot be convicted solely on the testimony of the prosecutrix.
2. **Criminal Law: Rape: Witnesses: Evidence: Trial.** In a prosecution for rape, while evidence of a prompt complaint standing alone is insufficient corroboration, such evidence is for the con-

sideration of the jury as corroboration of the main facts in issue.

3. ———: ———: ———: ———: ———. In a prosecution for rape, it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue.

4. **Criminal Law: Rape: Sentences.** Where punishment of a statutory offense is left to the discretion of the court, a sentence imposed within statutory limits will not be disturbed unless an abuse of discretion appears.

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

Beatty, Morgan & Vynhalek, 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.

McCOWN, J.

The defendant, James L. Ferguson, Jr., was found guilty by a jury of the crimes of rape and robbery. He was sentenced to a term of 5 to 8 years for the rape and 3 to 4 years for the robbery, the sentences to be served consecutively. The defendant's principal complaints on appeal assert a lack of sufficient corroboration for the offense of rape, and excessiveness of the sentences.

The complaining witness was a young married woman, separated from her husband, and living alone in a basement apartment at 1003 East 4th Street in North Platte, Nebraska. She attended college from 1964 to 1967, and was married in 1968. She had moved to North Platte from Lincoln, Nebraska, after separating from her husband. She was employed as a receptionist and secretary by a fire detection company in North Platte.

On February 25, 1971, she left her place of employment at 8 o'clock in the evening. She walked home

from work with stops at a grocery store and the post office and approached the door of the building in which her apartment was located at approximately 8:30 p.m. On her way home, she had noticed a yellow older model pickup truck being pushed out of a filling station and later saw the same truck parked near a motel located 2 blocks from her home. The entrance to her apartment was in the rear of the house which had been divided into apartments. Just as she reached the door, a young man called to her and asked if she had a car and if she could give him a push. She thought he looked to be about high school age. When she told him she had no car, he then asked to use the telephone and she referred him to an upstairs neighbor. At this point, she bent over to pick up the newspaper. The defendant took hold of her and placed a knife at her throat and a hand across her mouth. He told her to be quiet and that they were going to take a walk and to walk normally and naturally. Still carrying the newspaper, she was led 2 or 3 blocks north and across the railroad tracks. As they were crossing the railroad tracks, she hesitated. The defendant jerked her arm and she fell and skinned her right knee. The defendant led her between two buildings in the warehouse district and demanded money. She gave him the $8 which she had in her wallet. At this point the defendant said: "Not so fast; there's more." She screamed. The defendant again produced what she believed to be a knife, tripped her and threw her to the ground, put his knee on her chest, held the knife at her throat, threatened to kill her when she screamed, and then raped her. Afterward the defendant walked part way back with her and left.

Upon entering her apartment, she changed her clothes and called a friend at approximately 9:05 p.m. The friend and her husband came over immediately. The complaining witness was very excited and agitated, and related the story to them and they took her to the police station. There she complained that she had been raped

and robbed by a white male about 16 years old. She gave a complete statement to the police. The police showed her a file of over 200 pictures and she identified a picture of the defendant as the closest resemblance to her assailant. She took the police to the area of the crime. Pictures were taken of the scene. Most notable was a footprint left by a boot, and a newspaper of that date. A plaster cast of the footprint was later taken by the police. The police picked up the complaining witness' clothes some 3 or 3½ hours after the attack and at that time her panty hose were "pretty dry."

The defendant was arrested at his home the next morning. He was hiding under the floor. Clothes were recovered which generally matched the description given by the complaining witness of the clothing worn by her assailant. The plaster cast of the footprint at the scene and the defendant's boots were admitted in evidence. The defendant was 18 years of age, matched the physical description given at the time, and was identified by the complaining witness at the trial as her assailant.

A young girl who lived with him was the only witness for the defendant. She testified that on the night in question the yellow pickup in which they were riding had failed to start. A gasoline station attendant pushed them without success and left the truck in front of a motel. The defendant went to get somebody to push them and the girl testified that she waited inside the motel office for about 10 minutes before he returned. She testified that he was not disheveled or nervous when he returned. The truck then started and they returned home. She testified that he did not have a knife on that evening that she knew of. The truck was a family vehicle which the defendant frequently used.

The defendant asserts that the evidence to corroborate the testimony of the complaining witness is insufficient as corroboration for the crime of rape. Under the law of Nebraska an accused charged with rape cannot be

convicted solely on the testimony of the prosecutrix. Stapleman v. State, 150 Neb. 460, 34 N. W. 2d 907.

In this case there is no question but that the victim made complaint to her friends and to the police immediately following the commission of the crime. While that fact alone might be insufficient, it is clearly for the consideration of the jury as corroboration of the main fact in issue. See State v. Hunt, 178 Neb. 783, 135 N. W. 2d 475.

Unfortunately, the police did not request it and no medical examination of the complaining witness was made at the time, although the police did take pictures of her skinned knees. There is therefore no direct corroboration as to the act constituting the offense of rape. In this state, however, it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue. State v. Hunt, *supra;* State v. Garza, 187 Neb. 407, 191 N. W. 2d 454. On the facts before us there is substantial evidence of material facts and circumstances in addition to the testimony of the prosecutrix from which the jury properly may have and did draw the inference of guilt. The fact that the same corroborative evidence substantiated both crimes does not mean that its use must be limited to one.

The defendant also contends that the sentences here were excessive. The statutory sentence limits for both rape and robbery are not less than 3 nor more than 50 years imprisonment. The defendant received a sentence of 5 to 8 years for rape and 3 to 4 years for robbery. The defendant's misdemeanor conviction record extends back to his commitment to the Boys' Training School at the age of 13. Two separate felony charges were dropped by the prosecutor at time of sentencing. The record fully supports the action of the trial court and clearly establishes that there was no abuse of discre-

tion here. Where punishment of a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not be disturbed unless an abuse of discretion appears. State v. Thompson, 187 Neb. 682, 193 N. W. 2d 561.

The judgment of the trial court was correct in all respects and is affirmed.

AFFIRMED.

LAWRENCE C. SANDBERG, JR., APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.
196 N. W. 2d 501

Filed April 18, 1972. No. 38243.

1. **Constitutional Law: Statutes.** Classifications are limited to and are necessary for the accomplishment of the legitimate purposes of legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purposes of the act.
2. **Constitutional Law: Statutes: Legislature: Taxation.** It is a fundamental law of this State that the Legislature is vested with the taxing power without limit, subject only to restrictions contained in the Constitution. It is axiomatic, therefore, that the provisions of the Constitution in relation to taxation are not grants of power but are limitations on the taxing power of the State, lodged in the Legislature.
3. ———: ———: ———: ———. It is not denied that since the adoption of the Fourteenth Amendment, State taxing power can be exerted only to effect a public purpose and does not embrace the raising of revenue for private purposes, but the requirements of due process leave free scope for the exercise of a wide legislative discretion in determining what expenditures will serve the public interest.
4. **Constitutional Law: Legislature: Taxation.** Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
5. **Words and Phrases: Taxation.** A tax is not an assessment of benefits. It is a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is

consequently entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.

6. **Constitutional Law: Statutes: Legislature: Governor.** A legislative bill, passed with an emergency clause, vetoed by the Governor, is within the ambit of Article IV, section 15, Constitution of Nebraska, and requires only a three-fifths vote to override the veto.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Lawrence C. Sandberg, Jr., for appellant.

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

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

SPENCER, J.

This is an appeal from the sustaining of appellees' general demurrer to appellant's petition. The action, brought on behalf of appellant and all others similarly situated, seeks to declare Laws 1971, LB 87, now sections 77-2602, 77-2608, 77-2610, 77-2616, 85-1,100, 85-1,101, and 85-1,102, R. S. Supp., 1971, unconstitutional, and to enjoin its enforcement. The questions presented are solely ones of law and not of fact. We affirm the sustaining of the demurrer.

LB 87 increases the tax on cigarettes from 8 to 13 cents per package, and appropriates the 5 cent increase as follows: To the Department of Public Institutions for the construction of an activities building at the Beatrice State Home, until the sum of $695,000 is accumulated. Thereafter, said tax is appropriated equally to the State Office Building Fund, and the University of Nebraska at Lincoln Field House Fund. The bill was enacted with the emergency clause, on a vote of 34 Ayes, 11 Nays, and 4 Not Voting. It was sent to the Governor and returned by him without his signature, which constituted a veto. The Legislature then voted

to override the veto, as follows: 31 Ayes, 14 Nays, and 4 Not Voting.

Appellant contends that LB 87 is unconstitutional for the following reasons: (1) It constitutes a special law in favor of the State, in violation of Article III, section 18, Constitution of Nebraska; (2) it deprives appellant of his property without due process of law, and violates his equal rights in violation of the provisions of both the Nebraska and the United States Constitutions; and (3) it was not enacted by a sufficient vote to override the veto of the Governor.

Article III, section 18, Constitution of Nebraska, specifically provides that the Legislature shall not pass local or special laws in certain specified areas, and then provides: "In all other cases where a general law can be made applicable, no special law shall be enacted."

Appellant contends that when the Legislature enacted a law providing a tax increase upon a given and limited segment of the population of the State, and provided within the law that the proceeds thereby raised be used for specified and limited public facilities bearing no relation to the tax or to the taxpayers, such law must be determined to have been enacted solely for the purpose of accomplishing the construction of the public facilities enumerated, and accordingly the same constituted a special law in favor of the State. Appellant argues that such action by the Legislature "violates the letter, if not the intent, of Article III, Section 18, of the Nebraska Constitution."

If we understand the thrust of appellant's argument, it is that any construction of the nature involved constitutes a special law in favor of the State. Appellant misinterprets the intent of Article III, section 18, Constitution of Nebraska. The same point was raised in Stewart v. Barton (1912), 91 Neb. 96, 135 N. W. 381, involving an act to appropriate $100,000 for the construction and equipment of a laboratory building on the campus of the Medical College of the University of

Nebraska at Omaha. The following language from that case is particularly pertinent: "While it is alleged that this is the purpose of the act, the allegation is mere surplusage, since it is clearly beyond the power of the court to inquire into the springs of legislative action. With inquiries as to the hidden motives prompting the enactment of laws or the wisdom of legislative measures, the courts can have nothing to do. Moreover, the prohibition against the legislature enacting local or speical laws is not general, but is confined to the specific cases mentioned in section 15, art. III of the constitution. It is within its power to legislate upon any subject not therein prohibited (State v. Moores, 55 Neb. 480, 489), and we find no prohibition in the clause mentioned against such an act as this."

If appellant is inferentially arguing that the tax in and of itself is a special law, the question is entirely one of classification. In Gossman v. State Employees Retirement System (1964), 177 Neb. 326, 129 N. W. 2d 97, we said: "The principles to be applied to testing legislative classification have been well established. The difficulty arises in their application to a particular set of facts or a particular legislative act. Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The Legislature may, and many times must, carve out classes or distinctions that would appear arbitrary or unreasonable. But, on closer examination, it is found that the classifications are related to and are necessary for the accomplishment of the legitimate purposes of the legislation. The question is always whether the things or persons classified by the Act form by themselves a proper and legitimate class with reference to the purposes of the Act. See 2 Sutherland, Statutory Construction (3d Ed.), § 2104, p. 14. See, also, Wilson v. Marsh, supra; Hessian v. Ervin, 204 Minn. 287, 283

N. W. 404; Lickert v. City of Omaha, supra; Sullivan v. City of Omaha, supra."

Appellant in argument conceded that the class of cigarette purchasers forms a legitimate class for the purpose of imposition of a tax, and that the three proposed building funds are proper purposes for the benefit of the general public. He admits that if two bills had been introduced, one to increase the cigarette tax and one to fund the constructions provided for in LB 87, there would be no constitutional question. He argues in that situation two final votes would have been required, and either might have failed. This has nothing to do with the special law argument.

There have been many other instances where the Legislature has made specific disposition of tax proceeds directly into special funds without first putting them into the General Fund and without any particular connection or relationship to the taxpayer. We believe, however, that this is the first time this practice has been challenged before this court.

In Cincinnati Soap Co. v. United States (1937), 301 U. S. 308, 57 S. Ct. 764, 81 L. Ed. 1122, which involved an excise tax on coconut oil, the Supreme Court said, referring to the attack on the tax: "It is said to be bad because it is earmarked and devoted from its inception to a specific purpose. But if the tax, *qua* tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasury, neither is made invalid by being bound to the other in the same act of legislation. The only concern which we have in that aspect of the matter is to determine whether the purpose specified is one for which Congress can make an appropriation without violating the fundamental law. If Congress, for reasons deemed by it to be satisfactory, chose to adopt the quantum of receipts from this particular tax as the measure of

the appropriation, we perceive no valid basis for challenging its power to do so."

In State ex rel. School Dist. of Scottsbluff v. Ellis (1959), 168 Neb. 166, 95 N. W. 2d 538, we said: "It is the fundamental law of this state that the Legislature is vested with the taxing power without limit, subject only to restrictions contained in the Constitution. It is axiomatic therefore that the provisions of the Constitution in relation to taxation are not grants of power but are limitations on the taxing power of the state lodged in the Legislature. State ex rel. Atchison & N. R. R. v. Lancaster County, 4 Neb. 537, 19 Am. R. 641; State v. Cheyenne County, 127 Neb. 619, 256 N. W. 67. It is just as fundamental that the power to tax and the power to provide for the disposition of taxes raised are identical and inseparable, and the Legislature is clothed with full power and control over the disposition of revenues derived from taxation, including those raised by political subdivisions of the state under authority of the state, subject only to constitutional restrictions. 85 C. J. S., Taxation, § 1057, p. 644."

Appellant admits that the facilities funded by LB 87 are for proper public purposes and every citizen in the State has an interest in them. His principal contention, however, is that cigarette purchasers have no more interest or stake in the facilities funded by the proceeds of the increase in the cigarette tax than nonsmokers. He questions the power of the Legislature to tax that one segment of the population for projects which benefit the entire population. Actually, many tax exactions do exactly this. There is a general discussion on the subject in 51 Am. Jur., Taxation, § 332, p. 382, where this language is found: "Property may not be taxed for a purpose in which the owners or occupants have no interest, from which they can derive no benefit, and which is solely for the benefit of others. If a tax levy, however, is for a public purpose, it is no objection to its validity that the benefits paid and

the persons to whom they are paid are unrelated to the persons taxed. Nothing is more familiar in taxation than the imposition of tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied by the tax. A tax designed to be expended for a public purpose does not cease to be one levied for that purpose because it has the effect of imposing a burden upon one class of business enterprises in such a way as to benefit another class."

In Carmichael v. Southern Coal & Coke Co. (1937), 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A. L. R. 1327, the Supreme Court discussed this problem, saying: "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. * * * This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. * * *

"A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function. * * *

"It is not denied that since the adoption of the Fourteenth Amendment state taxing power can be exerted only to effect a public purpose and does not embrace the raising of revenue for private purposes. * * * but

the requirements of due process leave free scope for the exercise of a wide legislative discretion in determining what expenditures will serve the public interest. * * *

"Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.

"A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. See Cincinnati Soap Co. v. United States, supra. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good. A corporation cannot object to the use of the taxes which it pays for the maintenance of schools because it has no children. Thomas v. Gay, 169 U. S. 264, 280. This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him."

Appellant's third assignment, that LB 87 was not enacted by a sufficient vote to override the veto of the Governor, presents a more serious question.

Under the agreed facts, this bill was enacted by the Legislature on April 20, 1971, by a vote of 34 Ayes, 11 Nays, and 4 Not Voting. On April 26, 1971, the Governor returned the bill to the Legislature without his signature. The Legislature then, on a vote to over-

ride the veto, voted 31 Ayes, 14 Nays, and 4 Not Voting.

Article III, section 27, Constitution of Nebraska, provides in part: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the Legislature shall, by a vote of two-thirds of all the members elected to each House otherwise direct." Two-thirds of the 49 members of the Legislature is 33. Thirty-four votes, therefore, were more than adequate to pass the bill with the emergency clause. When the Governor vetoed the bill, this brought into play Article IV, section 15, Constitution of Nebraska, which provides in part: "Every bill passed by the Legislature, before it becomes a law, * * * shall be presented to the Governor. If he approves he shall sign it, and thereupon it shall become a law, but if he do not approve, he shall return it with his objections to the House in which it shall have originated, which House shall enter the objections at large upon its journal, and proceed to reconsider the bill. * * * and if approved by three-fifths of the members elected * * * it shall become a law, notwithstanding the objections of the governor."

Appellant's point is that although the bill originally passed with sufficient votes to justify the emergency clause, that notwithstanding the provisions of Article IV, section 15, it required 33 votes to override the Governor's veto when the bill contained the emergency clause. It is the State's contention that this situation is controlled by Article IV, section 15, regardless of the vote required to pass the bill in the first instance.

The history of Article IV, section 15, would refute appellant's contention. This language came into the Constitution in 1875. Volume III, Nebraska Constitutional Convention (1913), is an official report of the Journals of the Convention of 1875. On pages 565 and 566 is found the proposed draft of section 15. It reads,

so far as material herein, as follows: "Every bill passed by the legislature, before it becomes a law, * * * shall be presented to the governor. If he approve, he shall sign it and thereupon it shall become a law; but if he do not approve he shall return it with his objections to the house in which it shall have originated, which house shall enter the objection at large upon its journals and proceed to reconsider the bill. If, then, three-fifths of the members elected agree to pass the same, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by three-fifths of the members elected to that house, it shall become a law, notwithstanding the objections of the governor; *but the vote necessary to repass such bill shall not be less than that required on the original passage in each house.*" (Emphasis supplied.)

At page 597, we find the following: "Mr. President, the convention, in committee of the whole, have had under consideration the article on Executive and made the following amendments thereto: * * *

"4th. Strike out the words 'but the vote necessary to repass such bill shall not be less than that required on the original passage in each house,' in lines 10, 11 and 12, in section 15."

On page 599 we find: "The question being upon the adoption of the executive article as amended and reported back by the committee of the whole house, the first, second, third, fourth, and fifth amendments were concurred in."

It would, therefore, seem patent that the Constitutional Convention considered the possibility of the exact proposition contended for by appellant, and rejected it in the adoption of Article IV, section 15. The wording of section 15 is clear and unambiguous. To read into it the interpretation contended for by the appellant would require us to amend the Constitution. This we refuse to do. We, therefore, hold that a legislative bill passed

with an emergency clause, vetoed by the Governor, is within the ambit of Article IV, section 15, Constitution of Nebraska, and requires only a three-fifths vote to override the veto.

While the case is not mentioned by the parties, we are not unmindful of State ex rel. Main v. Crounse (1893), 36 Neb. 835, 55 N. W. 246, 20 L. R. A. 265, which would seem to sustain appellant's position. That case, however, is distinguishable on its facts in that the original bill even without an emergency clause required a two-thirds vote. Insofar as some language in that opinion may be construed to hold otherwise, State ex rel. Main v. Crounse, *supra*, is overruled.

Appellant's assignments of error are without merit. The demurrer was properly sustained, and the judgment is affirmed.

AFFIRMED.

NEBRASKA MIL-NIC, INC., A CORPORATION, APPELLANT, V. HALL COUNTY, NEBRASKA, ET AL., APPELLEES, CITY OF GRAND ISLAND ET AL., INTERVENERS-APPELLEES.
196 N. W. 2d 522

Filed April 20, 1972. No. 37983.

SUPPLEMENTAL OPINION

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. On motion for rehearing. See 187 Neb. 656, 193 N. W. 2d 450, for original opinion. Original opinion affirmed as amended. Motion for rehearing overruled.

E. Merle McDermott, for appellant.

Sam Grimminger and Gerald Buechler, for appellees.

Duane A. Burns, Kenneth H. Elson, James D. Livingston, and Walter Lauritsen, for interveners-appellees.

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

WHITE, C. J.

On motion for rehearing, the next to the last sentence of our previous opinion is amended to eliminate the words "is later" and as amended shall read as follows:

Under these circumstances, the special statute of limitations enacted in 1967 dealing with annexation controls over the more general limitation of actions for tax refunds, because the special statute specifically expresses the legislative will. Stacey v. Pantano, 177 Neb. 694, 131 N. W. 2d 163.

With this amendment we adhere to our previous opinion and the motion for rehearing is overruled.

AFFIRMED AS AMENDED.

CLINTON, J., dissenting.

I dissent from the overruling of the motion for rehearing. I have concluded that the opinion which we adopted in the above case is patently in error and should be withdrawn and an opinion reaching the opposite results should be adopted—or at the very least that the motion for rehearing should be granted. There are several reasons for my position.

(1) In the above case we held the applicable statute of limitations was section 18-1717, R. R. S. 1943. A rereading of this statute convinces me that by its terms it has no application to refunds of a void tax, the assessment of which as the result of a court decision has been declared void. Section 18-1717, R. R. S. 1943, by its terms pertains to ". . . any action or proceeding . . . legal or equitable . . . *to contest any act done* . . . pursuant to such annexation . . . ." (Emphasis supplied.) The above case was an action for a tax refund, not an action *"to contest any act done pursuant,"* etc. The record establishes that the tax in question was already void by virtue of the final decree in Pokorski v. City of Grand Island declaring the annexation in question void. The situation is therefore identical with that in Higgs v. Hall County, 184 Neb. 508, 168 N. W. 2d 920, except that here we do have before us the judgment in the

Pokorski case. Whatever section 18-1717, R. R. S. 1943, may pertain to, it does not pertain to tax refunds. This case is not an action *"to contest."* The record here discloses that the tax has already been made void by virtue of the judgment of the invalidity of the annexation. This is a proven fact in this case.

(2) The opinion is substantially founded upon the proposition that section 18-1717, R. R. S. 1943, is the latest expression of the legislative will and therefore prevails over section 77-1736.04, R. R. S. 1943. It is not the latest expression of the legislative will as is acknowledged in the supplemental opinion of White, C. J. The opinion in citing the doctrine of "latest expression of the legislative will" must by implication hold that section 18-1717, R. R. S. 1943, impliedly repealed, in part at least, section 77-1736.04, R. R. S. 1943, for the foregoing principle applies to implied repeal where there is an inconsistency or repugnance between the two acts. 82 C. J. S., Statutes, § 291a, p. 489. Yet there is no necessary inconsistency or repugnance. Implied repeal is not favored. 82 C. J. S., Statutes, § 288, p. 479. See, also, Steeves v. Nispel, 132 Neb. 597, 273 N. W. 50. Even if these sections seemed repugnant they should be harmonized if possible. 82 C. J. S., Statutes, § 291c, p. 496.

(3) If there is a substantial question as to which of the two statutes of limitations should apply then the following principle is applicable: ". . . where there is a substantial question which of two or more statutes of limitation within the jurisdiction should be applied, the doubt should be resolved in favor of the . . . longest limitation." 51 Am. Jur. 2d, Limitation of Actions, § 63, p. 641. This court has previously so held in Crum v. Johnson, 3 Neb. Unoff. 826, 92 N. W. 1054. The issue in the Crum case was which of two conflicting statutes of limitations was applicable to an action on an appeal bond. The court held that if two conflicting statutes of limitations are equally applicable the longer period

would govern. The court there said: "After a careful investigation we can reach no other conclusion than that this action falls within the terms of section 14 exclusively. But if section 10 were equally applicable we should hold, nevertheless, that the longer period would govern." Several recent cases from other jurisdictions follow this principle. Drug, Cosmetic & Beauty Trades Service, Inc. v. McFate, 14 Ariz. App. 7, 480 P. 2d 30 (1971 — tort); Matthews v. Travelers Indemn. Ins. Co., 245 Ark. 247, 432 S. W. 2d 485 (1968 — malpractice suit); Hire v. E. I. Dupont de Nemours & Co., Inc., 211 F. Supp. 164 (1962 — action to recover severance pay); O'Malley v. Sims, 51 Ariz. 155, 75 P. 2d 50, 115 A. L. R. 634 (1938 — inheritance tax refund); Southern Pac. R. R. Co. of Mexico v. Gonzalez, 48 Ariz. 260, 61 P. 2d 377, 106 A. L. R. 1012 (1936 — contract damages); Payne v. Ostrus, 50 F. 2d 1039 (1931 — negligence).

(4) Considerations of public policy and fairness support the principles mentioned in paragraph (3) preceding. This court has held: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; and it is, in legal contemplation, as inoperative as though it had never been passed." Board of Educational Lands & Funds v. Gillett, 158 Neb. 558, 64 N. W. 2d 105 (1954). If the annexation is null and void, as the record establishes it is, the plaintiff should not be placed in any worse position than those in the identical situation who have apparently received refunds. Higgs v. Hall County, *supra*.

(5) Section 77-1736.04, R. R. S. 1943, by its very terms applies to applications for refund of tax, where the tax "by judgment or final order of any court of competent jurisdiction in this state, in an action not pending on appeal or error, it has been or shall be adjudged and determined that any . . . tax, assessment, or penalty or any part thereof, was illegal and such

judgment or order has not been made or shall not be made in time to prevent the collection or payment of such tax . . . . If the tax, assessment, or penalty has been distributed by the collecting officer, *then the person claiming a refund, . . . shall file a claim with the county treasurer for such refund within two years after the final judgment is entered declaring such tax, assessment, or penalty as illegal.*" (Emphasis supplied.) This statute clearly covers the case at hand.

BOSLAUGH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. DONALD GEORGE ELROY MCDONALD, APPELLANT.
196 N. W. 2d 524

Filed April 20, 1972. No. 38099.

Appeal from the district court for Adams County: FRED R. IRONS, Judge. On motion for rehearing. See 187 Neb. 752, 194 N. W. 2d 183, for original opinion. Motion for rehearing overruled.

Brock & Seiler, 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.

SPENCER, J., dissenting.

I respectfully dissent to the court's failure, on the motion for rehearing, to consider the State's challenge to the requirement in NJI No. 14.52 which requires that a jury must find beyond a reasonable doubt that a defendant's confession was freely, voluntarily, and intelligently made. This instruction is based upon an erroneous statement in Parker v. State, 164 Neb. 614, 83 N. W. 2d 347.

The United States Supreme Court, in the recent case of Lego v. Twomey, Warden, decided January 12, 1972, 404 U. S. 619, 92 S. Ct. 619, 30 L. Ed. 2d 619, held that the hearing on the voluntariness of a confession required by Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, is not designed to implement the presumption of innocence and enhance the reliability of jury verdicts, but to prevent the use of a coerced confession as violative of due process quite apart from its truth or falsity. The Court specifically found that there was nothing in In re Winship, 397 U. S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368, which was inconsistent with this holding.

A confession or its voluntariness is not an element of the crime with which the defendant is charged. The purpose of a voluntariness hearing is not to implement the presumption of innocence but only to determine the confession's admissibility as evidence. It is difficult to understand why a different rule should pertain for the degree of proof necessary to decide the issue of voluntariness of a confession than the degree of proof necessary for the admission of other evidence, and no reason for this discrepancy has ever been advanced in a Nebraska decision. Strict rules pertain concerning search and seizure and also the giving of the Miranda warnings, yet proof of compliance with these rules need be only by a preponderance of evidence even though they pertain, as does the voluntariness of a confession, to whether the evidence was properly or wrongfully obtained.

The admissibility of a confession by a preponderance of the evidence is not a violation of a defendant's constitutional rights, but it certainly is in the public interest, especially in the present day and age.

LLOYD S. WHALEY, APPELLEE, V. MILDRED F. MINGUS, APPELLANT, IMPLEADED WITH G. F. LUTHER, APPELLEE.
196 N. W. 2d 516

Filed April 20, 1972. No. 38144.

1. **Adverse Possession: Property.** It is the visible and hostile possession, with an intention to possess land occupied under a belief that it belongs to the possessor, that constitutes its adverse character.
2. **Adverse Possession: Property: Notice: Time.** The real purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may, within the period of limitation, take action to protect his interest.
3. **Adverse Possession: Notice.** To be effective against a true owner, acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another.

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

Stewart & Stewart, for appellant.

Cook & Cook, for appellee Whaley.

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

McCOWN, J.

This case involves the ownership of 24.4 acres of land situated in the former bed of the Platte River in Dawson County, Nebraska. The plaintiff claims ownership by accretion to land owned and held under deed, while the defendant Mingus claims ownership of the same land by right of adverse possession. The district court entered judgment quieting title to the land in the plaintiff.

Plaintiff purchased his property in 1948. The defendant and her husband acquired their property in 1943, and defendant is now the owner. The two tracts adjoin. The accretion land involved here lies to the

north of the deeded lands. It is a triangular-shaped tract lying between the surveyed boundary and a line on which the defendant claims to have constructed a fence in the year 1948. The land is not cultivated, but has some brush and trees on it.

Defendant's evidence was that the fence was built with some small posts, one or two strands of used barbed wire, and the wire was nailed to trees where possible. Defendant's evidence was that the fence started some 200 feet north of the north boundary line of the defendant's deeded property and went out northerly to the river, a distance of some 1,500 feet. The defendant's evidence was that the fence was maintained from the time of its construction in 1948 until 1961. Defendant's evidence as to other acts of ownership on the disputed land was that they planted some grass in 1948; pastured sheep in 1950 and 1951 for 2 or 3 hours at a time; cleaned up tin cans and branches at various times; and maintained a duck blind near the northeast corner of the disputed land and hunted from the blind from 1948 on for more than 10 years.

Witnesses for the plaintiff, who were for the most part residents of the immediate area, sharply contradicted the defendant's evidence. Their evidence was that many people used the land for hunting and recreation without asking permission from anyone; that they had not seen any fence, nor could it be seen from the road; and that they had never seen any sheep pastured on the land. One witness, thoroughly familiar with the area, testified that he had trapped, hunted, or seined minnows in the area every year since the year 1949 and was completely unaware of any fence along the line claimed by the defendant.

The plaintiff viewed the land in the fall of 1948 and plaintiff's business manager stated that he had gone into the river bottom in the area after stray cattle on several occasions. Neither of them had ever seen the

fence nor were they aware of the defendant's claim until 1967.

In 1965, the county surveyor made a survey along the fence line claimed by the defendant. He found barbed wire grown into one tree approximately 200 feet northeast of the northeast corner of the defendant's deeded property; one other tree with barbed wire grown into it some 90 feet northeast of the first tree; and a single strand of barbed wire running from that tree approximately 100 feet northeast. He found no evidence of more than a single strand of barbed wire and only at the places indicated.

The district court viewed the premises in 1970 and inspected the fence line claimed by the defendant. He found no sign of any fence closer than 200 feet from the northeast corner of the defendant's deeded land. After the evidence of a former fence extending over approximately 200 to 250 feet as testified to by the county surveyor, the court found no further evidence of any fence from that point to the present flowing stream of the river, some 1,800 feet further to the northeast.

The trial court set out his findings and the evidence in a thorough and detailed memorandum. We think it clear that the critical issue here involves the facts and not the law. The primary test of adverse possession is the actual, continuous, open, notorious, and adverse possession of the property under claimed ownership during the 10-year period required by the statute. It is the visible and hostile possession, with an intention to possess land occupied under a belief that it belongs to the possessor, that constitutes its adverse character. Ordinarily the hidden or remote view or belief of the possessor in taking possession does not relate itself to the adverse character of the possession. Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331.

The real purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger

so that he may, within the period of limitation, take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. Purdum v. Sherman, *supra*.

To be effective against a true owner, acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. Krumwiede v. Rose, 177 Neb. 570, 129 N. W. 2d 491; Mentzer v. Dolen, 178 Neb. 42, 131 N. W. 2d 671.

The determination of the issues here rests primarily upon the facts. The evidence was conflicting. The trial court viewed the premises and saw and heard the witnesses. The record fully supports his determination.

The judgment is affirmed.

AFFIRMED.

VICTOR M. PETERSEN ET AL., APPELLANTS, V. SCHOOL DISTRICT OF BELLEVUE, COUNTY OF SARPY, STATE OF NEBRASKA, APPELLEE.
196 N. W. 2d 510

Filed April 20, 1972. No. 38145.

Eminent Domain: Property: Interest: Constitutional Law: Time. In an eminent domain proceeding, on appeal by the condemner from the award of the county court appraisers, interest is added or allowed only from the date on which the condemner deposited the amount of the appraisers' award and became entitled to enter into possession of the property involved. This is not constitutionally impermissible.

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

David S. Lathrop of Lathrop, Albracht & Dolan and Eugene T. Atkinson of Atkinson & Kelly, for appellants.

Dixon G. Adams, for appellee.

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

NEWTON, J.

This is an action in eminent domain. Appellee school district condemned a tract of land belonging to appellants. The only issue presented is one regarding interest on the amount of the award. Interest was denied by the district court. We affirm the judgment of the district court.

Petition was filed in the county court on July 3, 1969. An award was made by the appraisers on August 25, 1969, in the sum of $69,000. Condemner appealed to the district court and the verdict of the jury returned on March 25, 1971, was for $58,000. The record does not reflect any deposit made by condemner prior to trial in the district court.

Prior to the adoption of Laws 1951, c. 101, p. 451, we did not have a statute providing for interest on awards made in condemnation proceedings. Prior to the passage of this act, in compliance with accepted rules on the subject, interest was allowed in certain circumstances. In all instances the statute required a deposit of the amount of the appraisers' award before the condemner could take possession. Numerous cases determined that if, on appeal, the verdict of the jury was for a sum in excess of the appraisers' award, interest should be allowed but should not be allowed under other circumstances. See, Grimm v. Elkhorn Valley Drainage Dist., 98 Neb. 260, 152 N. W. 374; Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168; Kennedy v. Department of Roads & Irrigation, 150 Neb. 727, 35 N. W. 2d 781. An exception to this general rule appears in Ehlers v. Chicago, B. & Q. R.R. Co., 118 Neb. 477, 225 N. W. 468, where interest was disallowed when the amount of the appraisers' award had been deposited, but the condemnee remained in possession.

It is generally conceded that the recovery of interest is a matter of strict constitutional right. See Annota-

tion, 36 A. L. R. 2d 428. It is also generally conceded that interest must run "from the time of the taking." See Annotation, 36 A. L. R. 2d 443. In regard to the "date or time of taking," there is a considerable divergence in the authorities. See Annotation, 36 A. L. R. 2d 447. Prior to the adoption of our present statute, the Nebraska cases cited above indicated that the "taking" occurred when the eminent domain proceedings were commenced. The Ehlers case, previously cited, was an exception to the general rule. The Nebraska rule diverged from the majority rule which holds that "time of the taking" refers to the time when the condemner actually entered into possession. See Annotation, 36 A. L. R. 2d 451. This is also the federal rule. "In the federal courts interest is usually allowed from the time of the actual taking or entry into possession by the condemnor, unless the rule of the state wherein the land is situated requires the allowance of interest from an earlier time." 27 Am. Jur. 2d, Eminent Domain, § 301, p. 115. See, also, Fibreboard Paper Products Corp. v. United States, 355 F. 2d 752 (9th Cir., 1966); United States v. Mahowald, 209 F. 2d 751 (8th Cir., 1954).

The applicable Nebraska statute, section 76-711, R. R. S. 1943, provides that the condemner shall not acquire any interest in or right to possession of the property until he has deposited the amount of the appraisers' award. It further provides that in the event of an appeal by the condemnee if he succeeds in obtaining an amount greater than the appraisers' award, he shall recover interest from the date of the deposit. If the condemner appeals, interest shall be allowed from the date of the deposit on the amount finally allowed, less interest on that portion of the deposit withdrawn by the condemnee.

It is clear the statute contemplates that the condemner has entered into possession as of the date of the deposit and intends that interest shall be awarded from the time condemnee has been deprived of possession. On

the other hand, it does not provide for the allowance of interest during the period that the condemnee retains possession.

There does not appear to be any valid constitutional objection to the statutory provisions. In Feltz v. Central Nebraska Public Power & Irr. Dist., 124 F. 2d 578 (8th Cir., 1942), it was held: "The Nebraska law that landowner appealing from appraisers' award of damages in condemnation proceeding may not recover interest on verdict of jury which is equal to or less than award of appraisers, is not violative of constitutional requirement that all courts shall be open and every person shall have remedy for injury without denial or delay, and that property shall not be 'taken' or 'damaged' for public use without 'just compensation.'" In United States v. Certain Land in City of St. Louis, Mo., 41 F. Supp. 809 (D. C., 1941), affirmed 131 F. 2d 882, it is held: "The Fifth Amendment to the Federal Constitution guarantees to property owners full compensation for property taken for public use. That the full compensation guaranteed by the Constitution includes interest on the just compensation finally awarded when all or a portion thereof is withheld after the taking is no longer an open question. That full compensation includes the value of the use of the property after the taking and prior to payment therefor. * * * But interest as such is not *added* to value at the time of taking in order to arrive at just compensation subsequently ascertained and paid.[9] Interest is merely the equivalent of the value of a portion of the property taken, in this instance the value of the use of the property at the time it was taken. * * * If the full value is paid at the time of taking, the owner has the use of the money in lieu of the property and no right to further compensation exists." In State, By State Highway Commissioner v. Hankins, 63 N. J. Super. 326, 164 A. 2d 615, it was held: "'Whether interest must be paid on the value of land taken in a condemnation proceeding constitutionally depends on whether there is

a lapse of time between the date of the *actual taking of the property* and the tender of or payment of the value of the property so taken. The amount of interest and when it should be paid in turn depends on specific provisions with respect to interest in a statute or where there is no such provision then on general equitable principles.'" See, also, Central Nebraska Public Power & Irr. Dist. v. Fairchild, 126 F. 2d 302 (8th Cir., 1942); Kirby Lumber Corp. v. State of Louisiana, 293 F. 2d 82 (5th Cir., 1961); United States v. Mahowald, 209 F. 2d 751 (8th Cir., 1954).

Although it is true that a condemnee's use of his property during the pendency of eminent domain proceedings may be somewhat circumscribed due to uncertainty regarding the time when a condemner may deposit the amount of the appraisers' award and enter into possession, he continues to have its use and the rentals therefrom and any additional damages incurred, such as to crops, may be recovered. See Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200.

In the present instance, the condemner did not deposit the amount of the appraisers' award. The condemnees remained in possession until final judgment was entered on appeal to the district court at which time the judgment was paid in full. The appeal was taken by the condemner. Condemner not having made the deposit or entered into possession, the statute precludes the payment of interest alleged to have accrued prior to entry of final judgment. Condemnees take the position that the statute fails to cover a situation in which no deposit is made and that therefore the court may apply equitable principles in arriving at a solution of this case. We cannot agree with this. The statute allows interest only from the time a deposit is made and if none is made, interest cannot be assessed. To hold to the contrary would constitute judicial amendment and amplifying of the statute which is a legislative prerogative. Further-

more, if the statute is to be disregarded, then we fall back on the situation formerly presented at a time when there was no Nebraska statute on the question of interest. The cases decided during that period unanimously disallowed interest when, as here, the condemnees failed to obtain a greater sum on the appeal.

This court has stated that when a condemner makes a deposit in court, the amount of such payment constitutes a fund which is deemed a *substitute* to the owners for the land *of which they have been deprived* and for their damage. See Blecha v. School Dist. of Hebron, 173 Neb. 183, 112 N. W. 2d 783. Under the statute entry cannot occur until the deposit is made and until this occurs, the owner has not been deprived of his property. There is simply a procedure pending which will eventually result in such deprivation.

The judgment of the district court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The majority opinion dismisses the constitutional issue of just compensation by indirectly overruling all the past Nebraska cases, without mentioning them, which have uniformly held that the "taking" is deemed to occur at the time the petition for condemnation is filed. The majority opinion now holds, in effect, that there is no "taking" until a condemner actually enters into possession. The majority opinion then states: "Condemner not having made the deposit or entered into possession, the statute precludes the payment of interest." It is quite clear that, statute or no, something in the nature of interest must be included in a condemnation award in order to produce the full equivalent of the value of an award paid contemporaneously with the taking. This is without question the overwhelming general rule. See cases cited in Annotation, 36 A. L. R. 2d 413 and 443.

As this court said in a case similar to this where the condemner did not make any deposit: "* * * the owner

is entitled to interest on the amount of the compensation from the taking no matter whether the verdict of the jury is larger or smaller than the award of the appraisers and no requirement rests upon the owner to make demand for such deposit or to take any action requiring such deposit to be made to entitle him to interest thereon." Langdon v. Loup River Public Power Dist., 144 Neb. 325, at page 335, 13 N. W. 2d 168.

The only case found which directly considered the specific issue involved here is Central Nebraska Public Power & Irr. Dist. v. Fairchild, 126 F. 2d 302. That case was cited with approval in Langdon v. Loup River Public Power Dist., *supra*.

The court in Fairchild said: "The constitutional provision prohibiting the taking or damaging of private property for the public use without just compensation does not of itself suggest procedure for the taking of private property for such uses. That has evolved in Nebraska from the statute and from the decisions which firmly establish that for the purpose of assessing damages the 'condemnation' or 'taking' is deemed to occur at the time the petition for condemnation is filed."

The court in Fairchild specifically rejected the argument, now adopted by the majority opinion here, that interest should not commence until the time of entry into possession by the condemner. Both the majority opinion and the dissent in Fairchild agreed that interest must be allowed from the date the petition for condemnation is filed but disagreed only as to the proper rule to be applied in requiring the condemnee to account for the use of the property during the time he retained possession. The majority held that the actual amount of rentals received by the landowner during the pendency of the appeal should be offset against the interest allowed while the dissent determined that the landowner ought to be required to account for the reasonable value of the use of the property during the time of retained possession and not simply for such rental payments as

he had actually collected. As Judge Johnson said in the dissent: "The allowance of interest in a condemnation case in Nebraska is not a fixed statutory right, but simply a means of insuring 'just compensation' to the property owner. The only thing for which it can reasonably be held to constitute compensation is a deprivation of the use of the property or of the funds substituted for the property, during the condemnation litigation period."

In this case, the tract of land condemned was held for development and was not rented or used during the litigation period. The filing of the condemnation action effectively stopped all uses to which it might otherwise have been put and there was no evidence that its use had any reasonable value during the period of litigation. All of the expert testimony as to value was as of the date of filing the petition for condemnation. In spite of that fact, the majority opinion now holds that the "taking" as to which all of those witnesses were testifying, did not occur until the condemner might decide to enter into possession or until the final verdict of a jury might be entered on appeal. That is clearly a violation of the constitutional mandate that "the property of no person shall be taken or damaged for public use without just compensation therefor." The absence of a statute which specifically authorized interest was wholly immaterial. It should be noted also that the statute itself has now been changed to require deposit within 60 days from date of award of appraisers, and it entitles the condemnee to interest from date of deposit, where the appeal is by the condemner. § 76-711, Laws 1971, L. B. 191, § 1. There is even a serious question as to whether that statute by its own terms is applicable to pending appeals such as this one.

The judgment should have been reversed, and the condemnees should have judgment for the amount of the award with interest from the date the petition for condemnation was filed.

SMITH and CLINTON, JJ., join in this dissent.

FIRST NATIONAL BANK OF BELLEVUE, A BANKING CORPORATION, APPELLEE, V. GEORGE P. ROSE ET AL., APPELLANTS.

196 N. W. 2d 507

Filed April 20, 1972. No. 38159.

1. **Trial: Evidence: Sales: Contracts: Security Interest.** Under the Uniform Commercial Code, the adequacy or insufficiency of the price for which collateral is sold at a private sale after default and repossession is one of the "terms" of sale, and is relevant along with other issues, in determining whether the sale was commercially reasonable.
2. **Trial: Evidence: Pleadings.** A general denial is available to a defendant to challenge one or more of the elements essential to a recovery by the plaintiff and the effect of the denial is to put the burden on the plaintiff to establish by evidence the matter denied.
3. ———: ———: ———. Where an answer to a petition consists of a general denial, defendant may introduce such testimony as will tend to disprove testimony of plaintiff in support of his petition. For such purposes, no other allegations in the answer are necessary.

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

Ralph R. Bremers and George T. Burr, for appellants.

Keith I. Frederick of Schmid, Ford, Mooney, Frederick & Caporale, for appellee.

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

MCCOWN, J.

This is an action to recover a deficiency judgment for the balance due on a secured promissory note of the defendants, after a sale of the collateral security. The district court sustained plaintiff's motion for a directed verdict and entered judgment against the defendants for $9,422.88.

In April 1969, the First National Bank of Bellevue

consolidated two existing loans to defendants and advanced additional cash. The secured note was for $22,200. The security agreement covered various pieces of equipment, including tractors, vehicles, and trailers. Three monthly payments of $2,000 each were made. After default, the plaintiff replevined the equipment and disposed of it at private sale, after notice to the defendants. Following sale and disposition of the collateral, the plaintiff credited the sum of $10,268.50 on defendants' indebtedness.

Plaintiff's petition here set forth essentially those facts. Paragraph VII of the petition specifically alleged that $10,268.50 was the fair and reasonable value of the collateral. The petition prayed for attorneys fees and expenses in accordance with the security agreement and for judgment for the balance due on the note. When the jury trial began, the amount allegedly due was $9,422.88. The defendants' answer was a general denial of each and every allegation of the plaintiff's petition.

The plaintiff's evidence as to the value of the equipment sold at the private sale was largely undisputed except as to one 1959 Freuhauf platform flatbed trailer. Evidence as to that piece of equipment was confusing, to say the least. The flatbed trailer was on the equipment list attached to the financing statement and security agreement. It is not listed on the face of the judgment in the replevin action. There is evidence that a representative of the plaintiff at one point estimated the value of the trailer at $500. The defendant, George Rose, testified that its value was $1,000. The trailer is not specifically accounted for on any record of the sale. Plaintiff's witness conceded that the trailer had been repossessed but could not clearly account for it. In other testimony by that witness, he said: "I guess that trailer was thrown into the hopper." That same witness had assigned a value of $3,836.01 to two tractors. He finally testified that the tractors together with the trailer brought only $3,000 at the sale, but the plaintiff

credited the defendants with $3,836.01, the value of the two tractors.

The trial court took the position that inadequacy of price at the private sale of the collateral was not in issue under a general denial but was instead a matter of affirmative defense which had not been pleaded. However, the defendant Rose was permitted to testify as to the flatbed trailer. At the close of all the evidence, the court granted plaintiff's motion for directed verdict.

Section 9-504(3), U. C. C., provides in part: "Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable."

Under the Uniform Commercial Code, the adequacy or insufficiency of the price for which collateral is sold at a private sale after default and repossession is one of the "terms" of sale, and is relevant along with other issues, in determining whether the sale was commercially reasonable.

The first sentence of section 9-507(2), U. C. C., indirectly supports that conclusion: "The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." See, also, 64 Northwestern University L. Rev. 808, at p. 820. The plaintiff recognized the burden resting on it under the terms of the Uniform Commercial Code and affirmatively pleaded that the sale price was the fair and reasonable value of the collateral. To establish that every aspect of the sale was commercially reasonable was essential to plaintiff's case, and the issue was clearly within the pleadings.

The question remains as to whether or not evidence of inadequacy of price, or lack of proper credit on the indebtedness was admissible under a general denial. A general denial is available to a defendant to challenge

one or more of the elements essential to a recovery by the plaintiff, and the effect of the denial is to put the burden on the plaintiff to establish by evidence the matter denied. Master Laboratories, Inc. v. Chesnut, 154 Neb. 749, 49 N. W. 2d 693.

Where an answer to a petition consists of a general denial, defendant may introduce such testimony as will tend to disprove testimony of plaintiff in support of his petition. For such purposes, no other allegations in the answer are necessary. Alberts v. Pickard, 148 Neb. 764, 29 N. W. 2d 382; Ehlers v. Church of God in Christ, Inc., 173 Neb. 670, 114 N. W. 2d 716.

Here there was a flat contradiction in the testimony as to the value of the flatbed trailer together with no record of its sale and no evidence of the specific amount of credit allowed for it, if any. Under such circumstances, there was a factual issue which required submission to the jury. In a jury case where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury. Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178.

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

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. SAM L. SIMMONS, APPELLANT.
196 N. W. 2d 499

Filed April 20, 1972. No. 38255.

1. **Criminal Law: Arraignment: Guilty Plea: Records.** The record of the arraignment at which a plea of guilty is entered must show that the court determined there was a factual basis for the plea.
2. **Criminal Law: Arraignment: 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 Douglas County: Donald Brodkey, Judge. Affirmed.

William J. Riedmann, 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.

WHITE, C. J.

This is an appeal from a judgment and indeterminate sentence of 2 to 4 years in the Nebraska Penal and Correctional Complex on a guilty plea to a charge of grand larceny. The assignment of error generally is that the record fails to affirmatively show the defendant pled guilty voluntarily, understandingly, intelligently, and with full knowledge of the rights which he was waiving by his plea. We affirm the judgment and sentence of the district court.

There is no dispute between the parties as to the law that covers this case. Quite similar contentions to the ones made in this case were made in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763. The argument there, as here, was based essentially upon the holding of the United States Supreme Court in Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274. We held in Turner that the proper interpretation of Boykin is that the court cannot presume a waiver of federal constitutional rights from a silent record. We said that Boykin requires a plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. In Turner we specifically held as follows: "The criteria is whether or not the defendant understands the relevant factors involved in

a guilty plea. Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea." We also said in Turner 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 record in this case reveals an exhaustive and conscientious application of the principles and standards required in State v. Turner, *supra*. The court at the arraignment inquired as to the defendant's understanding of the nature of the offense and received a definite positive reply after the court had carefully explained the elements of the charge following a reading of the information. The court carefully explained "aiding and abetting" when the county attorney informed the court that it was possibly involved. The defendant at all times was represented by counsel and there is no contention in this case of inadequate representation. The court carefully explained the various pleas the defendant could make, including his right to remain silent and his various constitutional rights. With counsel present, the defendant stated that he understood his rights and the pleas that were open to him. He further stated that no force or threat had been used upon him nor had any promises been made to him in order to secure his plea. The court even inquired as to plea bargaining and was advised that there had been only unsuccessful plea bargaining. This statement was agreed to by the defendant. The court, in this case, even went so far as to explain to the defendant that if he pled not guilty he would be entitled to have a speedy public trial, the nature of a jury trial, the requirement of a unanimous vote to convict him, the protection of the presumption

of innocence, the right to be represented by an attorney at all times, the right of confrontation, the right not to testify or incriminate himself by his own testimony, the right to State process to procure witnesses, a full explanation of the term "aiding and abetting," an explanation of the meaning of the waiver of all these rights, and a specific inquiry as to whether he understood all of these rights. The court also interrogated the defendant's counsel in the course of the proceedings. The record reveals that a careful description of the penalties involved was made and the procedure of the court before determining the amount of the sentence, including a description of a presentence investigation.

The record here conclusively shows that at the arraignment at which the defendant pled guilty the court made proper inquiry and determined that there was a factual basis for the plea of guilty under the holding in State v. LeGear, 187 Neb. 763, 193 N. W. 2d 763. The court specifically told the defendant that "before I accept your plea of guilty, I want to ascertain if there is a factual basis for the plea * * *." Only a part of the colloquy resulting from this statement is recited herein in the interest of brevity. The record shows as follows:

"THE COURT: I just want to make sure you are under law guilty of aiding and abetting or whatever was involved.

"DEFENDANT: I took the money.

"THE COURT: You took the money from where?

"MR. RYDER: It was down at Tall Togs.

"THE COURT: I don't have the name.

"MR. RYDER: Tall Togs, it is a clothing store.

"THE COURT: Was that Jerry Leonard's?

"MR. RYDER: It is right down on 14th Street.

"THE COURT: Well, Mr. Breit, as counsel for the defendant and knowing the facts of this case as related to you and probably in more detail than I have had it here, and also whatever information you have been able to ascertain by your own investigation or that of

your office, is it your considered judgment and opinion that a plea of guilty to the charge of grand larceny by Mr. Simmons, your client, here today is warranted and justified?"

The contentions of the defendant are wholly without merit. This record affirmatively demonstrates that the plea of guilty herein was entered voluntarily and intelligently within the meaning of Boykin and Turner.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS W. ZOLLARS, APPELLANT.
196 N. W. 2d 521

Filed April 20, 1972. No. 38343.

Criminal Law: Appeal and Error. Relief cannot be granted on appeal when it is frivolous and completely lacking in merit.

Appeal from the district court for Butler County: HOWARD V. KANOUFF, Judge. Affirmed.

Dennis W. Zollars, pro se.

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

Heard before WHITE, C. J., BOSLAUGH, McCOWN, and CLINTON, JJ., and WARREN, District Judge.

WHITE, C. J.

The defendant, Dennis W. Zollars, asserts excessiveness of a 3-year sentence, for making, drawing, uttering, and delivering a bank check when he knew he did not have an account in or a deposit in the bank upon which he drew such check.

The defendant pled guilty to the charge and the record reveals a careful protection of the defendant's rights

and a plea completely voluntary in nature. The defendant does not contend otherwise. The record also reveals that on July 23, 1971, the defendant had committed another like offense for which he was found guilty in the district court for Platte County, Nebraska, and that the present charge of issuing a no-account check is a second offense.

It is clear that the sentence imposed was within the limits provided by law and there is nothing in the record to show that the court abused its discretion in imposing the sentence that it did. On the contrary, the record affirmatively shows that within a short period of time after having written a no-account check, the defendant repeated the offense in another county with no circumstances being shown by way of justification.

The defendant apparently contends now, after the sentence has been imposed, he was under the impression the court ruled that he be eligible for parole after serving 1 year of the sentence. Eligibility for parole, of course, is not within the jurisdiction or the discretion of the sentencing judge. The record of the sentence imports absolute verity and reads as follows: "The Court: Then, Mr. Zollars, the Court accepts your plea of guilty, and it is the order and judgment of this Court that you be confined and sentenced to the Nebraska Penal and Correctional Complex for a term of three years at hard labor, except for Sundays and holidays; and that no part of said sentence shall be in solitary confinement or upon bread and water. You are remanded to the sheriff to be taken to the complex as provided by law.

"The Witness: Yes, sir."

The sentence imposed is clear and unmistakable and there is utterly no merit to the defendant's contention. In State v. Moore, *ante* p. 104, 195 N. W. 2d 253, this court recently held that relief cannot be granted on appeal when it is frivolous and completely lacking in merit.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLYDE WEST ET AL., APPELLANTS.
196 N. W. 2d 514

Filed April 20, 1972. No. 38353.

1. **Criminal Law: Statutes: Motions, Rules, and Orders: Administrative Law.** A criminal prosecution cannot be maintained under a statute requiring a permit to be obtained from the Department of Environmental Control "as required by it," i.e., the department, in the absence of rules, regulations, or standards fixing the circumstances under which such a permit is to be "required."
2. **Criminal Law: Statutes.** A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder.

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

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

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.

NEWTON, J.

Defendants have been convicted of engaging in the construction of a sewer disposal system without obtaining a permit therefor from the state Environmental Control Council. We reverse the judgment of the district court.

Plans for the disposal system were submitted to the council and, after suggested revisions were made, ap-

proved. No permit was issued, but after institution of this prosecution, a letter was written approving the project plans and stating that the letter of approval should be considered a "permit."

Prior to the commencement of this prosecution, it was not the practice of the council to issue permits nor had it adopted any rules or regulations governing or setting standards for the construction of sewage disposal units. Neither had it, by rule or regulation, provided for the issuance of permits or set out the circumstances under which they would be required. The present act, Chapter 81, article 15, sections 81-1501 to 81-1532, R. R. S. 1943, supplants and combines the duties formerly allotted to the Air Pollution Control Council, Water Pollution Control Council, and Department of Health. By virtue of section 81-1505 (5), R. R. S. 1943, the State contends that the rules adopted by these organizations become the rules of the state Department of Environmental Control. We cannot agree. That section adopts only *"standards of quality* of air, waters or land." (Emphasis supplied.) Furthermore, this record fails to reflect the existence of *any* rules or regulations.

The statute under consideration, section 81-1506 (2), R. R. S. 1943, provides: "It shall be unlawful for any person to carry on any of the following activities unless he holds a *current permit therefor from the council, as is required by it,* for the disposal of all wastes which are or may be discharged thereby into the air, waters or land of the state:

"(a) The construction, installation, modification or operation of any disposal system or part thereof or any extension or addition thereto; * * *." (Emphasis supplied.)

It will be noted that one constructing a disposal system must hold "a current permit therefor from the council, *as is required* by it." (Emphasis supplied.) In the complete absence of rules or regulations of the coun-

cil requiring a permit and fixing standards or conditions under which it must be obtained, it is apparent that the statute is not applicable and has never been activated.

Furthermore, in the absence of standards of the council clearly defining when, under what conditions, and for what purposes a permit shall be required, the law is too vague and uncertain to support a criminal prosecution. The council may see fit to exempt certain types of projects or minor extensions. "A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder." State v. Nelson, 168 Neb. 394, 95 N. W. 2d 678.

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

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT D. CLAIRE, APPELLANT.
196 N. W. 2d 519

Filed April 20, 1972. No. 38383.

1. **Criminal Law: Trial: Conspiracy: 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 defendant's conduct subsequent thereto.
2. **Criminal Law: Trial: Conspiracy: Intent.** Participation in criminal intent may be inferred from presence, companionship, and conduct.
3. **Criminal Law: Sentences: Appeal and Error.** This court will not interfere with a sentence imposed by a lower court unless it appears to be the result of an abuse of discretion.

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

Eugene T. Atkinson of Atkinson & Kelly, for appellant.

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

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

SPENCER, J.

Defendant, Robert D. Claire, appeals from his conviction on three counts of burglary. He was sentenced to 3 years on each count, the sentences to run concurrently. We affirm.

Defendant was observed in a white Ford Maverick automobile in the east parking lot behind the approximate center of the Southroads Shopping Center in Sarpy County, at approximately 4:30 a.m., on the morning of March 9, 1971. When an officer drove up, the car left the shopping center and the officer followed and stopped it. When the defendant could not produce a driver's license or a registration for the car, he was placed under arrest. John Pakolnis was in the car with the defendant at the time. The two men were taken to the Bellevue police station, searched, and booked.

A check at the shopping center revealed that three stores, Woolworth's, Music Land, and Calandra's, had been forcibly entered. Some suitcases, television sets, and stereo cartridges were found stacked together on the floor in Music Land. Merchandise taken from Woolworth's was found in the suitcases. Under an opening in the ceiling of the mall, between two of the establishments, the officers found several .22-caliber bullets lying on the floor. Bullets of the same type and brand were found in the coat pocket of Pakolnis, as well as in a Kleenex box which was on a shelf under the dash in the center of the automobile being operated by the defendant. Defendant also had in his possession a pocket knife of a type sold exclusively by Woolworth's. Some 12 hours after the defendant's apprehension, a torn cardboard knife carton was found in the store, in the vicinity where the knives were displayed. A cash

register key, taken from Woolworth's, and used to open cash registers in the Woolworth store, was found in Pakolnis' possession.

Defendant assigns as error: (1) The insufficiency of the evidence to sustain the verdict; (2) the introduction of the knife carton; (3) the giving of an instruction on aiding and abetting; and (4) the excessiveness of the sentence.

The defendant was observed by the police in the immediate vicinity of the places burglarized at 4:30 a.m. He had a small pocket knife in his possession at the time of his arrest, which was of a type sold exclusively by Woolworth's. Several .22-caliber shells, of the exact type scattered on the floor of the mall in the shopping center, were found in his possession in the car. His companion had some of these same shells in his pocket, and also had a key taken from Woolworth's which opened cash registers at that establishment. The evidence was ample to warrant the submission of the case to the jury.

The torn cardboard knife carton, on the record herein, was properly received in evidence. Woolworth's opened for business routinely that morning. At approximately 4 or 5 p.m., when the officer made the inspection of the area where the knives were displayed, he found the torn knife carton on the floor in the immediate area where the knives were displayed. It is reasonable to believe the knife found in defendant's possession came from the carton in evidence.

The instruction on aiding and abetting was proper. The defendant and Pakolnis were observed parked together, behind the shopping center, immediately before defendant's apprehension. There can be little question that Pakolnis, who subsequently pled nolo contendere, had been in the burglarized establishments. Whether defendant actually entered the three establishments can only be inferred from the evidence, but there cannot be the slightest doubt defendant was with Pakolnis near

the scene. The evidence was also sufficient to permit the jury to find the defendant had some of the merchandise taken in his possession. This amply sustains the giving of an instruction on aiding and abetting. In Miller v. State, 173 Neb. 268, 113 N. W. 2d 118, we said: "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 defendant's conduct subsequent thereto.

"Participation in criminal intent may be inferred from presence, companionship, and conduct * * *."

The sentence is not excessive. Defendant was convicted on three counts of burglary and sentenced to serve concurrent terms of 3 years on each count. From the record, it is evident that there was also another charge pending. The sentence is a modest one under the circumstances. As we said in State v. Duitsman, 186 Neb. 39, 180 N. W. 2d 685: "This court will not interfere with a sentence imposed by a lower court unless it appears to be the result of an abuse of discretion." There definitely was no abuse of discretion herein.

Defendant's assignments of error are without merit. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HUBERT W. FINCHER, APPELLANT.
196 N. W. 2d 909

Filed April 27, 1972. No. 38122.

Criminal Law: Sentences: Appeal and Error. A sentence within the limits prescribed by statute will not be disturbed in the absence of an abuse of discretion.

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

Hubert W. Fincher, pro se.

Clarence A. H. Meyer, Attorney General, and Gerald S. Vitamvas, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

CLINTON, J.

The defendant was convicted by a jury of the crime of assault with intent to commit great bodily injury committed on September 29, 1970. He was sentenced to a term of 15 to 20 years. He appeals pro se and the sole assignment of error is that he received a sentence in excess of the maximum provided by statute. He points to section 28-413, R. R. S. 1943. He overlooks that in 1969 the Legislature amended that statute to provide for a penalty of "not less than one year nor more than twenty years." § 28-413, R. S. Supp., 1969. The assignment of error is not well taken.

If the defendant had been represented by counsel on this appeal a specific assignment of excessiveness of sentence would no doubt have been made, and since this appears to be the defendant's real complaint we treat his assignment of error as raising the question of excessiveness of sentence and have accordingly carefully reviewed the record.

The evidence of the defendant's guilt is largely circumstantial but quite conclusive. The crime was witnessed but the witness was not able to see the face of the defendant, only the wrist and the hand, the weapon, and the striking. The crime itself was a brutal one involving an apparently unprovoked assault with a hammer upon a man 80 years of age. The victim died. The defendant is of the age of 60 years. He took the stand in his own behalf. His explanation of the blood on his clothing is not convincing. He admits three prior felony convictions. The court did not abuse its discretion in imposing a sentence of 15 to 20 years.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DIANE CRAWFORD, APPELLANT.

196 N. W. 2d 915

Filed April 27, 1972. No. 38138.

1. **Criminal Law: Parent and Child: Negligence: Homicide.** A person who has the care, custody, or control of a child and causes the death of the child by willfully or negligently causing or permitting the life of the child to be endangered is guilty of manslaughter.
2. ———: ———: ———: ———. A parent who negligently or willfully fails to obtain medical aid for a child, thereby causing his death, is guilty of manslaughter.
3. **Criminal Law: Instructions: Negligence.** An instruction that criminal negligence or culpable neglect is not a slight breach of duty but a gross failure to do what is required is not prejudicially erroneous.

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

Frank B. Morrison, Sr., Bennett G. Hornstein, 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, Diane Crawford, appeals from a conviction for manslaughter. She contends the evidence was not sufficient to sustain the conviction; the trial court erred in admitting evidence and instructing the jury; and the sentence was excessive.

The defendant and Gene Crawford were married on December 1, 1969. Their son, Gene Crawford, Jr., born August 27, 1970, died on January 5, 1971, from malnutrition and dehydration. As a result of his death the defendant was charged with manslaughter. The State contends that the death was caused by the failure

of the defendant to provide proper food and medical care for her son.

At about 1 a.m., on January 5, 1971, Tyrone Parker, a friend of the defendant, called for an ambulance to take Gene Crawford, Jr., to the hospital. The child was taken to Immanuel Medical Center where he was examined by Dr. Donald Andrew Harvey. The child was gravely ill and at first was thought to be dead. He had a depressed temperature, no respiration on arrival, and a depressed heart rate. There were no reflexes. He weighed 6 pounds 10¼ ounces, or about 63 percent of normal weight. The head seemed large in proportion to the body. The extremities were very thin. His eyes were sunken. There was no subcutaneous tissue and all of the ribs could be made out in great detail. The child was placed in an isolette, oxygen was administered, and intravenous fluids were introduced through both ankles. At about 4 a.m. the child was taken to Children's Hospital where there was an intensive care ward for pediatric cases.

At Children's Hospital the child was examined by Dr. Abel Paredes. His heartbeat was irregular and his respiration was very slow. Two photographs of the child were taken at about 5 a.m. The child showed improvement at times but was pronounced dead at 7:45 a.m.

An autopsy was performed that same day at University Hospital by Dr. Blaine Roffman. The autopsy revealed that many of the internal organs weighed but a small fraction of their normal weight. The liver weighed 37 grams as compared to a normal weight of 160 grams. The kidneys weighed 11 grams each as compared to a normal weight of 21 or 22 grams. The spleen weighed 4 grams as compared to a normal weight of 16 grams. The autopsy disclosed no abnormality which could have caused the malnutrition. The cultures and microscopic examinations made were negative. The dehydration was a result of malnutrition

which had developed over a long period of time.

Gene Crawford, Jr., at birth weighed 6 pounds 3 ounces. When weighed at Immanuel Medical Center he weighed only 7¼ ounces more than his birth weight. His normal weight would have been 10 pounds or more. The photographs depict a child who is severely emaciated and obviously very ill. Despite the defendant's testimony and evidence to the contrary, the jury could have found that the condition had developed over a period of many weeks.

It is unlawful for a person having the care, custody, or control of a child to willfully or negligently cause or permit the life of the child to be endangered. § 38-116, R. R. S. 1943. The death of a child resulting from a violation of the statute is punishable as manslaughter. § 28-403, R. R. S. 1943; Delay v. Brainard, 182 Neb. 509, 156 N. W. 2d 14.

The father of Gene Crawford, Jr., was in the penal complex. The defendant had the sole care, custody, and control of Gene Crawford, Jr., and it was her responsibility to obtain adequate food and proper medical care for her son. A parent who negligently or willfully fails to obtain medical aid for a child, thereby causing his death, is guilty of manslaughter. Stehr v. State, 92 Neb. 755, 139 N. W. 676.

The record shows that a representative of the Douglas County social services contacted the defendant before the birth of Gene Crawford, Jr., and offered to assist the defendant in obtaining prenatal care and aid to dependent children. This evidence was admissible for the purpose of showing that assistance was available to the defendant if she was unable to provide food or medical care from her own resources.

The defendant contends that the trial court should have defined culpable negligence as a reckless, wanton disregard for the safety of others. In instruction No. 17 the trial court advised the jury that criminal negli-

gence or culpable neglect was "not any slight breach of duty but rather a gross failure to do what is required of one." The instruction conformed to the standards expressed in Stehr v. State, *supra,* and Delay v. Brainard, *supra,* and was not prejudicially erroneous.

The defendant contends that the sentence of imprisonment for 10 years, the maximum provided by statute, was excessive. In determining this question we consider both the circumstances of the case and the previous record of the defendant.

When Gene Crawford, Jr., died he was nearing the third stage of malnutrition. The condition had developed over a long period of time, but he had never been taken to a doctor since his birth. The record is devoid of any explanation why the defendant failed to obtain medical care for her child when it was obvious that the child was gravely ill.

The presentence report shows the defendant is 20 years of age. Her juvenile record began in 1965. She was committed to the Girls' Training School in 1967 and again in 1969. At the time of this offense she was on probation for burglary. The record fails to show that the sentence was excessive.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HARRY RYAN, APPELLANT.
196 N. W. 2d 919

Filed April 27, 1972. No. 38248.

1. **Trial: Appeal and Error: New Trial.** In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon.
2. **Criminal Law: Verdicts: Appeal and Error: Evidence.** In a criminal case this court will not interfere with a verdict of guilty based upon the evidence unless it is so lacking in pro-

bative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt.

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

Harry Ryan, pro se.

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

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

NEWTON, J.

This is an appeal from a conviction for burglary. The sole assignment of error is that the evidence is insufficient to sustain the conviction. We affirm the judgment of the district court.

A motion for new trial was not filed in this case. "In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon." State v. Stanosheck, 186 Neb. 17, 180 N. W. 2d 226. See, also, Kennedy v. State, 170 Neb. 193, 101 N. W. 2d 853.

A review of the record in this case reveals ample evidence to sustain the verdict of guilty. "In a criminal case this court will not interfere with a verdict of guilty based upon the evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt." State v. Goodwin, 184 Neb. 537, 169 N. W. 2d 270.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE DOUGLAS NERO, APPELLANT.
196 N. W. 2d 913

Filed April 27, 1972. No. 38252.

Criminal Law: Witnesses: Trial: Evidence. Convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

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

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

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

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

SMITH, J.

An information charged that Lawrence Douglas Nero had feloniously entered a dwelling in Omaha at night with intent to rob Richard Paul Floen. A jury found him guilty. On appeal the question relates to a pretrial identification by Floen from an exhibit of photographs by a police officer. The identification procedure, Nero contends, was so suggestive that the in-court identification of him by Floen constituted prejudicial error.

Floen was alone at home on December 2, 1970, when he admitted a black female whom he knew. At 8:30 p.m. and upon the ringing of the doorbell, the girl opened the door. Two black males who were strangers to Floen entered. Seizing a telephone, water pitcher, and picture frame, they beat Floen upon the top of his head 20 or 25 times. Floen suffered 4 head wounds that bled. The struggle lasted 10 minutes. The black males then departed in an automobile. Floen noted

the license number which he reported to the police department. The automobile was owned by Nero.

Police Sergeant Raymond Holewinski testified as follows. Nero and a companion, Roscoe Bolden, ages 22, were arrested on December 2, 1970, at 11 p.m. After the arrest Floen, who had been hospitalized, was interviewed by Holewinski. The latter informed Floen that Nero, the owner of the car, was in custody, and that he would return with photographs of the two suspects in custody. At the police station two photographs were taken of each man. Holewinski knew that Nero wore prescription sunglasses, and for one photograph Nero posed wearing them. Holewinski, because of an erroneous estimate of age, obtained three photographs of men in the 25 to 30 age group from the police files.

Holewinski, according to his testimony, returned to the hospital with the seven photographs randomly mixed. Floen had said he was certain he could positively identify the first man who had entered his house. From one of the photographs Floen identified Nero, but he could not identify anyone else. Holewinski did not recall which photograph Floen had selected.

Floen testified that only one of the two black males had been wearing sunglasses, and that he was the second male to enter the house. The only basis of his identification was Nero's face. The sunglasses had fallen to the floor during the struggle. They were not prescription glasses. At the hospital Holewinski gave him five photographs to examine. In the one he selected Nero was wearing sunglasses. Nero had been the second man to enter the house. Floen was the only witness to identify Nero. His testimony in many respects was vague and contradictory. On the whole, however, he repeatedly and positively testified that he based his in-court identification on having seen Nero in his home and not on the photographs.

Part of the foregoing summary was taken from a proceeding prior to the commencement of the prosecu-

tion's case-in-chief. The balance was taken from testimony before the jury, the testimony covering the photographic identification. In the first proceeding the court had overruled a motion to exclude an identification by Floen in the presence of the jury. The judge remarked that he was looking not only at the pictures of Nero and Bolden but also at the pictures of the 25 to 30 age group. All appeared to him to be in the same age group. Only the four pictures of Nero and Bolden were incorporated in the record for us to review.

Convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Each case must be considered on its own facts. Simmons v. United States, 390 U. S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); State v. Moss, 187 Neb. 391, 191 N. W. 2d 543 (1971); State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225 (1971).

The district court rulings challenged by Nero were not prejudicially erroneous. The judgment is affirmed.

AFFIRMED.

MARINE EQUIPMENT AND SUPPLY CO., A NEBRASKA CORPORATION, APPELLEE, V. DON WELSH, APPELLANT.
196 N. W. 2d 911

Filed April 27, 1972. No. 38263.

1. **Landlord and Tenant: Forcible Entry and Detainer.** A tenant possesses a right to a demand for payment of rent and to a reasonable opportunity to pay. There must be a neglect or refusal on his part before the landlord may claim a forfeiture of the lease or a judgment of ouster for nonpayment of rent.
2. **Landlord and Tenant: Forcible Entry and Detainer: Equity: Statutes.** Equity considers statutory provisions concerning non-

payment of rent to secure the rent and not to forfeit the lease, provided that the tenant acts in good faith and pays promptly on demand.

3. ———: ———: ———: ———. Defenses in forcible entry and detainer actions may be equitable. The tenant will be relieved from a technical forfeiture in circumstances in which absolute good faith is shown and the exercise of equitable principles in his behalf is necessary that gross injustice may be prevented.

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

Leamer & Galvin and John C. Baker, for appellant.

Smith, Smith & Boyd, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

SMITH, J.

The district court on appeal from county court found Don Welsh guilty of unlawful and forcible detention of business premises for nonpayment of rent. It ordered restitution to Marine Equipment and Supply Co. Welsh appeals. He contends that nonpayment of rent under the circumstances constituted no ground for eviction.

On April 1, 1969, Marine verbally leased premises in South Sioux City to Welsh for a month-to-month term. The rent was to be $175 a month payable in advance on the first of the month and the cost of utilities. The utilities were metered separately, billed shortly after the first of each month of use, and due when billed. Billings ordinarily were made not later than the 10th of the month. Welsh operated a beauty shop on the premises.

In the first part of December 1970, Welsh had paid the $175 part of the rent and the utilities to December 1, 1970. Marine timely billed Welsh for the December and January utilities in the sums of $69.34 and $67.96. On February 26, 1971, Marine served Welsh with a 3-day notice to quit the premises. After service of the

notice but on the same day Welsh tendered the $69.34 and $67.96. At this time Welsh had paid the $175 sums at due date. Marine refused that tender and a subsequent tender of $175 for March rent. Marine commenced the forcible detention action against Welsh in county court on May 3, 1971. Prior to trial Welsh tendered payment of all sums due, but Marine refused the tender. Welsh offered no excuse for his dilatoriness.

Welsh argues as follows. Acceptance of the rent check of $175 for February waived the default in payment of the bills for December and January utilities. Marine failed to demand payment prior to service of the 3-day notification so that the notification was simply a demand for payment. Marine acquiesced by failing to prosecute diligently after service of the 3-day notice.

A tenant possesses a right to a demand for payment of rent and to a reasonable opportunity to pay. There must be a neglect or refusal to pay on his part before the landlord may claim a forfeiture of the lease or a judgment of ouster for nonpayment of rent. Equity considers statutory provisions for forfeiture for nonpayment of rent, to secure the rent and not to forfeit the lease, provided that the tenant acts in good faith and pays promptly on demand. §§ 26-1,119 and 27-1402, R. R. S. 1943. Defense in forcible entry and detainer actions may be equitable. The tenant will be relieved from a technical forfeiture in circumstances in which absolute good faith is shown and the exercise of equitable principles in his behalf is necessary that gross injustice may be prevented. See Farmer v. Pitts, 108 Neb. 9, 187 N. W. 95, 24 A. L. R. 719 (1922).

A practice of payment of rents at irregular periods of time may constitute a waiver by conduct of the parties. Goetz Brewing Co. v. Robinson Outdoor Advertising Co., 156 Neb. 604, 57 N. W. 2d 169 (1953).

The difficulty with the argument of Welsh lies in the facts. The premises were not used for residential purposes. The billings for utilities constituted demands

for payment. The lapse of time between service of notification and commencement of action without more did not constitute acquiescence on the part of Marine. There is no evidence that Welsh relied on the interval to his detriment. The facts are insufficient for a finding of waiver by conduct of the parties. The position of Welsh is without equity.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WARDELL NELSON SMITH, APPELLANT.
196 N. W. 2d 918

Filed April 27, 1972. No. 38269.

Post Conviction: Motions, Rules, and Orders: Pleadings. 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 Douglas County: JOHN C. BURKE, Judge. Affirmed.

Wardell Nelson Smith, pro se.

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

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

SPENCER, J.

This is a post conviction action to vacate and set aside defendant's sentence and conviction for first degree murder. Defendant pled guilty and was sentenced to life imprisonment. The trial court appointed counsel,

granted defendant a hearing, and decided the case on its merits.

This, however, is a second motion for post conviction relief on behalf of the defendant. In State v. Reichel, 187 Neb. 464, 191 N. W. 2d 826, we held: "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." We see no reason to depart from that holding in this case.

The judgment of the district court is affirmed.

AFFIRMED.

A. RICHARD WEINER ET AL., APPELLEES, V. ROBERT T. HROCH, APPELLANT.
196 N. W. 2d 907

Filed April 27, 1972. No. 38287.

1. **Contracts.** The rule that mutuality is an essential element of an executory contract is not applicable to executed contracts or where the party not bound has performed its conditions.
2. **Contracts: Deeds.** It is the general rule that for most purposes when a deed is made in execution of a contract of sale, the provisions of the contract are merged in the deed.
3. **Deeds: Property: Evidence.** The true consideration for a deed of conveyance of real estate may be shown by parol evidence, although the deed recites a consideration.
4. **Contracts: Deeds: Mortgages: Evidence.** An agreement to pay an existing mortgage, as part of the consideration for a conveyance of mortgaged premises, need not be inserted in the deed, neither must it necessarily be in writing. Such an agreement is an independent undertaking of the party making it, the conveyance affording sufficient consideration to sustain it when its existence is established by a preponderance of evidence.
5. **Trial: Evidence: Appeal and Error.** It is not the province of

this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.

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

John Stewart Barrett and Spielhagen, Matejka & Spielhagen, for appellant.

Lawrence R. Brodkey, for appellees.

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

NEWTON, J.

This is an action for a deficiency judgment following the foreclosure of a real estate mortgage. The primary question presented is whether a provision in a contract of sale that a vendee shall assume and pay a mortgage is merged in a deed which states it is subject to the mortgage but silent on the question of assumption. The district court entered judgment for a deficiency and that judgment is affirmed.

Plaintiffs listed certain real estate owned by them subject to a mortgage for sale. Defendant was interested in purchasing the property but desired to make only a small cash payment. A new mortgage for a larger sum was then entered into by plaintiffs to cut down the amount required as a cash payment. Sale was made to defendant for $1,000, subject to a mortgage of $10,000 which defendant assumed and agreed to pay. The deed omitted the assumption of mortgage clause and stated conveyance was subject to the mortgage. The mortgage was subsequently foreclosed and a deficiency judgment requested against plaintiffs. This they settled. Plaintiffs sought reimbursement for the deficiency from defendant and obtained judgment therefor.

Defendant asserts the contract of sale is not enforceable because plaintiffs were joint owners and only one of them signed the contract. The contract provided

that vendor would "convey or cause to be conveyed" the property sold. The property was in fact conveyed with both owners joining in the conveyance. "The rule that mutuality is an essential element of an executory contract is not applicable to executed contracts or where the party not bound has performed its conditions." 17 Am. Jur. 2d, Contracts, § 12, p. 351. See, also, Bigler v. Baker, 40 Neb. 325, 58 N. W. 1026; Stearns v. Nebraska Building & Investment Co., 109 Neb. 657, 192 N. W. 330.

It is the general rule that for most purposes when a deed is made in execution of a contract of sale, the provisions of the contract are merged in the deed. See Hoke v. Welsh, 162 Neb. 831, 77 N. W. 2d 659.

There are exceptions to the foregoing general rule. One exception relates to the assumption of a mortgage as part of the consideration. " 'The true consideration for a deed of conveyance of real estate may be shown by parol evidence, although the deed recites a consideration.' " Barth v. Reber, 135 Neb. 25, 280 N. W. 219. The rule is well settled that: "An agreement to pay an existing mortgage, as part of the consideration for a conveyance of mortgaged premises, need not be inserted in the deed, neither must it necessarily be in writing. Such an agreement is an independent undertaking of the party making it, the conveyance affording sufficient consideration to sustain it when its existence is established by a preponderance of evidence." Reynolds v. Dietz, 39 Neb. 180, 58 N. W. 89. See, also, Rockwell v. Blair Savings Bank, 31 Neb. 128, 47 N. W. 641; Wiltrout v. Showers, 82 Neb. 777, 118 N. W. 1080; Logan Valley Bank v. Christensen, 98 Neb. 49, 151 N. W. 939.

There can be little, if any, question about the nature of the agreement entered into by the parties. The purchase agreement specifically states that the buyer was to assume a loan of $10,000 and the settlement agreement reflects a "mortgage assumption fee." The

defendant buyer admits he helped the real estate agent make up the contract of sale. He further admits it was his understanding that he was to pay the mortgage. The agreement by defendant to assume the mortgage is supported by the evidence and we are compelled to conclude that a jury question was presented. "It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence." Parsons Constr. Co. v. State, 180 Neb. 839, 146 N. W. 2d 211.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY KOCH, APPELLANT.
196 N. W. 2d 910

Filed April 27, 1972. No. 38315.

Criminal Law: Sentences: Appeal and Error. This court will not interfere with a sentence imposed by the district court unless the sentence appears to be an abuse of discretion.

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

Joseph D. Martin and Orval W. Von Seggern, for appellant.

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

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

SMITH, J.

Gary Koch pleaded guilty to an information that charged him with unlawfully possessing peyote and with feloniously dispensing the substance. The district court imposed concurrent sentences of imprisonment for 1 year on the first count and for 3 to 5 years on

the second count. Koch appeals. He asserts that the sentences are excessive.

Koch, age 24, passed the tenth grade in school and "GED in service" or "GED at G. I. H. S." He enjoys attending school. There is evidence of no prior felony convictions and of an honorable discharge from the Navy. The probation officer reported that Koch had been a leader of many teenagers and that he had induced them to use drugs. The court remarked that Koch had testified in another case and that the testimony indicated involvement of Koch in the drug business.

This court will not interfere with a sentence imposed by the district court unless the sentence appears to be an abuse of discretion. State v. Claire, *ante*, p. 373, 196 N. W. 2d 519.

Koch violated the Uniform Controlled Substances Act. For these offenses it prescribes imprisonment for not less than 1 year nor more than 5 years, or a fine of not more than $2,000, or imprisonment in the county jail for not more than 6 months, or both such fine and imprisonment. See §§ 28-4,117, Schedule I (c) (9), 28-4,125 (2) (b), R. S. Supp., 1971. The sentences imposed upon Koch fell within the discretion of the district court. The judgment is affirmed.

AFFIRMED.

IOLA M. MARTIN, APPELLEE, V. GRANT L. MARTIN, APPELLANT.
197 N. W. 2d 388

Filed May 5, 1972. No. 38203.

1. **Divorce: Property: Alimony: Contracts: Equity.** It is the duty of the court to scrutinize settlement agreements closely in divorce actions and to protect against fraud, intimidation, and ignorance and guard against unconscionable results. The court is required to render a fair and equitable result under all the circumstances.

2. **Attorneys at Law: Trial.** A party who appears pro se is subject to and will receive the same consideration as if he had been represented by an attorney.
3. **Attorneys at Law: Trial: Stipulations: Parties.** Stipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy.
4. **Courts: Trial: Stipulations: Parties.** Courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that the parties could not be placed in status quo.
5. **Trial: Stipulations: Parties.** Parties are bound by stipulations voluntarily made and relief from such stipulations after judgment is warranted only under exceptional circumstances.
6. **Actions: Equity: Appeal and Error: Evidence: Witnesses.** Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict 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 opposite.
7. **Divorce: Alimony: Judgments: Appeal and Error.** The judgment of a trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

William L. Walker and Earl Ludlam, for appellant.

Beynon, Hecht & Fahrnbruch, for appellee.

Heard before WHITE, C. J., BOSLAUGH, McCOWN, and CLINTON, JJ., and WARREN, District Judge.

WARREN, District Judge.

This is a divorce action wherein plaintiff Iola M. Martin was granted an absolute divorce on May 3, 1971, from the defendant Grant L. Martin on grounds of extreme cruelty. Defendant concedes that plaintiff is entitled to a divorce and that plaintiff should be awarded one-half of the property of the parties, but attacks the trial

court's division of property and alimony provisions on various grounds.

Plaintiff was 60 years of age at the time of trial, and defendant was 63. They were married in 1935 and their three children were grown and emancipated. They have been in various businesses in and near Lincoln since their marriage, and for the past 5 years have owned and operated a valuable dairy and stock farm a short distance west of Lincoln, consisting of approximately 400 acres. The evidence demonstrated without question that the defendant was a man of violent and surly disposition, an absolute dictator to his wife and children, and a man who was guilty of extreme cruelty, both physical and mental, in every sense of that legal terminology. The plaintiff had admittedly made substantial and continuing contributions to the accumulation of property, both as a farm wife and otherwise. The trial court awarded each party an undivided one-half interest in the farm real estate, subject to defendant's sole use and entitlement to the income therefrom from December 1, 1969, to March 1, 1972, conditioned upon payment of $900 to plaintiff, the payment of real estate taxes for 1970 and 1971, the maintenance of improvements in good condition, and payment of all expenses of operation, maintenance, and improvement of the farm real estate after December 1, 1969. Plaintiff was awarded as her separate property an automobile valued at $1,190 and $3,600 in bank money orders. Defendant was awarded farm machinery, livestock, and miscellaneous farm personal property valued by the court at $63,755. The parties had each purchased a $15,000 certificate of deposit in 1968 from the proceeds of a land sale, and each had expended a portion thereof in payment for permanent improvements to the 400-acre farm. After such expenditures, plaintiff was awarded the $10,253.88 balance of her certificate of deposit, and defendant was awarded the truck and farm machinery he purchased with the $7,457.30 balance of his certif-

icate of deposit funds. Each was allotted a portion of the household goods. Defendant was ordered to pay plaintiff as alimony the sum of $20,000 in three installments, without interest, ending September 1, 1972, together with further alimony of $3,900 payable to plaintiff at $65 per month for 60 months commencing March 1, 1972, with credit to be allowed thereon for any Social Security payments received by plaintiff during that period. Defendant was required to pay all indebtedness incurred before December 1, 1969. Costs were taxed to defendant including an attorney's fee of $4,300 for plaintiff's attorney. The court specifically considered the fact that no temporary support had been paid plaintiff during the 13½ months of litigation.

Until the time of filing his motion for new trial, the defendant acted as his own counsel, despite the repeated suggestions of the trial judge and plaintiff's attorney that he employ counsel. Defendant's stubborn insistance that he act pro se resulted in a trial of 5½ full days duration, a complex record of monumental proportions, a series of debates by defendant with witnesses, and a disruption of the entire trial process. The record demonstrates that the trial judge, exhibiting patience far beyond the call of duty, acted throughout the trial with complete fairness to the defendant, a fact which the defendant acknowledged many times during the trial.

Defendant's first contention is that the court erred in not upholding a written agreement, termed the "Wilson Agreement," entered into by the parties on December 1, 1969. Plaintiff testified that defendant had the property settlement agreement prepared on his own, that she was afraid that if she didn't sign it she would forfeit everything, and that she was fearful of physical harm if she did not sign it. The so-called Wilson Agreement provided, among other things, that defendant should have the use of the 400-acre farm, and home thereon, and all farm machinery, for 5 years, upon payment to

plaintiff of $600 a year rent. The trial court held that plaintiff's execution of the Wilson Agreement was coerced by the defendant, was not entered into freely and voluntarily by plaintiff, was unfair and inequitable in its provisions, and was therefore null and void.

This court has stated: "It is the duty of the court to scrutinize settlement agreements closely in divorce actions and to protect against fraud, intimidation, and ignorance and guard against unconscionable results. The court is required to render a fair and equitable result under all the circumstances." Diers v. Diers, 185 Neb. 552, 177 N. W. 2d 503. We have concluded that the trial court properly held the Wilson Agreement to be a nullity.

During the second day of trial, the defendant, acting pro se, orally stipulated with plaintiff in open court that the court should determine the property of the parties and its value as it existed on December 1, 1969. The stipulation was the result of defendant's repeated refusal to testify regarding the cattle or other personal property he owned at the time of trial, or about his dealings after December 1, 1969. In that connection, defendant testified as follows: "What I bought afterwards is none of your business; and what I traded is none of your business; none of her business."

The court, after carefully informing the defendant as to the effect of such a stipulation, accepted the same, and the evidence thereafter was directed to the date of December 1, 1969, to the exclusion of testimony as to the property situation at the time of trial. The defendant now contends that the court erred in determining and valuing the property as of December 1, 1969, rather than at the time of trial as is the general rule.

The defendant was acting as his own counsel, as he had every right to do; but when a party does so, his rights are subject to and will receive the same consideration as if he had been represented by an attorney. Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497. Stip-

ulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy. Courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that the parties could not be placed in status quo. Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N. W. 2d 768.

Parties are bound by stipulations voluntarily made and relief from such stipulations after judgment is warranted only under exceptional circumstances. Ehlers v. Vinal, 382 F. 2d 58; Farmers Co-op. Elevator Assn. Non-Stock, Big Springs, Nebraska v. Strand, 382 F. 2d 224. Defendant did not ask to be relieved of the stipulation during trial, and he is not now in a position to secure such relief, particularly where the stipulation was acted upon by the parties in the trial court in restricting proof offered to property and values only as of December 1, 1969. Defendant's second contention has no merit.

Defendant's remaining contentions are directed to the trial court's division of property and award of alimony. The evidence as to the extent of personal property owned on December 1, 1969, and the valuation thereof is sharply conflicting. "Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Keenan v. Keenan, 187 Neb. 686, 193 N. W. 2d 568.

Under the circumstances shown by this record, plaintiff was entitled to one-half of the accumulated prop-

erty of the parties. The defendant never contended otherwise. A careful review of the trial court's extensive and detailed findings of fact convinces us that the division of property and provisions for payment of alimony are fair and reasonable, and that the award of the trial court should be approved.

The defendant complains that he should have been awarded the entire title to the real estate, with an award of money alimony to plaintiff for her one-half interest in the farm. This court has where possible favored a division of property in such manner as to permit a husband to retain the means to pay off any judgment awarded to the wife. Kula v. Kula, 181 Neb. 531, 149 N. W. 2d 430. However, there are special circumstances disclosed by the record in this case. Testimony as to valuation of the farm varied from $70,000 to $98,600. The defendant had decided that he could not continue to operate the farm alone due to his advancing age and declining health. He had been actively attempting to sell the farm since December of 1969; he was advertising it for rent. Furthermore, the court provided for defendant's exclusive use of the farm until March 1, 1972, and he was awarded all of the farm machinery, equipment, and livestock. In Newton v. Newton, 188 Neb. 242, 196 N. W. 2d 116, this court said: "A judgment of a trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown." We cannot say that the defendant has shown good cause why the provision for the award to each party of an undivided one-half interest in the real estate should be modified.

With reference to the allowance of attorney's fees, the court must consider the fact that defendant's obstinate refusal to employ counsel during the trial of this action in district court, and the resultant bill of exceptions containing 1,054 pages of testimony and 153 exhibits, of necessity caused an unusual and extensive expenditure of time and effort by plaintiff's counsel in

this appeal. Plaintiff is allowed $2,000 for the services of her attorney in this court.

We affirm the judgment of the trial court.

AFFIRMED.

IN RE APPLICATIONS OF PETROLEUM TRANSPORT SERVICE, INC., COUNCIL BLUFFS, IOWA, ET AL.
PETROLEUM TRANSPORT SERVICE, INC., ET AL., APPELLANTS, V. WHEELER TRANSPORT SERVICE, INC., ET AL., APPELLEES.
197 N. W. 2d 8

Filed May 5, 1972. No. 38282.

1. **Public Service Commissions: Carriers: Trial.** In determining the issue of public convenience and necessity, in cases where new or extended operating rights are sought, controlling questions are whether the operation will serve a useful purpose responsible to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest.
2. **Public Service Commissions: Carriers: Statutes.** The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition is a normal attribute of our free enterprise system. It must be permitted to exist and the law contemplates that it shall.

Appeal from the Nebraska State Railway Commission. Reversed.

Viren, Epstein & Leahy, for appellants.

James E. Ryan, for appellees.

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

SPENCER, J.

Petroleum Transport Service, Inc., Bray Lines, Inc.,

and Groendyke Transport, Inc., appeal from the denial of their separate applications to transport anhydrous ammonia and fertilizer solutions from the Phillips Petroleum plant at Hoag, Nebraska, over irregular routes to all points and places in Nebraska. The applications were heard on a consolidated record, and were protested by the following appellee carriers: Wheeler Transport Service, Inc.; Herman Brothers, Inc.; Bulk Carriers, Inc.; Wynne Transport, Inc.; O. E. Poulson, Inc.; Henry W. and T. Clarence Bridge, doing business as Bridge Bros.; Ruan Transport Corporation; Ward Transport, Inc.; and Peake, Inc. We reverse.

The first hearing in this matter was held February 25, 1970, and on June 1, 1970, the applications were granted as applied for. Appellees filed motions for rehearing and reconsideration. On October 26, 1970, the Commission granted the motion for rehearing and rescinded the order entered June 1, 1970, and held a further hearing which resulted in the present order denying the applications, which was entered on June 7, 1971.

Appellants urge that the granting of the motion for rehearing and the rescinding of the order entered on June 1, 1970, and the granting of the order on June 7, 1971, denying the applications, are contrary to the law and the evidence and are null and void as being arbitrary and unreasonable.

The appellants, who are headquartered in states other than Nebraska, are motor carriers of anhydrous ammonia and fertilizer solutions, with extensive operations in interstate commerce. Appellants have been hauling these commodities from Hoag, Nebraska, in interstate commerce. The demand for anhydrous ammonia and its shipping date depends upon the amount of rainfall in the areas where the commodity is to be used. If there is a certain moisture content on the land, it cannot be used. On occasions appellants have had equipment standing at Hoag, Nebraska, for the purpose of rendering service in interstate commerce, and because of cli-

matic conditions in states served from Hoag, Nebraska, its trucks are idle when at the same time Phillips Petroleum Company is without available equipment from carriers holding authority in Nebraska to conduct transportation in Nebraska intrastate commerce because of the heavy demand for fertilizer.

The testimony of the shipper's regional director of rates and services indicated that Phillips, which has extended its fertilizer operations in surrounding areas, is faced with extremely high distribution costs brought about by rate increases and keener competition. Phillips has shifted its rail tonnage to trucks because railroads were found to be unsatisfactory for the movement of fertilizer. Ninety percent of the fertilizer volume moves during the months of April, May, and June. Fertilizer distribution is completely seasonal, with a peak month within the season and a peak week within that month. Phillips must not only compete for business but also for the equipment of fully certified motor carriers. It must also compete with the climatic condition, which is the determining factor in the demand and use of fertilizer.

Phillips has actively solicited the appellants herein to obtain additional equipment, and in spite of their cooperation Phillips has been unable to meet the needs and demands of its customers. To be competitive, Phillips purchased 18 trailers and leased them to one of the appellees. In spite of this heavy investment, it is still unable to meet its needs. Phillips is not interested in any additional investment in trailers, and is willing to sell its present trailers if the carriers can furnish it with sufficient equipment. It urges the granting of the applications herein to help alleviate the situation.

The Commission found that there is no doubt there is a problem in the transportation of anhydrous ammonia during the peak season, although both appellants and appellees testified that they had some equipment available which was not used in the peak season. This was due, with regard to appellees' equipment, to the lack of

knowledge of the availability of this equipment by the shippers. On the part of the appellants, this was due to bad weather in the areas into which they were certified to transport anhydrous ammonia. The Commission found that it is clear from the evidence that the present Nebraska interstate carriers of anhydrous ammonia and liquid fertilizer solutions cannot fulfill the need for transportation of these commodities during the peak season to the satisfaction of all shippers. The Commission also found that the amount of equipment that appellants could supply would not make an appreciable contribution to the solution of the problem and this is the basis on which the applications were denied.

The Commission specifically found that the appellants are willing and able to properly perform the services proposed and to conform to the provisions of sections 75-301 to 75-322.01, R. R. S. 1943, and the requirements, rules, and regulations of the Commission thereunder. It further found that the proposed intrastate service is not required by the present or future public convenience and necessity. It is this latter finding we question.

The appellees concede that there are times in the peak season when the needs of Phillips and others who are their competitors are such that appellees do not have sufficient equipment to meet the demands of the shippers, but they allocate their equipment in as equitable a manner as possible between all of the shippers. Appellees are protesting the applications because of the competition the appellants would provide during the off season when the equipment available by the appellees is more than adequate to meet the demands of the shippers. Phillips' testimony is that it expected to use appellants' equipment to move its commodities only during the peak season.

The law applicable herein was enunciated in Poulson v. Hargleroad Van & Storage Co., 183 Neb. 201, 159 N. W. 2d 302, in which we held: "In determining the issue of public convenience and necessity, in cases where new

or extended operating rights are sought, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well as by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest.

"The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition is a normal attribute of our free enterprise system. It must be permitted to exist and the law contemplates that it shall."

The record is conclusive that the appellees cannot adequately meet the shippers' demand or need at peak periods. If 90 percent of the fertilizer volume comes during the peak periods, it should be evident that the volume the rest of the year should not control the granting of the applications herein. We appreciate that there will be peak periods within the peak periods, when even the granting of these applications will not completely meet the need, but it is evident that it will come more nearly doing so than the denial of the applications.

We find the conclusion reached by the Commission that the amount of equipment the appellants could supply would not make an appreciable contribution to the solution of Phillips' problem is not justified by the record. We believe it is based on the erroneous asumption that because appellants did not supply equipment during the past season they would be unable to do so in the future. The failure to supply equipment pending the contest of the order sustaining the motion for rehearing, and the denial of the applications, was on the advice of counsel and is not to be considered as a cri-

terion of what would be done if the applications were granted.

We find the Commission was correct in the first instance in granting the applications, and hold that the sustaining of the motion for rehearing and the denial of the applications was arbitrary and unreasonable. The order is accordingly reversed.

REVERSED.

LLOYD HOOVER, AND IN BEHALF OF ALL OTHER PERSONS SIMIILARLY SITUATED, APPELLANT, V. JOHN CARPENTER ET AL., APPELLEES.

197 N. W. 2d 11

Filed May 5, 1972. No. 38305.

Municipal Corporations: Ordinances: Referendum. Whether a municipal ordinance is subject to referendum is determined by the language of the applicable provision for referendum and by the facts of each case.

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

E. Merle McDermott, for appellant.

Duane A. Burns and Young, Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellees.

Stewart, Calkins, Duxbury & Crawford, for amicus curiae.

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

SMITH, J.

The broad question is whether a municipal ordinance that established rates for electric energy supplied by a plant owned by the city is subject to referendum. Although the district court dismissed a petition to uphold the right of referendum by a declaratory judg-

ment, it found the referendum inapplicable. Plaintiff appeals.

The City of Grand Island, a city of the first class, operates under the city manager form of government. It has adopted the referendum laws pertaining to cities of the first class.

The city pursuant to a vote of the electors in 1905 acquired a light plant for supplying customers at retail. Revenue bonds have been issued from time to time, and some are outstanding. The council in November 1970, enacted an ordinance that generally increased electric rates charged to retail customers. The service area extended outside the territorial limits of the city.

No ordinance, resolution, or contract may abridge the powers of cities of the first class to establish rates for supply of electric energy. § 16-679, R. R. S. 1943. Other sections provide that electors of such cities may reserve the right of referendum on any ordinance or other measure subject to exceptions immaterial here. See, §§ 18-119, 18-129, 19-638, and 19-640, R. R. S. 1943. The council must levy a sufficient tax to operate the plant and to provide for payment of bonds. See § 19-1403, R. S. Supp. 1971.

In 1963 the Legislature established the Power Review Board chiefly to eliminate competition among public suppliers of electric energy at wholesale and retail. Section 70-1017, R. R. S. 1943, a part of the original act, reads: "Any supplier of electricity at retail shall furnish service, upon application, to any applicant within the service area of such supplier. If the supplier and the applicant cannot agree upon any of the terms under which service is to be furnished, or if the applicant alleges that the supplier is not treating all customers and applicants fairly and without discrimination, the matter shall be submitted to the board for hearing and determination." From any final action of the board an appeal may be taken to this court. § 70-1016, R. R. S. 1943.

Differences exist among the States on the applicability of the referendum to rates of municipal utilities. See 5 McQuillin, Municipal Corporations (3d Ed. Rev., 1969), § 16.57, n. 65, p. 220, and 16.58, n. 98, p. 225; 12 id., § 35.37, p. 479 (1970). Language reserving the right no doubt accounts for some of the differences.

For purposes of judicial review of the reasonableness of rates, the establishment of rates is ordinarily a legislative function. See Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney, 186 Neb. 168, 181 N. W. 2d 682 (1970).

The Legislature in providing for the right of referendum has used the word "legislative" or a similar word in one section alone. See § 18-119, R. R. S. 1943. This court has said that legislative matters, but not administrative matters, are subject to the right. See Kelley v. John, 162 Neb. 319, 75 N. W. 2d 713 (1956) (rezoning ordinance with right of appeal was an administrative matter not subject to referendum). The contradistinction has been criticized on the ground that its application is difficult, and abandonment of it has been recommended. See Antieau (4th Ed., 1964), Cases and Problems on the Law of Municipal Corporations, pp. 299, 300. The criticism is not without merit. Compare Kelley v. John, *supra,* with Scottsbluff Improvement Assn. v. City of Scottsbluff, 183 Neb. 722, 164 N. W. 2d 215 (1969) (rezoning ordinance was a legislative matter not subject to judicial review by a proceeding in error); cf. School Dist. No. 23 v. School Dist. No. 11, 181 Neb. 305, 148 N. W. 2d 301 (1967).

Without an apocalyptic view, we adopt this rule: Whether a municipal ordinance is subject to the right of referendum is determined by the language of the governing legislative provision for referendums and by the facts of each case. Kelley v. John, *supra,* is modified accordingly.

In the present case we consider (1) the number of electors affected; (2) the existence of revenue bonds;

(3) the temporal nature of the rate ordinance; (4) the statutory authority of the Power Review Board; (5) the need for expertise to determine the reasonableness of rates; and (6) the fairness of our denying or upholding the right of referendum. Only the first consideration points toward the right of referendum. The others point the opposite way.

The district court in finding referendum inapplicable was correct.

AFFIRMED.

THOMAS V. HOFFMANN, APPELLANT, V. RUTH A. HOFFMANN, APPELLEE.
197 N. W. 2d 373

Filed May 12, 1972. No. 38098.

1. **Divorce: Alimony.** The fixing of the amount of alimony rests, in each case, within the sound discretion of the court.
2. ———: ———. The problems of alimony awards are not subject to solution by mathematical formula. Generally speaking, awards of this court in cases of this kind vary from one-half to one-third of the value of the property, depending on the facts and circumstances of the particular case.

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

Quigley, Dill & Quigley, for appellant.

Reddish, Fiebig & Curtiss, for appellee.

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

SPENCER, J.

Ruth A. Hoffmann, the defendant, was granted an uncontested divorce from the plaintiff, Thomas V. Hoffmann, as well as the custody of their three minor children. No appeal is being taken on this portion of the decree. In a separate hearing the district court deter-

mined the issues of alimony, child support, and division of property. The appeal herein involves only one question: The size of the alimony award. We affirm.

The factors to be considered by this court in the determination of the excessiveness or sufficiency of an alimony award are well established. See Strasser v. Strasser (1950), 153 Neb. 288, 44 N. W. 2d 508.

The trial court ordered plaintiff to pay $210 per month child support and alimony in the amount of $70,750 in 10 equal annual installments of $7,075 each. The alimony installments were to be secured by plaintiff's written bond for $70,750, secured by a pledge of 115 shares of stock in the Hoffmann Cattle Company. The court further awarded the defendant the family car and various other items of personal property; ordered the plaintiff to pay certain of defendant's debts, in the amount of $2,707.35; the defendant's legal fees; and all costs of the action.

The parties were married in September 1958, and are both in their early thirties. There is evidence in the record that the defendant does have some health problems, and during the marriage incurred substantial medical bills. In 1969, she underwent ovary surgery and is now required to take hormone shots, and will do so for the remainder of her life. Her drug bills are and will continue to be substantial. The plaintiff has a degree in animal husbandry from the University of Nebraska. The defendant completed 1 year of college. At the beginning of their marriage they lived together on various military bases until the plaintiff was discharged from the Army in November 1960. They then moved to a ranch owned by plaintiff's parents in Cherry County, Nebraska.

When the parties separated in 1967, the defendant moved to Alliance, Nebraska; set up a separate home for herself and her children; and attempted to support herself on a monthly temporary alimony award of $225. They lived in a house owned by her father and some

other relatives. A rental arrangement was made, but the defendant testified that she was unable to pay any rent. Since 1967, the record indicates that defendant has attempted to supplement her income by taking odd jobs, such as ironing, caring for an elderly woman, giving music lessons, and acting as a census numerator. The usual difficulties of attempting to fit responsible employment into the necessities and requirements of motherhood appear in this record. Her income from these jobs was of such limited amounts as to be of little significance in the determination of the issues in this case.

The record shows that defendant quit college in order to marry, and, after occupying herself as a housewife and mother for the intervening years, is now in the unenviable position of having to support herself and her three growing children while being qualified only for menial or low-paying jobs. She has enrolled in Chadron State College in order to improve her earning ability. She has joined in a car pool with other local women for the purpose of commuting. Under present conditions, she can complete her education and acquire a teaching certificate in 5 years. She appears to be an energetic and capable woman and, health permitting, has worked out a practical solution to her financial problem in attempting to train herself for suitable employment. If she can secure the necessary means to accomplish this purpose, she will be restored to the roll of a self-supporting and productive member of society, besides being able to adequately care for and raise her children. It appears without dispute that in the absence of an adequate alimony award, she will be unable to execute this laudable plan because it will be impossible for her to secure the funds for its achievement.

The plaintiff is employed by the Hoffmann Cattle Company and draws an annual salary of $4,800 per year. The corporation also furnishes him a trailer home on the ranch; pays for health insurance for himself and

family; furnishes him meat; and pays $25 monthly to an investment company for him. His income from the corporation in the 4 years preceding 1970, averaged $6,463. His assets, other than his stock in the Hoffmann Cattle Company, total $4,420.27. The Hoffmann Cattle Company is a subchapter "S" corporation, owned entirely by the Hoffmann family. It was originally organized by the plaintiff's father. It is a 13,280-acre ranch in Cherry County, Nebraska. The assets of the corporation, including real estate, livestock, machinery, and cash, are presently worth $870,010.23. The court arrived at the book value of plaintiff's corporate stock by taking current values on the day of the trial, which values were stipulated by the parties. At the present time, of 1,400 shares of outstanding stock, the plaintiff owns 450 shares. His brother owns an identical number, and his father retains 500 shares. The difficult aspect of this case, and the one stressed at length by plaintiff, is the problem created by the corporate ownership of the ranch property and the fact plaintiff is a minority stockholder. Plaintiff's stock interest as of the date of the trial had a book value of $279,643.50.

The fixing of the amount of alimony rests, in each case, within the sound discretion of the court. Neeman v. Neeman (1968), 183 Neb. 105, 158 N. W. 2d 236. This court has observed many times that the problems of alimony awards are not subject to solution by mathematical formula. Generally speaking, awards of this court in cases of this kind vary from one-half to one-third of the value of the property, depending on the facts and circumstances of the particular case. Loukota v. Loukota (1964), 177 Neb. 355, 128 N. W. 2d 809.

The plaintiff is the present owner of property with a value in excess of $280,000, which must be considered. Present income from a family corporation cannot be the sole criterion where a party is the owner of a substantial interest, even though a minority one, in that corporation. The trial court was faced with

the problem of making a division of that interest. We cannot say it abused its discretion in doing so. Rather than making a distribution of the shares of stock in the corporation, it gave defendant an amount the present value of which is considerably less than one-fifth, payable over a period of 10 years. Under the circumstances presented by this record, we cannot conclude the trial court dealt unfairly or unreasonably with the plaintiff in this respect, and its decision is approved.

The defendant is awarded $500 for the services of her attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE ELLIS NEWTE, APPELLANT.
197 N. W. 2d 403

Filed May 12, 1972. No. 38140.

1. **Criminal Law: Witnesses: Trial.** The trial judge is vested with a broad discretion to properly circumscribe inquiry into a criminal defendant's past conduct when that subject is raised during the cross-examination of a defense character witness.
2. **Criminal Law: Witnesses: Trial: Evidence.** While particular facts are inadmissible in evidence upon direct examination for the purpose of sustaining or overthrowing character, this doctrine does not extend to cross-examination.
3. **Criminal Law: Witnesses: Trial.** Upon cross-examination of a witness who has testified to general reputation, questions may be propounded for the purpose of eliciting the source of the witness' information, and particular facts may be called to his attention.
4. ———: ———: ———. The extent of the cross-examination of a witness must be left to the discretion of the trial court.
5. ———: ———: ———. A character witness may be cross-examined as to an arrest whether or not it culminated in a conviction of the defendant.

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

Frank B. Morrison, Sr., and Bennett G. Hornstein, 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.

WHITE, C. J.

The appellant was charged and convicted of robbery. At trial, several different versions of the fact situation were disclosed to the jury. The victim of the robbery was a cab driver who testified as follows: At an early morning hour on November 27, 1970, two men entered the driver's cab while it sat in front of a bus depot in Omaha. The cab driver had been noticing a white car with a dented fender as it circled the block before the two men entered the cab. The driver proceeded to a destination requested by his passengers. Upon arrival, one of the passengers, identified by the driver as the defendant, put a dull object to the back of his neck while the other passenger jumped over the front seat and took the driver's money, glasses, and wristwatch. Both men then fled on foot and the driver made an attempt to follow. While attempting to follow the men and then moments later when the police were on the scene, the white car with a dented fender was again noticed by the cab driver.

Police officers testified that they stopped the white car pointed out to them by the cab driver and they searched the occupants. One of the occupants, Ronald Chatman, was carrying a number of small bills and a wristwatch that matched the cab driver's description. The defendant, George Newte, was not in the car. After the occupants were arrested, one of them informed police that the defendant Newte had also been involved in the robbery. Later police arrested Newte and took a statement from him. The statement, read to the jury,

was essentially Newte's denial that he had ever entered the cab or participated in the robbery. Ronald Chatman testified for the defense and contradicted elements of Newte's written statement. Chatman said that Newte did enter the cab with him but did not want to rob the driver. According to Chatman, Newte got out of the cab before the driver was robbed. Newte took the stand at trial, said his written statement did not contain the true facts, and testified to facts which were nearly identical to those given in Chatman's testimony. The State then called a rebuttal witness who had interviewed Chatman previously and another version of the robbery was presented. Chatman had told this witness that his recollection of the facts of the robbery was poor due to intoxication, but he did remember taking the watch from the cab driver's wrist and Newte giving him some of the cab driver's money.

Although the briefs contain much able and refined discussion of the theory and problems involved in the examination of a character witness in a criminal case, the essential question in this case boils down to whether a character witness produced by the defendant in a criminal prosecution may be cross-examined as to an arrest of the defendant whether or not it culminated in a prior conviction. It is clear from the statement of facts heretofore given that there were several versions of the alleged robbery before the jury and, consequently, that the veracity of the witnesses was in question. The defense itself called a state parole officer under whose supervision the defendant had been while on parole from a previous offense. This witness testified that he knew the defendant's reputation for truth and veracity, and after further foundation testified that he would believe the defendant under oath. As a part of his foundation testimony, the parole officer stated that his opinion of the defendant's testimony was based in part upon contact with men who had known the defendant while at the reformatory.

On cross-examination by the prosecutor, the court sustained several objections to questions, the target of which were prior arrests or charges made against the defendant. It appears that the court not only sustained the objections but directed the jury and advised it to disregard the questions themselves, even though there was no answer in the record. The pertinent part of the testimony admitted by the court and under attack in this case is as follows: "Q. (Mr. Brown) Do you know—

"Mr. Schirber: Your Honor, I also object, it should be if he has any convictions only.

"Mr. Brown: I think arrests would have to do with his reputation also, your Honor.

"The Court: He can answer. Do you understand the question?

"The Witness: I'm—I don't.

"The Court: Let me suggest, Mr. Brown, that you rephrase the question. I think it was changed perhaps in the middle and I doubt whether it would be helpful to have it read back.

"Q. (Mr. Brown) Do you know whether or not Mr. Newte, the Defendant here, has had any arrests or convictions since his parole from the Nebraska Penal and Correctional Complex?

"Mr. Schirber: Same objection.

"The Court: Overruled. He may answer.

"The Witness: Sir, I don't. Mr. Newte has been discharged. I don't have his file.

"Q. (Mr. Brown) Well, I am asking you about whether you know or not.

"A. No, sir, I do not."

At the outset, we observe that a line of inquiry directed towards the defendant's previous character is firmly forbidden the State on direct examination. On the other hand, a defendant may adduce affirmative testimony that the general estimate of his character is so favorable the jury may infer he would not be

likely to commit the offense charged. However, "When the defendant elects to initiate a character inquiry, another anomalous rule comes into play. Not only is he permitted to call witnesses to testify from hearsay, but indeed such a witness is not allowed to base his testimony on anything but hearsay." Michelson v. United States, 335 U. S. 469, 69 S. Ct. 213, 93 L. Ed. 168. As the decisions have noted, the courts, in ruling on the admissibility of hearsay testimony in this area are called upon to rule in an illogical and anomalous situation. The question arises as to the latitude of the prosecutor's inquiry into the hearsay basis and foundation. The rule properly to be deduced from the decisions all over the United States in this area is that the trial judge is vested with a broad discretion to properly circumscribe inquiry into a criminal defendant's past conduct when that subject is raised during the cross-examination of a defense character witness. Basye v. State, 45 Neb. 261, 63 N. W. 811; Michelson v. United States, *supra;* 3A Wigmore on Evidence (Chadbourn Rev., 1970), § 988, p. 912. The rule is well settled in this state. As early as Basye v. State, *supra,* this court said as follows: "While particular facts are inadmissible in evidence upon direct examination for the purpose of sustaining or overthrowing character, yet this doctrine does not extend to cross-examination. It is firmly settled by the adjudications in this country that upon cross-examination of a witness who has testified to general reputation questions may be propounded for the purpose of eliciting the source of the witness' information, and particular facts may be called to his attention, and asked whether he ever heard them. This is permissible not for the purpose of establishing the truth of such facts, but to test the witness' credibility, and to enable the jury to ascertain the weight to be given to his testimony. *The extent of the cross-examination of a witness must be left to the discretion of the trial court.* The questions

put to the several witnesses were within the scope of a legitimate cross-examination, and there was *no abuse of discretion in permitting them to be answered.*" (Emphasis supplied.)

The precise question, of course, presented by the defendant's brief is whether a cross-examination as to a previous arrest or some other offense is permissible within the latitude of legitimate cross-examination. Following the overwhelming weight of authority (see Annotation, 47 A. L. R. 2d 1258) the Supreme Court of the United States has consistently followed and adhered to the rule announced in Michelson v. United States, *supra,* by stating categorically that "a character witness may be cross-examined as to an arrest whether or not it culminated in a conviction, according to the overwhelming weight of authority." See, also, Mannix v. United States, 140 F. 2d 250; Josey v. United States, 135 F. 2d 809; Spalitto v. United States, 39 F. 2d 782. It is true that the Michelson opinion, around which so much of the argument centers in the briefs in this case, contains a considerable discussion by way of dicta of the theory, difficulties, problems, and suggested procedures for judges to follow in solving the problem. However, it appears abundantly clear in the Michelson case, in a situation directly in point with the case at bar, that such evidence is permissible, rests within a wide and broad discretion of the trial court under all circumstances, and will not be reversed or set aside unless there is a clear abuse of the discretion. After a discussion and a suggested approval of some of the procedures that have been followed by some of the courts, that court concluded with this clear holding which is decisive of the case at bar: "The present suggestion is that we adopt for all federal courts a new rule as to cross-examination about prior arrest, adhered to by the courts of only one state and rejected elsewhere. The confusion and error it would engender would seem too heavy a price to pay *for an almost im-*

perceptible logical improvement, if any, in a system which is justified, if at all, by accumulated judicial experience rather than abstract logic.

"The judgment is affirmed." (Emphasis supplied.)

We further feel that when we are dealing with the limitation of cross-examination in such a broad and vague field, it would be unwise for this court to formulate any rigid rule for the exclusion of evidence of previous arrests. As Mr. Justice Frankfurter stated in the concurring opinion in Michelson v. United States, *supra,* it would be unwise to deny trial courts a power to control, under all of the circumstances, the allowable scope of cross-examination in such an admittedly broad area, precipitated by the granting to a defendant in a criminal case of a right which is impermissible under all other evidentiary standards for which there is no logical rationale.

In a more precise examination of the question of alleged abuse of discretion by the trial court, we observe that the trial court did sustain every objection directed at a question mentioning a prior arrest for auto theft. Although as we have pointed out, this was not necessary under the principles announced in Michelson and Basye, nevertheless the defendant had the benefit of these rulings and an admonition by the trial court to disregard such questions. Second, we observe that the question complained of by the defendant was answered in the negative and there was no affirmative evidence in the record of the arrest to which the question was directed. Third, and more important, the jury already knew from the voluntary, direct examination of the defendant himself that he had been previously arrested and convicted of a crime. Surely, alluding to another subsequent arrest on cross-examination would not bring into play any prejudice which should limit legitimate cross-examination of a character witness. In examining the record in this case we are unable to find that the prosecutor's questions fell within

the inhibition of "asking a groundless question in order to waft an unwarranted innuendo into the jury box." We further observe that the defendant at no time objected to the form of the question asked by the prosecutor on cross-examination, but rather based his objection upon the contention that the question would have to be targeted at prior convictions rather than prior arrests. The contention that a calculated innuendo of prior guilt against a previously innocent defendant was wafted into the jury box is without merit in this case.

The above conclusions are reinforced in the record by the fact that the defendant himself admitted he violated the terms of his parole which forbad association with criminal confederates, and which he violated by being in their company at the time of the commission of the robbery involved.

In this case, two men, the witness Chatman and the defendant, got into a taxicab in the middle of the night in Omaha. The cab driver positively identified the defendant as one of the men; the defendant admitted being in the cab at the time; and Chatman too admitted being in the cab at the time. Although these last two witnesses attempted to change their testimony the evidence is convincing that Chatman, prior to the time of the trial, stated he was in the cab and he remembered taking the watch from the cab driver's wrist and that the defendant gave him some of the cab driver's money.

Considering the evidence and the testimony in the case and the elusive nature of the argued contention of prejudice from the admission of the testimony of the previous arrest, we think the following rule is applicable: "No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if this

court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." State v. Sharp, 184 Neb. 411, 168 N. W. 2d 267.

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

AFFIRMED.

CHARLES A. DICKEY ET AL., APPELLANTS, V. ESTATE OF KATHERINE MEIER, DECEASED, ET AL., APPELLEES.
187 N. W. 2d 385

Filed May 12, 1972. No. 38185.

Actions: Negligence: Master and Servant: Agents: Release. In a tort action based exclusively on the alleged negligence of an employee or agent, a valid release of that employee-agent releases the employer or principal from liability, even though the release specifically reserves all claims against the employer-principal.

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

Hutton, Hutton & Garden, Margolin, Goldblatt & Steinstra, and McGroarty & Welch, for appellants.

Deutsch & Hagen, Thomas H. DeLay, and Rogers & Rogers, for appellees.

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

MCCOWN, J.

The plaintiff, Charles A. Dickey, was injured in an accident on December 2, 1964, when Matthew Meier, an agent and employee of Katherine Meier, backed a pickup truck into another vehicle pinning the plaintiff between the vehicles. The issues on appeal involve the nature and effect of "a special and restricted release" releasing and discharging Matthew Meier from liability for the

personal injuries to the plaintiff but specifically reserving any and all claims which the plaintiff might have against Katherine Meier. The district court found that the release by operation of law discharged the liability of both Katherine and Matthew Meier and dismissed the action.

Following the accident of December 2, 1964, both Matthew Meier and Katherine Meier died. The plaintiff filed claims against both the estates and the claims were disallowed by the county court. Appeals were then perfected to the district court. While the cases were pending in the district court, the plaintiff, upon payment of $6,250, executed a "special and restricted release and indemnifying agreement" to Matthew Meier, deceased, which released and forever discharged Matthew Meier, deceased, his heirs, personal representatives, successors, and assigns, "and all other persons, firms or corporations, who are or who may be liable for any claims of any kind or character, demands, rights or causes of action of whatsoever kind or nature, foreseen and unforeseen, developed and undeveloped, especially because of bodily and personal injury to said Charles A. Dickey * * * reserving, however, all claims, demands and causes of action * * * against said Katherine Meier, deceased." The release also agreed to indemnify and hold harmless Matthew Meier, deceased, and his representatives and assigns "against loss from any further claims, demands or actions that may hereafter, at any time, be made or brought against them or either of them for the purpose of enforcing any further claim for damages, reimbursement, contributions, or otherwise * * * in consequence of said accident, it being understood that this includes particularly, any claims of Katherine Meier, deceased, her personal representatives, heirs * * *." A separate paragraph repeats the statement that the release is a special and restricted release releasing only Matthew Meier, deceased, his personal representatives and heirs and reserving any and all claims against Katherine Meier,

deceased, her personal representatives and heirs.

The action against the estate of Matthew Meier was thereafter dismissed with prejudice. In the action against the estate of Katherine Meier with which we are concerned, the foregoing release and settlement with Matthew Meier were established. The pleadings and answers to requests for admissions also establish that the only basis of liability against the estate of Katherine Meier rests on the doctrine of respondeat superior. There is no allegation or evidence of any independent negligence of Katherine Meier, the employer-principal, and the sole negligence was that of Matthew Meier, the employee-agent, who has been released and discharged.

The defendant moved for summary judgment on the basis of the pleadings and responses to requests for admissions. The motion was sustained by the trial court, and the action dismissed.

The plaintiff contends that under the circumstances here Matthew Meier and Katherine Meier were joint tort-feasors, and that in such a situation release and discharge of one joint tort-feasor on settlement and payment of damages is not a defense to an action against another unless it was agreed between the parties to the settlement that such payment was in full satisfaction of all damages suffered. Authority for the latter portion of plaintiff's contention rests on Fitzgerald v. Union Stock Yards Co., 89 Neb. 393, 131 N. W. 612. The rationale of that case has been consistently followed since. It is also in accord with Restatement, Torts, § 885(1), p. 460: "(1) A valid release of one tortfeasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, unless the parties to the release agree that the release shall not discharge the others and, if the release is embodied in a document, unless such agreement appears in the document." Tentative Draft, No. 16, Restatement, Torts 2d, dated April 24, 1970, changes that subsection to read: "(1) A valid release of one tortfeasor from liability for

a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it shall do so." Under either version, the specific reservation of the claims against Katherine Meier would give plaintiff the benefit of the rule if Matthew Meier and Katherine Meier were joint tort-feasors.

The critical factor, however, is that Matthew Meier and Katherine Meier were not joint tort-feasors under the facts here. Plaintiff relies on the case of S.M.S. Trucking Co. v. Midland Vet, Inc., 186 Neb. 647, 185 N. W. 2d 667, for the proposition that an employer is regarded as a joint tort-feasor having joint and several liability. Two or three other cases involving employers and employees in which similar statements are found are likewise relied upon. In each of these cases it is apparent that the employer could have been guilty of independent negligence. None of them fit the situation involved here where the liability of the employer-principal arises only by virtue of the doctrine of respondeat superior, and not through any independent negligence of the employer-principal. The employer-principal here was not a joint tort-feasor in the technical sense. Her liability was purely derivative, stemming from the sole negligence of the employee-agent, and resting upon the employer-principal only because of the doctrine of respondeat superior.

Courts generally have not made this distinction or have followed rules applicable to true joint tort-feasors even though recognizing the distinction. See Annotation, Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa, 92 A. L. R. 2d 533, at page 536 et seq.

Where the doctrine of respondeat superior has been involved, many cases make no distinction between releases and covenants not to sue. There are also cases which can be cited in support of a great variety of interpretations as to the effect of a release by an employer or an employee on the liability of the other where

the cause of action is in tort and the liability is founded on the doctrine of respondeat superior.

Consideration of the many and divergent legal principles and the practical problems in multiplicity of litigation and in determining whether satisfaction was full or only partial, all lead us to the view adopted by most courts which have considered the issue. See Annotation, 20 A. L. R. 2d 1044. We hold that in a tort action based exclusively on the alleged negligence of an employee or agent, a valid release of that employee-agent releases the employer or prinicpal from liability, even though the release specifically reserves all claims against the employer-principal. See, Max v. Spaeth, 349 S. W. 2d 1 (Mo.); Bacon v. United States, 321 F. 2d 880 (8th Cir.). Both courts held in those cases: "The master's liability under the doctrine of respondeat superior is based not on his own misdeeds but those of his servant, and therefore, when the servant is not liable, the master for whom he was acting at the time should not be liable. It matters little how the servant was released from liability; as long as he is free from harm, it appears to us that his master should also be held blameless." Subject to exceptions not present here, the statement is applicable to this case.

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

AFFIRMED.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA EX REL. SOUTHEAST RURAL FIRE PROTECTION DISTRICT ET AL., APPELLEES, V. WILLIAM GROSSMAN ET AL., APPELLEES, BENNET RURAL FIRE PROTECTION DISTRICT, A MUNICIPAL CORPORATION AND BODY POLITIC, ET AL., INTERVENERS-APPELLANTS.

197 N. W. 2d 398

Filed May 12, 1972. No. 38208.

Judgments: Actions: Res Judicata. The conclusiveness of a prior

judgment precluding subsequent litigation of the same cause of action between the same parties is much broader in its application than a determination of the questions actually involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined but also to other matters which properly could have been raised and determined and those which were necessarily adjudicated or necessarily implied in the final judgment, whether formally raised or not.

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

William L. Walker and Earl Ludlam, for interveners-appellants.

Paul Douglas and Marti, O'Gara, Dalton & Bruckner, for appellees.

Heard before WHITE, C. J., BOSLAUGH, McCOWN, and CLINTON, JJ., and WARREN, District Judge.

CLINTON, J.

This is an appeal by the interveners from an order overruling their motion for new trial following the issuance of a peremptory writ of mandamus by the district court for Lancaster County directing the county commissioners of Lancaster County, Nebraska, respondents in this mandamus proceeding, to comply with the judgment of the court in a prior proceeding in error, wherein the respondents were defendants. The prior error proceedings involved the review by the district court of an order of the board of county commissioners approving the merger of the Southeast Rural Fire Protection District and the Bennet Rural Fire Protection District. There are many questions raised by the interveners in this appeal but it is necessary to decide only one as that is determinative of the matters involved. Before that question is stated it will be useful to recite some of the background of the case.

In the year 1968 pursuant to the provisions of sections 35-514 and 35-516(2), R. R. S. 1943, petitions to

initiate the merger of the two fire protection districts were filed with the county clerk of Lancaster County, Nebraska. Thereafter following a hearing before the county commissioners that body entered an order approving the merger. That order was entered on December 17, 1968. We gather from the record that similar petitions had been filed with the county clerk of Otoe County in which at least part of one of the districts lies, but we are not here concerned with those proceedings.

From the order of the board of county commissioners of Lancaster County proceedings by petition in error were brought to the district court for Lancaster County. In that proceeding Siefert et al., interveners in this case, were petitioners in error and the relators herein, Ehlers et al., were defendants as were the two fire protection districts and the county commissioners who are respondents in this mandamus proceeding. Ehlers et al., and the interveners are residents and persons who have property assessed for taxes in one or the other of the two districts. Some of the interveners are officers of the Bennet district and successors to persons who were as such predecessor officers, parties in the error proceedings. Thus all parties to this mandamus action were parties to or virtually represented in the error proceedings.

In those proceedings many attacks were made upon the legality of the approval of the merger. Those included sufficiency of signatures to the petitions; inaccuracy of descriptions and boundaries; sufficiency of the certifications; legality of the action of the board of the districts; inadequacy or lack of notice of meetings; whether or not petitioners had withdrawn their signatures from the petition; deficiencies in the order of the county commissioners approving the merger; and others.

In the error proceedings the court entered judgment on October 15, 1970, in which it found it had jurisdiction of the parties and the subject matter; the order

of the county board was a final and appealable order; the board of county commissioners was not a state agency subject to the provisions of sections 84-901 to 84-919, R. R. S. 1943; and the "Order was not in proper form and failed to include the boundaries of the merged districts and that no proper written Order was filed in the office of the County Clerk. IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that these proceedings be, and hereby are, remanded to the Lancaster County Board of Commissioners and that such Board enter an appropriate order in conformity with Section 35-514, R. R. S. 1943, as amended, and that same be filed in the office of the County Clerk of Lancaster County, Nebraska."

The above order was not appealed from and became final. The county commissioners took no steps to comply with the order. The relators then brought this action to compel compliance. First an alternative writ and later a peremptory writ of mandamus were issued directing compliance. The interveners were denied intervention in the case until the commissioners announced that they would not appeal from the order overruling their motion for a new trial and then they were permitted to intervene for the purposes of this appeal. Denial of their earlier right to intervene is one of the assignments of error made here and which we do not decide because we will assume but not hold that they had a right to intervene. In their motion to intervene they raised substantially the same issues as were raised in the proceeding in error, and in addition alleged that the governing body of the Bennet Fire Protection District on September 2, 1970, enacted a resolution revoking its earlier resolution approving the petition, finding that the merger was in the best interest of the district, and transmitting the petition and the attachments to the county clerk. It is to be noted that the alleged revocation resolution was enacted while the error proceedings were pending and when jurisdiction

had already passed to the district court.

It is apparent that what the interveners seek to do in this mandamus action is to attack the judgment rendered in the error proceedings from which they did not appeal and the enforcement of which judgment is the purpose of this mandamus action. It appears to us that this appeal should be disposed of upon either of two principles: (1) Collateral estoppel preventing the interveners from attacking a judgment which is not void, or (2) res judicata. The general distinctions between collateral estoppel and res judicata are succinctly stated in Slater v. Skirving, 51 Neb. 108, 70 N. W. 493. If we view the mandamus proceeding as a cause of action separate from that which rose out of the merger proceedings and culminated in the judgment in the district court in the review on the petition in error then the attack is collateral and only a void judgment is subject to collateral attack. "Where a judgment is attacked in other ways than by proceedings in the original action to have it vacated or reversed or modified or by a proceeding in equity to prevent its enforcement, the attack is a 'collateral attack.'" County of Douglas v. Feenan, 146 Neb. 156, 18 N. W. 2d 740, 159 A. L. R. 569. See, also, Restatement, Judgments, § 11a, p. 65. The judgment of the district court in the error proceedings was not void. That court had both jurisdiction of the subject matter and the parties, and it so found. Where the court has jurisdiction of the parties and the subject matter its judgment is not subject to collateral attack. Stanton v. Stanton, 146 Neb. 71, 18 N. W. 2d 654; Wistrom v. Forsling, 144 Neb. 638, 14 N. W. 2d 217; Clayton v. Evans, 137 Neb. 574, 290 N. W. 447; School Dist. D. v. School Dist. No. 80, 112 Neb. 867, 201 N. W. 964; Restatement, Judgments, § 10(1), p. 57; 49 C. J. S., Judgments, §§ 401, 402, pp. 792, 798.

On the other hand, the mandamus action may be properly viewed as simply a method of execution of

the previous judgment after it became final. State ex rel. Warren v. Raabe, 140 Neb. 16, 299 N. W. 338; State ex rel. Campbell v. Slavik, 144 Neb. 633, 14 N. W. 2d 186. When it is so viewed then the principle of res judicata seems to apply because the prior judgment is the foundation of the mandamus action and the mandamus a mere extension of it. We place our decision on grounds of res judicata. The applicable principle is that: "The conclusiveness of a prior judgment precluding subsequent litigation of the same cause of action between the same parties is much broader in its application than a determination of the questions actually involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined but also to other matters which properly could have been raised and determined and those which were necessarily adjudicated or necessarily implied in the final judgment, whether formally raised or not." Norlanco, Inc. v. County of Madison, 186 Neb. 100, 181 N. W. 2d 119. See, also, 50 C. J. S., Judgments, § 598, p. 16.

Interveners rely upon the proposition that mandamus does not lie to compel discretionary action of a board and this is of course correct. However, the approval of the merger by the board ended its discretionary powers. The direction of the court by its judgment to the board to recite the boundaries of the merged districts did not involve discretion. It must be borne in mind that the proceedings were for the merger of two existing districts whose boundaries were already fixed. The recital in an appropriate order of the boundaries of the merged districts was therefore only a formal matter not involving discretion.

AFFIRMED.

STATE OF NEBRASKA, BOARD OF EDUCATIONAL LANDS AND FUNDS, APPELLANT, V. FLOYD O. ALLEN, APPELLEE.

197 N. W. 2d 393

Filed May 12, 1972. No. 38222.

Appeal from the district court for Keith County: JOHN H. KUNS, Judge. Reversed and remanded with directions.

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

McGinley, Lane, Mueller, Shanahan & McQuillan and John A. Gale, for appellee.

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

PER CURIAM.

The question is whether an outgoing lessee of common school land possesses a compensable interest in 16,565 feet of conservation terracing by him under a lease dated January 9, 1956. The judgment of the district court declared that he possessed a compensable interest. The State Board of Educational Lands and Funds appeals.

The lessee possessed no compensable interest in the conservation terraces. The judgment is reversed and the cause remanded with directions to render a declaratory judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SMITH, J., concurring.

The lease obligated the lessee, Floyd O. Allen, to observe and carry out soil conservation requirements according to the rules and regulations of the board. Breach of the obligation was ground for cancellation. Allen terraced two fields in 1963 in compliance with the lease.

Statutory provisions in force on January 9, 1956, enumerated improvements for which an outgoing lessee might recover compensation. Conservation terraces were not named. See Laws 1953, c. 255, §§ 1 and 2, pp. 862 to

864; §§ 72-240.06 and 72-240.07, R. S. Supp., 1953. The list was exclusive under the facts of the present case. State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769 (1972); Banks v. State, 181 Neb. 106, 147 N. W. 2d 132 (1966). In 1957 the Legislature added conservation terraces to the list. See Laws 1957, c. 303, § 1, p. 1107; § 72-240.06, R. S. Supp., 1957.

The statutory provisions in force on January 9, 1956, determined the legal operation of the lease. See Stoller v. State, 171 Neb. 93, 105 N. W. 2d 852 (1960). That proposition was beclouded by references in Banks v. State, *supra,* to legislation enacted in 1957. The references to the 1957 act were erroneous but irrelevant.

On January 9, 1956, conservation terraces did not appear on the statutory list of compensable improvements, and the addition in 1957 came too late to benefit Allen. I therefore concur that he possessed no compensable interest in the conservation terraces.

CLINTON, J., dissenting.

I dissent. I believe the Per Curiam opinion will create confusion in an area which Rosenberger settled and will appear (and in fact is) a flip flop such as I believe occurred in Banks v. State, 181 Neb. 106, 147 N. W. 2d 132; and State v. Bardsley, 185 Neb. 629, 177 N. W. 2d 599.

There are some areas where the rule of stare decisis and the consequent stability and certainty in the law are especially important. This is one of those areas. We know that there are a large number of pending cases involving the question. They can, however, encompass only a few categories. Until there is some stability in the area and the opinions of the court acquire consistency the litigation will continue.

The Per Curiam opinion in this case presents no reasons whatsoever. It therefore decides no law, but just the case. The concurring opinion which accompanies it presents what I believe is a mistaken reason. The foundation of that opinion is the statement: "The statu-

tory provisions in force on January 9, 1956, determined the legal operation of the lease." Stoller v. State, 171 Neb. 93, 105 N. W. 2d 852, is cited. The proposition is abstractly correct but not as applied in this case. What Stoller really held was that the State could not *unilaterally* make changes in the lease adversely affecting the rights of the tenant. Syllabi 5 and 6 of Stoller are as follows: "5. The rights of a lessee of school lands are determined by the law as it was at the time the lease was made and the *lessee may not thereafter be deprived of any substantial right resulting from the lease in his favor by subsequent legislation.* . . . 6. *The state* by entering into a contract abandons its attributes of sovereignty and *binds itself, to the extent of its power to contract, substantially as an individual does who becomes a party to a contract.*" (Emphasis supplied.)

In this case the lease required that Allen follow conservation practices but without specifying what they were. In 1957 the Legislature made conservation terracing compensable. Thereafter the Board approved plans for conservation terracing by general regulation and required Allen under threat of forfeiture to do certain terracing which is here involved. This he did in reliance on the statute. All of this was a *bilateral change* in the lease contract made by the Board and the Legislature under their constitutional power of management and which changes were accepted by Allen. He clearly is entitled to compensation under the terms of his contract as amended by the statute and accepted by him.

In the Stoller case this court also said: "Every contract is made with reference to, and subject to, existing law, and every law affecting the contract is read into it and becomes a part thereof. This is true between individuals dealing between themselves by contract, express or implied, and *likewise true between individuals and the government.*" (Emphasis supplied.) I take it that no one would question that such "existing law" includes the Constitution. Article VII, section 1, says:

"The *general management* of all lands . . . shall be vested, *under the direction of the Legislature,* in . . . the Board of Educational Lands and Funds." (Emphasis supplied.) It can hardly be questioned that the Board and the Legislature have the same powers of management and the same duties that any other trustee has in the absence of some limiting provisions in the trust instrument (or here, in the Constitution).

The dissent in Rosenberger and the dissent in Banks completely ignore the "general management" provision of the Constitution. They ignore the unique nature of the "contractual" provisions which rise out of the statutes pursuant to the "management" power of the Constitution. The unique nature of the compensable interest of the lessee was completely analyzed and lucidly set forth in the concurring opinion of Carter, J., in the Banks case and need not be reiterated here.

Nowhere has it been pointed out how the duty of a trustee is violated when the trustee in effect says to the tenant (through the statutes) i.e., "When the lease is transferred or the land is sold, I will see to it that you are reimbursed by the new tenant or the purchaser, but only to the extent that your improvements have added to the value of the land and in no event to exceed your cost." These limitations upon reimbursement which found their genesis in the concurring opinion of Carter, J., in Banks and were later enacted by the Legislature into law, Laws 1967, c. 467, pp. 1452 to 1457; now §§ 72-240.10 to 72-240.24, R. R. S. 1943, and further defined and limited in Rosenberger, completely protects the trust corpus from invasion.

The improvements which the Legislature and the Board required or encouraged the tenant to make in order to make the land productive was simply carrying out the management powers under the Constitution and the provisions for reimbursement as limited by statute and the opinions of this court are clearly within the ordinary powers of a trustee. There is no principle of

trust law which requires a trustee to unjustly enrich itself or to take unconscionable or technical advantage. A trustee within its authority is bound by its contracts just as much as any other person.

The Restatement of Trusts sets forth pretty much the common law of trusts and to establish my point I will make reference thereto. I find no Nebraska cases contradicting the principles I will cite. While a trustee is personally liable to those with whom he deals in administering the trust, he is entitled to indemnity out of the trust estate if liability was properly incurred by him. Restatement, Trusts 2d, § 261, p. 2. Creditors may reach the trust property by proceeding in equity. Restatement, Trusts 2d, § 267, p. 12. Sections 169 to 196, Restatement, Trusts 2d, set forth pretty generally the powers of the trustee and I will make reference to some of them. The trustee must exercise the same care and skill as a man of ordinary prudence would exercise in dealing with his own property. Restatement, Trusts 2d, § 174, p. 379. He has the duty to use reasonable care and skill to preserve the trust property. Restatement, Trusts 2d, § 176, p. 381. He has a duty to make the trust property productive. Restatement, Trusts 2d, § 181, p. 391. He has such powers as "are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust." Restatement, Trusts 2d, § 186, p. 399. He is in his discretionary powers "subject to control by the courts" only for an abuse of discretion. Restatement, Trusts 2d, § 187, p. 402. He has the power to lease "for such periods and with such provisions as are reasonable." Restatement, Trusts 2d, § 189, p. 412.

The legislative act amending the statute to include conservation terraces was enacted in 1957. The terraces were constructed by Allen in 1963. They are a compensable improvement under the Laws of 1957, chapter 303, section 1, page 1107. The record here establishes that they were authorized improvements in

fact. There was here the same kind of consent which existed in Banks. In any event they are not one of the listed improvements where consent was required.

The Constitution entrusts to the Board of Educational Lands and Funds and the Legislature "general management" of the trust lands. Pursuant to that power of management the Board required "conservation terracing" and the Legislature authorized compensation from the new purchaser on the making of a lease to a new lessee or sale of the lands. In reliance upon the direction of the Board and the statute, the lessee constructed the terracing. This amounts to a mutual amendment of the contract. Allen clearly has a compensable interest under the Constitution and the statute.

BOSLAUGH and MCCOWN, JJ., join in this dissent.

MIDLANDS TRANSPORTATION COMPANY, A CORPORATION, APPELLEE, V. APPLE LINES, INC., A CORPORATION, APPELLANT.
197 N. W. 2d 646

Filed May 12, 1972. No. 38223.

1. **Contracts: Sales: Damages.** The amount recoverable for a breach of an agreement by the seller of a business not to engage in competition with the buyer is the loss which the latter has sustained, naturally resulting from the breach.
2. **Contracts: Damages.** The general rule is that the party injured by a breach of contract is entitled to recover all of his damages, including gains prevented, as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow the breach.
3. **Contracts: Trial: Damages: Evidence.** Plaintiff must not only show in a breach of contract case his right of recovery, but the elements and facts which compose the measure of his recovery, and not leave the jury to rove without guide or compass through the limitless fields of conjecture and speculation.
4. **Trial: Damages: Evidence.** It is the duty of the district court to refrain from submitting to a jury the issue of damages

when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture.

5. **Contracts: Trial.** A contract restraining a person from establishing a business competitive with that of the other party to it is strictly construed and doubts are resolved against the latitudinarian construction thereof.
6. **Contracts: Lessor and Lessee.** The mere leasing of personal property, without proof of other circumstances, by a covenantor to an existing competitor of a promisee, does not constitute a breach of a general covenant not to compete.

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

Stern, Harris, Feldman, Becker & Thompson, for appellant.

Nelson, Harding, Marchetti, Leonard & Tate and Kermit A. Brashear, II, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and WARREN, District Judge.

WHITE, C. J.

This is a suit on a promissory note, but the real issue presented is the sufficiency of the evidence to submit the questions of liability and damages to a jury for the alleged breach by the plaintiff of a covenant not to compete with the defendant. These issues were raised by the cross-petition of the defendant and the district court, holding that there was insufficient evidence to submit the case to a jury, directed a verdict for the plaintiff on the promissory note originally sued upon. We affirm the judgment of the district court.

The controversy here rose on an agreement by Apple Lines, Inc., hereinafter referred to as Apple, to purchase a portion of an I. C. C. Certificate of Public Convenience and Necessity held by Midlands Transportation Company, hereinafter referred to as Midlands. Apple paid $5,000 when the agreement was made, in May 1967, and executed a negotiable promissory note for $22,000 for the balance of the purchase price. Apple

was a petroleum products carrier from Kansas City, Missouri, north to Omaha, Nebraska. The purchase of Midlands' authority was to make the return trip south to Kansas City more profitable by trucking malt beverages from Omaha south to the Kansas City area. After a period of operation on a grant of temporary authority, the I. C. C. approved the agreement and the transfer of the relevant portion of Midlands' certificate was made. Midlands also agreed that it would not compete with Apple in the transportation of any commodity in any area covered by the transferred authority for a period of 5 years from the date of the transfer.

Was there competent evidence to submit the issue of damages on Apple's cross-petition? The proper measure of damages with regard to breach of a covenant not to compete was established by this court in Gallagher v. Vogel, 157 Neb. 670, 61 N. W. 2d 245 (1953), wherein it was said: "Speaking broadly, the amount recoverable for breach of an agreement by the seller of a business not to engage in competition with the buyer is the loss which the latter has sustained, naturally resulting from the breach.

"The general rule is that the party injured by a breach of contract is entitled to recover all of his damages, including gains prevented, as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach. See Western Union Tel. Co. v. Wilhelm, 48 Neb. 910, 67 N. W. 870." Admittedly, damages in such a case cannot be proved with mathematical certainty. There must be some basis for computation of either a general loss to the business or a loss of profits. Apparently, from the pleadings, the cross-petitioner, Apple, asserts both aspects in its theory of recovery. In a quite recent case, relied upon by Apple in its brief, this court said as follows as to the measure of damages in an action for the loss of goodwill: "In an action at law for the loss of goodwill, the evidence must contain *sufficient*

data to enable a jury, with a reasonable degree of certainty and exactness, to estimate the actual damages." (Emphasis supplied.) Frank H. Gibson, Inc. v. Omaha Coffee Co., 179 Neb. 169, 137 N. W. 2d 701.

The case of McGinnis v. Hardgrove, 163 Mo. App. 20, 145 S. W. 512 (1912), was concerned with an action against a seller for violation of an agreement not to compete in a livery business. Plaintiff testified that his gross receipts amounted to $8 to $10 a day before defendant began to compete but that subsequent to such competition his gross receipts amounted to only $4 or $5 a day. There was no evidence as to plaintiff's business expense except the fact that he merely paid expenses when his gross receipts diminished. With language extremely applicable to the instant situation the court discussed the plaintiff's burden in such an instance: "Plaintiff must not only show in such a case his right of recovery but the elements and facts which compose the measure of his recovery and not leave the jury to rove without guide or compass through the limitless fields of conjecture and speculation."

Summarizing these authorities the more precise question before us is not whether there is any competent evidence in the record to show that the damages are capable of mathematically exact measurement, but whether there is sufficient evidence and data to enable the trier of fact, the jury, with a reasonable degree of certainty and exactness to estimate the actual damages. Turning to the record we find that there is evidence that Midlands' gross income from the operation of the malt beverage authority was approximated, but that there is no competent evidence anywhere in the record as to Apple's gross income from said operation either prior to or after the effects of the alleged breach of the contract not to compete. The damage which Midlands' was allegedly responsible for was based primarily on the loss of a major user of Midlands' services soon after the sale to Apple. Without producing any

records or books of the company, Apple's general manager testified that the loss of this customer reduced Apple's gross income "about $650 per week" from sometime near the end of 1967 until the trial date of June 3, 1971. However, the record shows that the same witness went on to testify that Apple had continued to operate under the beverage authority with other customers and had made a profit, but due to the destruction of the company records in an untimely fire, he could not testify as to the amount or the extent of the profits from the whole malt beverage operation. There was also evidence that Apple invested in new refrigerated trailer units. There is no evidence of pecuniary loss, no dollar figures to show any degree of loss on this investment, and none at all to show any direct connection with the claimed loss of the one customer due to the breach of the covenant not to compete. Summarizing, the only competent evidence in terms of dollars is that Apple realized approximately $650 gross per week from servicing the Schatz account and that it spent approximately $80,000 for the acquisition of new refrigerated trailer units to be utilized *generally* in its common carrier business. More precisely, and in accordance with the trial court's finding on this issue, the record is wholly void of any basis for arriving at the most elementary computation as to the difference between Midlands' per annum gross in the operation of the malt beverage authority and Apple's per annum gross in the operation of the same. On the other hand, the testimony of Apple's general manager substantiated the fact that the malt beverage authority purchased from Midlands was operated at a profit. It is clear that the additional essential facts necessary to a computation of damages are not present in the record. The evidence does not reflect the present gross of Apple in the operation of the malt beverage authority. And, while acknowledging that it realized a profit, there is no evidence in the record showing in

dollar figures what such profit was. More important, nowhere in the evidence are Apple's expenses or any delineation of the relationship between overhead and gross presented; nor is there any evidence of the present value of the equipment which Apple claims to have purchased for the purpose of the operation of the malt beverage authority. Nothing but conjecture or speculation could guide the jury in making any determination as to how and in what manner the acquired equipment is used in relationship to the other aspects of Apple's common carrier business. We observe further that nowhere in the record does there appear any rational method or basis for the computation of Apple's claimed damage. The jury would be left to pure speculation to find the loss of the Schatz account as being the proximate cause of any unknown and unproved yet pecuniary loss, either a general one or from loss of profits.

It is true that Apple was prevented from the proper presentation of its case on damages due to the fact that the relevant documents and evidence were lost when fire destroyed the company office building. This explains but obviously does not excuse Apple's failure to sustain its burden of proof on the issue of damages. It is the duty of the district court to refrain from submitting to a jury the issue of damages when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture. Johnsen v. Taylor, 169 Neb. 280, 99 N. W. 2d 254. To submit the issue of damages in this case to the jury would be to "leave the jury to rove without guide or compass through the limitless fields of conjecture and speculation." See McGinnis v. Hardgrove, *supra*. The determination of the trial court not to submit Apple's cross-petition to the jury is sustained on this ground alone.

We turn to the issue of liability. The evidence adduced by Apple clearly establishes that no more than

one truck at a time that was titled in the name of "Midlands" was leased by it to a competing common carrier with malt beverage authority from November 13, 1967, to July 21, 1968, which period of time was approximately subsequent to the loss of the Schatz account by Apple.

It appears that the majority and proper rule is that the mere leasing of personal property, without proof of other circumstances, by a covenantor to an existing competitor of a promisee, does not constitute a breach of a general covenant not to compete. Apple premises its argument mainly upon the case of Dowd v. Bryce, 95 Cal. App. 2d 644, 213 P. 2d 500, 14 A. L. R. 2d 1329, and J. D. Nichols Stores, Inc. v. Lipschutz, 120 Ohio App. 286, 201 N. E. 2d 898. We feel that the better rule, both on reason and authority, is stated in the later case of Wineteer v. Kite, 397 S. W. 2d 752 (Mo. App., 1965), wherein the court in discussing the Dowd and the Nichols cases said as follows: "Although it was clearly obvious to the court that sales of land were expressly barred by the covenant and that the lesser act of leasing could have well been implied to be a prohibited act, the court did not choose to make its determination on that basis. Instead, it reached the conclusion that the parties did not intend that plaintiff would be permitted to lease his property for the purpose of competition *on the independent ground that such lease constituted indirect competition.*

"On its face the Dowd opinion appears to be supporting authority in defendants' favor. However, the decision of the court, founded as it is on the basis of competition instead of the clearly expressed covenant restriction against selling, has been criticized in 14 A. L. R. 2d 1333, Annotation, Contract Not to Compete - Lease, by editorial comment reading in part as follows:

" 'There can be hardly any doubt that the decision in Dowd v. Bryce * * * is correct under the circumstances. The inclusion in the restrictive covenant of the provi-

sion against selling other property to future competitors shows the intention of the parties as to the scope of the prohibited activities clearly. It is more difficult, however, to justify the decision on the ground that the lease amounts to indirect competition by the lessor. While the arguments advanced by the court in favor of this viewpoint are of considerable force, the decision seems to go further in restricting the seller in his business activities than most cases involving similar situations. * * * Thus, it has been held generally that there is no breach of the covenant where the covenantor *merely lends money to a person engaged in a similar business, or where or where the covenantor sells land to another who erects a building thereon for the purpose of carrying on the business.* On the other hand there is a breach of the covenant where the covenantor engages in the business as a partner, *organizes a competing corporation, or otherwise engages in a similar business under corporate form, or takes active interest in the encouragement of the business in other ways.*

" 'Without endeavoring to lay down any general principles it may be suggested *that only such conduct by the covenantor constitutes a breach of the agreement which amounts to an active participation on his part in the running of the competitive business even though this activity is conducted by indirect means.*'

"We have found only one instance in which the Dowd case has been approved or followed as authority on the specific question here considered. In the Ohio Case, J. D. Nichols Stores v. Lipschutz, 120 Ohio App. 286, 201 N. E. 2d 898, the court adopted the reasoning of Dowd and also held that a seller of a business violates his agreement to refrain from competition, per se, and without any other act on his part, by leasing other premises for purposes of a similar business. In its effect this holding amounts to an extension or redeclaration of the Dowd case ruling and would be subject to the same

critical examination that the Dowd result has undergone." (Emphasis supplied.)

In accord with the authority and reasoning of the Wineteer case, see Adams v. Adams, 156 Neb. 778, 58 N. W. 2d 172; Ericson v. Jayette, 149 Fla. 82, 5 So. 2d 453; McKeighan Wachter Co. v. Swanson, 138 Wash. 682, 245 P. 10, affirmed on rehearing, 141 Wash. 694, 250 P. 353; Houston Transfer & Carriage Co. v. Williams, 201 S. W. 712 (Tex. Civ. App., 1918), reversed on other grounds, 221 S. W. 1081 (Tex. Comm. App., 1920); Management, Inc. v. Schassberger, 39 Wash. 2d 321, 235 P. 2d 293.

In Nebraska, although we have no case directly on the question of whether a lease to a competitor constitutes a breach of a covenant not to compete, our court in Adams v. Adams, *supra,* stated the correct approach to the interpretation of a covenant restricting competitive freedom, when it stated as follows: "A contract restraining a person from establishing a business competitive with that of the other party to it is strictly construed and doubts are resolved against the latitudinarian construction thereof."

As we have pointed out, basically, Apple relies solely upon the leasing of equipment to an active competitor, in order to sustain its claim of the breach of an agreement to not compete. There is no evidence to show that Midlands organized a competing corporation, or directly or indirectly engaged in a similar business under corporate form, or otherwise took an active interest in the encouragement of the competitive business. Though each case must be judged upon its particular facts and circumstances, it is clear that generally the mere lease of personal property by covenantor to a previously existing competitor of the covenantee does not constitute a violation of a general covenant not to compete. Accordingly, we hold in this case that the contention the lease of the equipment to an active competitor was a violation of a covenant not to compete must fall and the trial

court's direction of a verdict on the cross-petition is sustainable on this ground alone.

The district court correctly determined that the defenses and alleged set-off of Apple are without merit as a matter of law. Accordingly, Midlands' motion for a directed verdict as to its petition and motion to dismiss as to Apple's cross-petition were properly sustained and the motion for summary judgment on the promissory note was correctly granted thereafter. The judgment of the district court is correct and is affirmed.

AFFIRMED.

IN RE INTERESTS OF PAMELA DENISE ANDERSON ET AL., CHILDREN UNDER EIGHTEEN YEARS OF AGE.
ETHEL ANDERSON, APPELLANT, V. GORDON E. DOESCHOT, CHIEF PROBATION OFFICER, APPELLEE.
197 N. W. 2d 384

Filed May 12, 1972. No. 38227.

Parent and Child: Infants: Trial: Appeal and Error. An order of the juvenile court regarding the custody of children 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 Douglas County: SEWARD L. HART, Judge. Affirmed.

McGrath, North, Nelson, Shkolnick & Dwyer, for appellant.

Donald L. Knowles, Colleen R. Buckley, and Roger R. Holthaus, for appellee.

Heard before WHITE, C. J., BOSLAUGH, McCOWN, and CLINTON, JJ., and WARREN, District Judge.

BOSLAUGH, J.

This is an appeal by Ethel Anderson from an order of the separate juvenile court of Douglas County, Nebraska, terminating her parental rights to two minor

children. The children, born July 17, 1966, and November 7, 1968, have separate fathers and were born out of wedlock.

On April 7, 1970, the juvenile court found the children were dependent and neglected and terminated the parental rights of each father. The parental rights of the appellant were not terminated but the children were placed in the temporary custody of the Douglas County welfare administration. The appellant was granted reasonable visitation privileges including weekend privileges. The matter was continued until July 2, 1970, and the appellant was ordered to find a suitable home for the children; obtain suitable employment; and keep the juvenile court informed of her whereabouts and her address.

Further continuances were granted at the request of the appellant, and on January 8, 1971, the appellant was ordered to appear April 8, 1971, and demonstrate her fitness to have the children returned to her custody.

On March 22, 1971, a supplemental petition was filed alleging the appellant had visited the children only 6 times since December 31, 1969; the appellant had failed to obtain and hold gainful employment and had failed to provide a suitable home for the children; the appellant had been convicted of petit larceny on April 16, 1970, and of carrying a concealed weapon on July 2, 1970; and the parental rights of the appellant should be terminated. On May 6, 1971, the juvenile court found that the parental rights of the appellant should be terminated and placed the custody of the children in the Department of Public Welfare, State of Nebraska. From this order the appellant has appealed.

At a hearing on April 8, 1971, Flora Rollerson, a foster mother who had taken care of the children since March 1970, testified that the appellant had visited the children 7 or 8 times in the past year. The appellant had not visited the children since Christmas in 1970.

William Webb, an employee of the Douglas County

social service, testified as to his difficulty in trying to locate the appellant. The appellant had lived with friends and did not maintain an apartment or home of her own. The appellant had been employed by 4 different employers but only for relatively short periods of time.

The appellant's testimony disclosed that she had not rented an apartment until the day of the hearing or several days before. Her testimony conflicted in some particulars with that of the witnesses called by the county attorney but there was no substantial dispute as to the material facts alleged in the supplemental petition.

At the hearing on May 6, 1971, the chief adult probation officer for Douglas County testified that the appellant had failed to comply with the terms of a probation order entered on July 28, 1970. At this hearing the appellant's counsel stated the appellant was having some health problems and requested that final disposition of the matter be continued. The juvenile court refused this request and terminated the appellant's parental rights to the children.

An order of the juvenile court regarding the custody of children will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence. State v. Randall, 187 Neb. 64, 187 N. W. 2d 586. The appellant failed to comply with the order of April 7, 1970, and demonstrated her inability to care for the children. The record sustains the findings and order of the juvenile court.

The order of the separate juvenile court is affirmed.

AFFIRMED.

FRANCIS J. MELANSON, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, ET AL., APPELLEES.
197 N. W. 2d 401

Filed May 12, 1972. No. 38250.

1. **Motor Vehicles: Administrative Law.** The points to be assessed

by the Director of Motor Vehicles for a speeding violation are determined by the amount by which the limit was exceeded.

2. **Motor Vehicles: Administrative Law: Trial: Statutes.** The amount by which the limit was exceeded is not an essential element of the offense of speeding, but the point system statute requires that the magistrate or judge make such a finding. The finding is a part of the information to be shown on the abstract for conviction.
3. **Criminal Law: Administrative Law: Guilty Plea.** A plea of guilty permits a finding conforming to the allegations of the complaint.

Appeal from the district court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

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

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

Heard before WHITE, C. J., BOSLAUGH, McCOWN, and CLINTON, JJ., and COLWELL, District Judge.

BOSLAUGH, J.

This is an appeal from an order of the Director of the Department of Motor Vehicles revoking the driver's license and operating privilege of the plaintiff for 1 year under section 39-7,129, R. R. S. 1943. The plaintiff appeals from an order of the district court affirming the order of the director.

The record shows the plaintiff was convicted of 4 charges of speeding and 1 charge of following another vehicle too closely within a period of 2 years. The director assessed a total of 11 points on the speeding charges and 2 points on the charge of following another vehicle too closely. The plaintiff contends there is no basis upon which the director could assess more than 1 or 2 points for each speeding conviction because the offense consists only of exceeding the applicable limit and the amount by which the limit was exceeded is not an element of the offense.

Under section 39-7,128, R. R. S. 1943, the points assessed by the director for a speeding violation are determined by the amount by which the limit was exceeded. Westenburg v. Weedlun, 187 Neb. 679, 193 N. W. 2d 566. One point is assessed if the driver did not exceed the limit by more than 5 miles per hour; 2 points if his speed was more than 5 but not more than 10 miles per hour over the limit; and 3 points if his speed exceeded the limit by more than 10 miles per hour.

The precise amount by which the limit was exceeded is not an essential element of the offense of speeding. To support a conviction for speeding it is necessary only that the evidence show the limit was exceeded. But the point system statute requires an additional finding by the magistrate or judge in a speeding case and this finding is to be included in the abstract of conviction sent to the director. This is apparent when the applicable sections are considered and construed together. It is a part of the "necessary information" as to "the nature of the offense" which is to be included in the abstract for conviction report. § 39-796, R. S. Supp., 1969. See, Richard v. Holliday, 261 Iowa 181, 153 N. W. 2d 473; State v. Bookbinder, 82 N. J. Super. 179, 197 A. 2d 35; Chappelle v. Board of Commissioners of District of Columbia (Muni. Ct. of App., D. C.), 110 A. 2d 697.

All of the speeding convictions involved in this case were based upon pleas of guilty. Each complaint charged a particular speed in excess of the applicable limit. The complaints alleged 70 miles per hour in a 60-mile-per-hour zone; 78 miles per hour in a 65-mile-per-hour zone; 46 miles per hour in a 30-mile-per-hour zone; and 48 miles per hour in a 30-mile-per-hour zone. The plea of guilty to each charge permitted a finding conforming to the allegations of the complaint. Stewart v. Ress, 164 Neb. 876, 83 N. W. 2d 901.

The abstracts which are in evidence show findings based upon the complaints and the pleas of guilty. Upon

receipt of the abstracts showing an accumulation of 12 or more points within 2 years, the director was required to suspend the plaintiff's license and operating privilege. Westenburg v. Weedlun, *supra*.

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

AFFIRMED.

CHARLES J. HARNETT, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.

197 N. W. 2d 375

Filed May 12, 1972. No. 38265.

1. **Appeal and Error: Records: Evidence.** In a proceeding in error, the review is solely upon the record made by the tribunal whose action is being reviewed. No new facts or evidence can enter into the consideration of the court.
2. **Appeal and Error: Records: Evidence: Administrative Law.** Where it appears in an error proceeding that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the administrative agency will be affirmed.

Appeal from the district court for Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded with directions.

Herbert M. Fitle, James E. Fellows, and Warren C. Schrempp and J. William Gallup of Schrempp & Bruckner, for appellants.

Paul E. Watts, Michael N. Schirber, Samuel A. Boyer, Jr., and Stephen Greenberg, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

BOSLAUGH, J.

This is a proceeding in error to review an order of the personnel board of the City of Omaha, Nebraska,

dismissing Charles J. Harnett, a patrolman, from the Omaha police department. The trial court set aside the order of the personnel board and ordered the plaintiff Harnett reinstated. The City of Omaha et al., and Richard J. Dinsmore, a taxpayer, have appealed.

On September 5, 1970, the plaintiff arrested Eileen M. Waites, an 18-year-old girl, for abusing an officer. At the time of the offense the girl was a passenger in the back seat of an automobile operated by Laura Waites. The plaintiff's report stated that in making the arrest he had attempted, unsuccessfully, to break a window of the automobile with the butt of a shotgun.

On September 22, 1970, the chief of police suspended the plaintiff from duty for 30 days for violating a rule of the police division, department of public safety. The rule provided that no officer should abuse, orally or physically, any person in his custody, or any other person, during the performance of his duty, and should use only such force as was reasonably necessary.

The plaintiff appealed to the personnel board. At the hearing before the personnel board, three occupants of the automobile testified that when the plaintiff was unable to break the automobile window, he pointed the gun at the window and ordered the occupants to unlock the door. When the door was unlocked, the plaintiff opened the door and struck Eileen Waites in the face with the butt of the gun. Later that night, after she had been released from jail, Eileen Waites was treated at St. Joseph's Hospital for a hairline fracture of her cheekbone.

The plaintiff testified that Eileen Waites had shouted obscenities at him after he directed the driver to turn around and go north on Twenty-fourth Street. He then "tapped" on the rear window of the automobile with the butt of the shotgun. When the door was opened, he told Eileen Waites she was under arrest. Eileen Waites started screaming and kicking at him and it was necessary for him to pull her from the rear seat of

the automobile to complete the arrest. The plaintiff testified he did not strike Eileen Waites with the gun or point it into the car. He had no explanation as to how her cheekbone was fractured and indicated it was not incident to the arrest.

The personnel board also considered the special report file concerning the plaintiff which had 31 entries dating from December 6, 1967, to this incident on September 5, 1970.

The case was tried in the district court as though proceedings before the personnel board were subject to review by trial de novo. No statute or other authority has been cited which would permit a de novo review in the district court. The Administrative Procedure Act, cited by the plaintiff, provides only for a review on the record of the agency (§ 84-917 (5), R. R. S. 1943). The statute is applicable only to agencies of the state. § 84-901, R. R. S. 1943.

The procedure which is applicable to a proceeding in error is well established. It is discussed in detail in Anania v. City of Omaha, 170 Neb. 160, 102 N. W. 2d 49. The review is solely upon the record made by the tribunal whose action is being reviewed, and no new facts or evidence can enter into the consideration of the court. Moser v. Turner, 180 Neb. 635, 144 N. W. 2d 192. If the board acted within its jurisdiction and its findings are sustained by some competent evidence, its action must be sustained. Lynch v. City of Omaha, 153 Neb. 147, 43 N. W. 2d 589. See, also, Lewis v. City of Omaha, 153 Neb. 11, 43 N. W. 2d 419; First Nat. Bank & Trust Co. v. Ley, 182 Neb. 164, 153 N. W. 2d 743; Ostler v. City of Omaha, 179 Neb. 515, 138 N. W. 2d 826.

In this case there was no contention that the board exceeded its jurisdiction. The evidence before the personnel board was conflicting, but the credibility of the witnesses was a question for the board. There was competent evidence to sustain the findings and order

of the board and its order should have been affirmed.

The judgment of the district court is reversed and the cause remanded with directions to enter a judgment affirming the order of the personnel board.

REVERSED AND REMANDED WITH DIRECTIONS.

ANDREW R. MOATS, ADMINISTRATOR OF THE ESTATE OF MARVIN A. MOATS, DECEASED, APPELLEE, V. ARNOLD C. LIENEMANN, ADMINISTRATOR OF THE ESTATE OF JOHN B. LIENEMANN, DECEASED, APPELLANT.

197 N. W. 2d 377

Filed May 12, 1972. No. 38290.

1. **Trial: Evidence.** In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
2. **Trial: Evidence: Motions, Rules, and Orders.** A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
3. **Trial: Evidence: Negligence.** In determining the question of whether the evidence is sufficient to submit the issues of negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence are for a jury.
4. **Verdicts: Evidence: Appeal and Error.** A jury verdict based upon conflicting evidence will not be set aside unless it is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record.
5. **Witnesses: Evidence.** Hypothetical questions propounded to an

expert, if so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, will be sufficient, provided the subject is one proper for expert testimony.

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

Healey, Healey, Brown & Burchard, Deutsch & Hagen, Thomas H. DeLay, and Mark A. Buchholz, for appellant.

Nelson, Harding, Marchetti, Leonard & Tate, Kenneth Cobb, Hutton, Hutton & Garden, and Richard H. Williams, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

CHADDERDON, District Judge.

This is an action by Andrew R. Moats, administrator of the estate of Marvin A. Moats, deceased, hereinafter called plaintiff, against Arnold C. Lienemann, administrator of the estate of John B. Lienemann, deceased, hereinafter called defendant, for the wrongful death of Marvin A. Moats as a result of a collision of a car driven by Marvin A. Moats and a car driven by John B. Lienemann. Marvin A. Moats, deceased, will be hereinafter called Moats, and John B. Lienemann, deceased, will be hereinafter called Lienemann. The jury returned a verdict for plaintiff for $46,037.12. We affirm the judgment of the district court.

Assignments of error Nos. 1, 2, 3, 4, and 5 go to the sufficiency of the evidence and will be considered together. In considering these assignments of error we must look to the former decisions of this court. In Lund v. Mangelson, 183 Neb. 99, 158 N. W. 2d 223, the court said: "In every case before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof

is imposed. Weston v. Gold & Co., 167 Neb. 692, 94 N. W. 2d 380.

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

In Flanagin v. DePriest, 182 Neb. 776, 157 N. W. 2d 389, this court said: "In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury."

In Wright v. Haffke, *ante* p. 270, 196 N. W. 2d 176, the court said: "'A jury verdict based upon conflicting evidence will not be set aside unless it is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record.' Satterfield v. Watland, 180 Neb. 386, 143 N. W. 2d 124."

The autopsy revealed that Lienemann died as a result of a ruptured aorta probably caused by broken ribs, and that he had a blood clot in the brain which had been there before the accident occurred.

The defense of the defendant was that Lienemann was suddenly stricken by illness, which he had no reason to anticipate, while driving an automobile, which rendered it impossible for him to control the car and is, therefore, not chargeable with negligence. The defend-

ant argued that the basis for the jury verdict was the result of speculation and conjecture.

The jury could have found from the evidence that Lienemann was driving his car north on U.S. Highway No. 81 north of Norfolk, Nebraska, at approximately 8:45 p.m. The road was concrete paved, 24 feet wide, dry, and with a slight incline from the south to the north. At a point approximately 3 miles north of Norfolk the right wheels of Lienemann's car left the pavement on the east side for .3 mile when the left side of the car left the pavement. The car continued in the ditch for some distance where it jumped a drainage ditch and was in the air for 42 feet. It continued on some distance where it grazed a fence on the east side of the ditch, then veered to the west onto the pavement, and never again left the paved surface from that point to where it struck head-on the car of Moats, which was a distance of 3,800 feet. As a result of the accident both Moats and Lienemann were killed. After Lienemann's car returned to the pavement, it continued north in the west lane and at least the driver of one car avoided it by going on the shoulder of the road. Just before Lienemann's car came to a control ditch bridge it turned to the east lane and passed a car, the driver of which had stopped it on the bridge and had started to back up because he had seen Lienemann's car in his lane of traffic. Lienemann's car continued north across a bridge of the North Fork of the Elkhorn River to a point a short distance south of a road which is the boundary between Madison and Pierce Counties where it turned into the west lane. A car he was meeting swerved to the east lane to miss his car, and then Lienemann's car ran head-on into Moat's car at a point .1 mile north of the county line road. From the place the right wheels of Lienemann's car first left the paved surface to the point of impact it was at least 1.2 miles.

The medical testimony regarding the ability of Lienemann to control his car is conflicting, but the jury could

have found from this testimony that in order to drive the car the distance of 3,800 feet from the place where he returned to the highway after being in the ditch and not thereafter having left the 24-foot paved road, he had the ability to control the car, which would include the ability to stop the car, and that such action on his part is evidence of negligence.

In the light of the cited cases and the evidence we find that the trial court did not err in overruling the defendant's motion for directed verdict at the end of the testimony, for judgment notwithstanding the verdict, or for a new trial, and that the verdict was not contrary to the evidence and to the law.

Assignments of error Nos. 6, 10, 11, and 12 are the claimed errors of the trial court in sustaining objections to questions on cross-examination. These questions were either argumentative, did not reflect a true statement of the evidence by other witnesses, or were indefinite, and the law is so firmly established on these points that it does not require the citation of cases thereon.

Assignments of error Nos. 7, 8 and 9 have to do with hypothetical questions asked by the plaintiff of the doctors and the overruling of objections to these questions by the trial court. In considering these assignments we must consider the case of Jacobson v. Skinner Packing Co., 118 Neb. 711, 226 N. W. 2d 321, wherein the court said: " 'Hypothetical questions propounded to an expert, if so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, will be sufficient, provided the subject is one proper for expert testimony.' " Without going into detail regarding these questions, we find that they fairly and reasonably reflected the facts proved by the other witnesses in this case, and that the trial court was not in error in overruling the objections to these questions.

In his brief the defendant cites Jacobson v. Skinner Packing Co., *supra*, and Brugh v. Peterson, 183 Neb. 190, 159 N. W. 2d 321.

In Jacobson v. Skinner Packing Co., *supra,* the court found: the witness "was not shown to have proper information upon which to base an estimate . . .." In Brugh v. Peterson, *supra,* in ruling on an answer to a hypothetical question as to the speed of a vehicle, the court said: ". . . the expert opinion depends upon the resolution of so many variables that it is, in effect, a statement of a possibility. Under the circumstances in this case the expert testimony was neither necessary nor advisable as an aid to the jury."

We find that this case was fairly and impartially tried, that the verdict of the jury was based upon sufficient evidence to find for the plaintiff, and that the verdict of the jury was not the result of speculation or conjecture.

AFFIRMED.

JACK LEE LOVEALL ET AL., APPELLEES, V. MARJORIE A. R. LOVEALL, APPELLANT.
197 N. W. 2d 381

Filed May 12, 1972. No. 38297.

1. **Divorce: Parent and Child: Domicile.** A court which has personal jurisdiction of the parties, both of whom are domiciled within the state, may determine the custody of a child as between the parties even though the child is absent from the jurisdiction.
2. ———: ———: ———. A court which has personal jurisdiction of the parties may determine the custody of a child as between the parties although the child is neither domiciled nor present in the state.
3. **Habeas Corpus: Parent and Child.** In a habeas corpus proceeding to determine the custody of a child the prime consideration is the welfare of the child.
4. **Judgments: Parent and Child: Comity.** Ordinarily, effect will be given to a prior judgment of another state determining the custody of a child as a matter of comity unless a change in circumstances requires a different result.

Appeal from the district court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Christensen & Glynn and Lawrence C. Sandberg, Jr., for appellant.

F. W. Carstens of Carstens & Carstens, for appellees.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

BOSLAUGH, J.

This is a proceeding in habeas corpus by Jack Lee Loveall, Marion Loveall, and Rowena Loveall to obtain the custody of Jack Lee Loveall, Jr., a minor. Jack Lee Loveall, who will be referred to as the plaintiff, is the father of the child. Marion Loveall and Rowena Loveall are the parents of the plaintiff. The defendant, Marjorie A. R. Loveall, is the mother of the child. She has since remarried and her name is now Brecht.

The plaintiff and the defendant were married on January 29, 1965. Jack Lee Loveall, Jr., was born July 4, 1965. On July 22, 1970, the plaintiff commenced an action for divorce in Colorado. Both parties were then residents of Colorado, and personal service was had upon the defendant. Later the defendant filed an answer and counterclaim and was represented by counsel throughout the Colorado divorce proceedings.

The defendant appeared in person at a hearing on temporary custody, alimony, and support on December 9, 1970. Upon a stipulation of the parties, the Colorado court granted temporary custody of Jack Lee Loveall, Jr., to Marion Loveall and Rowena Loveall. The defendant did not comply with this order and moved to Beatrice, Nebraska, on December 23, 1970.

On January 26, 1971, the plaintiff was granted a final decree of divorce by the Colorado court. On June 14, 1971, the Colorado court found that "the defendant is *not* a fit and proper person to have the care, custody and control of the minor child, Jack Lee Loveall, Jr.," and awarded the custody to the plaintiff and his parents jointly. The defendant refused to surrender the

child to the plaintiff. This action was commenced on August 24, 1971.

The trial court found the Colorado court had jurisdiction of the parties and the minor child; the Colorado decree should be considered as a matter of comity; the plaintiff and his parents were fit persons to have the custody of the child; and there had not been a change in circumstances sufficient to justify granting custody to the defendant. The defendant has appealed.

The defendant contends that the Colorado decree as to child custody was void because at the time the divorce proceedings were commenced the child was in Nebraska and the defendant was not domiciled in Colorado. The issue raised was a question of fact.

After a separation in 1968, the parties lived together in Des Plaines, Illinois. A second child, Robert Lee Loveall, was born on February 4, 1969. At the temporary custody hearing on December 9, 1970, the Colorado court determined that the plaintiff was not the father of Robert Lee Loveall.

The parties moved back to Denver, Colorado, in June 1969. They separated again in October 1969, and the defendant moved to Nebraska. In June 1970, the defendant returned to Colorado with the children and the parties lived together for a short time. On July 11, 1970, the children were taken to Beatrice, Nebraska, by defendant's parents. The evidence indicates that this was intended to be a temporary visit, but Jack Lee Loveall, Jr., was never returned to Colorado. The defendant remained in Colorado until December 23, 1970, when she moved to Beatrice, Nebraska. Although there is some conflict in the evidence, we think it sustains the finding of the trial court that the defendant was domiciled in Colorado at the time the divorce action was commenced. See Restatement, Conflict of Laws 2d, § 79, Comment c, p. 239, stating that a court with personal jurisdiction of the parties may determine custody of a child as between the parties although the child is

neither domiciled nor present in the state.

The defendant complains that the trial court decided the case on the ground that the Colorado decree should be recognized as a matter of comity and not on the basis of the best interests of the child. That is not an accurate summarization of the trial court's decision, but it is not important because the matter is here for review de novo. State ex rel. Cochrane v. Blanco, 177 Neb. 149, 128 N. W. 2d 615.

In a habeas corpus proceeding to determine the custody of a child the prime consideration is the welfare of the child. Copple v. Copple, 186 Neb. 696, 185 N. W. 2d 846. This does not mean that a prior judgment in another state determining custody as between the parties will be disregarded. Ordinarily, effect will be given to such a judgment as a matter of comity unless a change in circumstances requires a different result. Copple v. Copple, *supra*. See, also, In re Application of Reed, 152 Neb. 819, 43 N. W. 2d 161.

The problem in this case arises out of the finding by the Colorado court that the defendant was guilty of "not just substantial but overwhelming evidence of acts of sexual promiscuity and other acts of misconduct" which were detrimental to the welfare of Jack Lee Loveall, Jr. This finding, made 10 weeks before this action was commenced, together with the entire absence of evidence of unfitness on the part of plaintiff, are controlling circumstances.

The defendant's evidence established that she and her new husband have an adequate home; that Jack Lee Loveall, Jr., is well adjusted in his present environment; that Jack Lee Loveall, Jr., has formed an attachment for his half-brother, Robert; and that he will miss the company and companionship of Robert. We do not consider these facts to be sufficient to overcome the defendant's previous history of misconduct and unfitness. This is particularly true in view of the brief interval between the Colorado decree regarding custody

and the commencement of this action. The record does not show a change in circumstances sufficient to require that the plaintiff be denied custody of Jack Lee Loveall, Jr.

The judgment of the district court is affirmed.

AFFIRMED.

WESLEY F. HANSEN, APPELLEE, V. COUNTY OF LINCOLN, NEBRASKA, ET AL., APPELLANTS.
197 N. W. 2d 651

Filed May 12, 1972. No. 38355.

1. **Statutes: Notice: Taxation.** The provision of section 77-1315, R. R. S. 1943, requiring that notice be given to the record owner of "every piece of real estate which has been assessed at a higher figure than at the last previous assessment," does not apply to increases ordered by the State Board of Equalization and Assessment under section 77-508.01, R. R. S. 1943.
2. **Statutes: Taxation: Administrative Law.** Under the provisions of section 77-1311, R. R. S. 1943, the county assessor has authority to correct valuations which have become erroneous by reason of a judicial declaration of invalidity of an increase ordered by the State Board of Equalization and Assessment.
3. **Actions: Parties: Taxation.** Generally a suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover taxes alleged to have been illegally assessed.
4. **Actions: Parties: Judgments.** Ordinarily an action may not be maintained as a class action by a plaintiff on behalf of himself and others unless he has the power as a member of the class to satisfy a judgment on behalf of all members of the class.
5. **Actions: Parties: Judgments: Statutes: Trial: Taxation.** The provisions of section 77-1736.04, R. R. S. 1943, do not contemplate that the court which has entered a judgment declaring the invalidity of a tax will in a class action supervise the tax refund or credit procedures.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed in part, and in part reversed and remanded.

W. R. Mullikin and Richard P. Myers, for appellants.

Jack North and August Ross, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and WARREN, District Judge.

CLINTON, J.

This case is a class action by a taxpayer to have declared null and void a portion of the tax levied against rural lands in Lincoln County, Nebraska, for the year 1970 and to have the allegedly illegal portion of the tax refunded to the individuals who paid the same. The trial court declared void the portion of the tax as prayed for and retained jurisdiction for the apparent purpose of supervising refunds. We affirm the part of the decree declaring the portion of the tax increase void and reverse the remainder of the decree.

This case is a sequel to County of Sioux v. State Board of Equalization & Assessment, 185 Neb. 741, 178 N. W. 2d 754. The task with which we are now confronted is a distinctly unpleasant one because the problem itself, at first blush, appears to defy both reasonable analysis and reasonable result primarily because it involves a situation for which the statutes made no provision and because it is not clearly evident that any real benefit will accrue to the taxpayers, and the decision which we make clearly adds to the burden of the officials administering the tax laws.

In 1969 the State Board of Equalization and Assessment, acting apparently pursuant to the provisions of L. B. 391, Laws 1969, c. 628, § 1, p. 2528, now section 77-508.01, R. R. S. 1943, ordered after hearing a 50 percent increase, among others, in the valuation of rural lands in Lincoln County, Nebraska. This increase was certified to the county assessor of Lincoln County on August 18, 1969. The county officials acquiesced in the order and prepared their tax valuations for 1969 accordingly, but a taxpayer, Wesley F. Hansen, the plaintiff in the present case, appealed. This court on

July 17, 1970, rendered its decision voiding the increase in valuations on "rural lands."

The problem here arises because before the final decision of this court on July 17, 1970, the county assessor had pursuant to the provisions of section 77-1315, R. R. S. 1943, completed his assessment rolls and certified them to the county clerk, presumably before April 1 as required by the statute just mentioned. Section 77-1315, R. R. S. 1943, requires that: "The county assessor shall before such filing, notify the record owner of every piece of real estate which has been assessed at a higher figure than at the last previous assessment." The statute requires that the notice describe the real estate, state the old and new valuations, and give the date of the convening of the county board of equalization.

The assessor gave no notice to the complaining taxpayer or others similarly situated and in defense of his position asserts that the valuations being used were not an increase over those used for the preceding year as shown by the prior year's assessment rolls as increased by the order of the State Board of Equalization and Assessment, and that there is no requirement in the statutes that notice be given to any taxpayer of any increase in the valuation of any class of property made by the State Board of Equalization and Assessment.

Plaintiff relies upon the provision of section 77-1315, R. R. S. 1943, requiring a notice to the taxpayer where his property "has been assessed at a higher figure than at the last previous assessment." We hold that this provision pertains, obviously it seems to us, only to individual valuation changes made by the assessor. It does not and was not intended to apply to changes in classes of property or percentages which were over a whole taxing district made by the State Board of Equalization and Assessment. Nor do the constitutional requirements of due process make such notice mandatory.

Frye v. Haas, 182 Neb. 73, 152 N. W. 2d 121.

At the time the 1970 assessment was made, the 1969 valuation remained as an increase by the State Board of Equalization and Assessment. At that time both the taxing officials and the taxpayer knew that the 1969 valuation was then under attack in County of Sioux v. State Board of Equalization & Assessment, *supra*. Did the assessor under the circumstances have the duty to anticipate a result adverse to the valuation increase and therefore have a duty to give a provisional notice under section 77-1315, R. R. S. 1943, because a declaration of the invalidity of the 1969 increase would make its use by the assessor in 1970 his increase to which section 77-1315, R. R. S. 1943, would apply? Alternatively, if he had no such duty to anticipate the declaration of the invalidity did he have a duty after July 17, 1970, to restore the 1969 valuations? Even though the notice provisions of section 77-1315, R. R. S. 1943, were not applicable, it nevertheless seems clear that under the provisions of section 77-1311, R. R. S. 1943, the assessor had a duty to make the necessary valuation corrections. Section 77-1311, R. R. S. 1943, in part provides that the county assessor shall "annually revise the real estate assessment for the correction of errors and . . . shall have general supervision over and direction of the assessment of all property." These provisions clearly gave him the authority to make the reduction in valuations after July 17, 1970, when the valuations involved became erroneous because of the decision of this court in the parent case. The evidence establishes that the change could have been accomplished before the levy date. That part of the order of the trial court declaring null and void the part of the 1970 tax attributable to the 50 percent increase of valuation of "rural lands" in Lincoln County ordered by the State Board of Equalization and Assessment for 1969 is correct and is affirmed.

In passing we call attention to the fact that the Leg-

islature in 1971 made provision authorizing the county board of equalization to make percentage increases in classes or subclasses of property after completion of equalization of individual parcels. § 77-1506.02, R. R. S. 1943. The notice provisions under that statute would have been broad enough to cover the situation which arose here had they then been available.

The prayer of the plaintiff's petition, in addition to asking for a declaration of the nullity of the 50 percent valuation increase, asked that "so much of said tax as is the result of the increase in valuation be . . . ordered refunded to the individuals who paid the same, and for such other and further relief as equity may require." The court in its decree not only declared the valuation increase void, but ordered certain unspecified legal subdivisions, presumably school and other districts who were not parties to this action, to levy sufficient taxes to make refunds or give credits, "less the proportionate cost of this proceeding." The court also retained jurisdiction "for the purpose of entering such orders as may be necessary to implement the Decree entered herein."

We hold that all that portion of the court's decree other than the part declaring null and void that part of the 1970 tax attributable to the 50 percent increase in valuation of "rural lands" in Lincoln County ordered by the State Board of Equalization and Assessment for 1969 is erroneous and is vacated.

It has long been the law of this state that a suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed. In such case each must bring an action on his own behalf. Monteith v. Alpha High School Dist., 125 Neb. 665, 251 N. W. 661; State ex rel. Sampson v. Kenny, 185 Neb. 230, 175 N. W. 2d 5. The reason given in these cases is that generally an action cannot be maintained as a class action by a plaintiff on behalf of himself and others

unless he has the power as a member of the class to satisfy a judgment on behalf of all members of the class. This the plaintiff here cannot do insofar as refunds or tax credits are concerned. Further, it would appear that the refund and credit procedures provided by section 77-1736.04, R. R. S. 1943, are exclusive and do not contemplate supervision by the court.

Costs are taxed to the plaintiff.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, BOARD OF EDUCATIONAL LANDS AND FUNDS, APPELLANT, V. LINDBERG CARMAN, APPELLEE.
197 N. W. 2d 643

Filed May 12, 1972. No. 38357.

Public Lands: Improvements: Statutes: Constitutional Law: Landlord and Tenant: Administrative Law. A lessee of common school land possesses a compensable interest in improvements covered by statute and placed by him or his predecessor in interest on the land prior to September 14, 1953, in accordance with statute, notwithstanding the subsequent determination of unconstitutionality of the statute or the absence of permission from the Board of Educational Lands and Funds.

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

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

Tye, Worlock, Tye, Jacobsen & Orr, Gary L. Loseke, and Kenneth C. Fritzler, for appellee.

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

SMITH, J.

The district court decided that a lessee of common school land possessed a property interest in certain im-

provements placed on the land by his predecessor. The Board of Educational Lands and Funds appeals.

The parties concede the facts as follows: Effective January 1, 1945, Robert Carman obtained a renewal of a lease that he had acquired by assignment in December 1934. The renewal term was 25 years. Lindberg Carman acquired the renewal lease by operation of law upon the death of Robert, his father. At the expiration of the term the board extended the lease to Lindberg on a year-to-year basis.

The improvements in dispute were two houses, a granary, a cattle shed, an open shed, a double corn crib, a well, a cistern, and board and wire fences. The lessee had placed them upon the land after 1934 and prior to 1953 without permission of the board. Lindberg acquired whatever interest Robert possessed.

A lessee of common school land possesses a compensable interest in improvements covered by statute and placed by him or his predecessor in interest on the land prior to September 14, 1953, in accordance with statute, notwithstanding the subsequent determination of unconstitutionality of the statute or the absence of permission from the Board of Educational Lands and Funds. State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769 (1972).

The judgment of the district court was correct.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion in this case. I repeat once more what I have said before. I concede the legislative intent to grant rights to lessees in school land improvements, but question its power or the power of this court to grant an interest of any nature in the land.

This case emphasizes what was pointed out in the dissents in Banks v. State (1966), 181 Neb. 106, 147 N. W. 2d 132. The decision would be construed to give a lessee a property interest in the fee at the expense of the real

owners of the fee, the cestui que trust, the public schools of the state. There can be no question this is now the result.

In Propst v. Board of Educational Lands & Funds (1952), 156 Neb. 226, 55 N. W. 2d 653, this court said: "The title to the state school lands was vested in the state upon an express trust for the support of common schools without right or power of the state to use, dispose of, or alienate the lands or any part thereof except as allowed by the Enabling Act and the Constitution."

The problem occurs because the majority of the court construed the legislation permitting lessees to recover from their successor lessees for the value of the improvement to give the lessee an interest against the trust itself. This premise I cannot accept, because the Legislature does not have the power to create interests in the trust property for anyone.

In State ex rel. Ebke v. Board of Educational Lands & Funds (1951), 154 Neb. 244, 47 N. W. 2d 520, this court said: "A trustee acts in a representative capacity and persons dealing with him are bound to be cognizant of his powers. A trustee is required to dispose of trust property upon the most advantageous terms which it is possible for him to secure for the benefit of the cestui que trust whom he represents. *The rule is no different in the leasing of property of a trust estate.*" (Italics supplied.) In that same case, this court said: "The state in acting as a trustee is subject to the same standards, and when its status as a trustee is fixed by the Constitution a violation of its duty as a trustee is a violation of the Constitution itself."

The majority of the court has consistently ignored this court's holding in Blomquist v. Board of Educational Lands & Funds (1960), 170 Neb. 741, 104 N. W. 2d 264: "As a general rule, improvements of a permanent character, made on real estate and attached thereto without consent of the owner of the fee, by one having no title

or interest, become a part of the realty and vest in the owner of the fee as his own property.

"The general rule that improvements which become a part of the real estate may not be removed and do not become the property of the lessee is applicable in the absence of agreement, express or implied, or a statute indicating otherwise."

Blomquist involved trees growing on the land, which are not movable improvements. In Blomquist, referring to the statutory provision which attempted to grant a retroactive interest, this court held the Board was without authority to create an interest in the fee.

Article VII, section 1, Constitution of Nebraska, provides: "The general management of all lands set apart for educational purposes shall be vested, under the direction of the Legislature, in a board of five members to be known as the Board of Educational Lands and Funds." This gives the Legislature the power to direct the general management of the lands, but certainly does not give it the power to authorize the Board of Educational Lands and Funds to permit the acquiring of any interest in the trust property. It is my contention that the State is powerless to gratuitously create liens of any form on public school lands. I contend further that any lessee dealing with the State in its trust capacity is conclusively chargeable with knowledge of the extent of its power.

It seems elementary to me that a strict interpretation must be placed upon all statutes, agreements, and proceedings for the protection of the beneficiaries of our public school lands. This fact has been consistently ignored since Banks v. State, *supra*. I reiterate that I cannot agree with any opinion which grants lessees any lands benefits as against the trust, for the simple reason that the Legislature and this court are without power to create or grant such benefits.

What I said in my dissent in Banks v. State, *supra*,

and in State v. Rosenberger (1972), 187 Neb. 726, 193 N. W. 2d 769, is equally applicable herein.

I am authorized to state that WHITE, C. J., and NEWTON, J., join in this dissent.

DWIGHT ROBINSON, APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE.
197 N. W. 2d 396

Filed May 12, 1972. No. 38367.

1. **Contracts: Insurance: Words and Phrases.** The terms and provisions which control in the construction of the coverage afforded by a temporary insurance "binder" are those contained in the ordinary form of policy usually issued by the company at that time upon similar risks.
2. **Contracts: Insurance: Trial: Evidence.** Where the insurer's defense is based upon an exclusionary clause in a policy, the burden is on the insurer to prove facts which bring it within the exclusion.

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

Don A. Fitch, for appellant.

Healey, Healey, Brown & Burchard, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and WARREN, District Judge.

MCCOWN, J.

This was an action based on an automobile insurance "binder" issued by an agent for the defendant insurance company. At the conclusion of the plaintiff's evidence, the district court sustained a motion to dismiss.

Plaintiff was the owner of a 1967 Ford truck. On May 21, 1969, the plaintiff called at the office of defendant's local agent in Boone, Iowa, and executed an application for insurance on the truck and contents. The plaintiff paid the agent for the first 6 months premium

by check. The agent filled out and delivered to the plaintiff a binder in which the defendant agreed "to bind the named insured subject to the conditions given in the regular policy, for such of the following coverages as are indicated pending the issue of an automobile insurance policy in the form and at the rates and classifications of the Company's manual. This binder shall in no event be in force more than 30 days from date written and shall be superseded by the policy." The plaintiff was the named insured and the binder was dated and effective May 21, 1969. It described plaintiff's truck, and specifically included comprehensive and $100 deductible collision coverage.

On June 9, 1969, the plaintiff's truck was wrecked when it left a county road in Lancaster County, Nebraska, and overturned in an adjacent field. The truck was being driven by another individual with plaintiff's permission. The plaintiff's ownership of the truck and the facts of the accident were admitted in defendant's answer. The answer also alleged that if a policy of insurance existed, it expressly excluded coverage "while owned motor vehicle is rented or leased to others by the insured," and that at the time of the loss the truck was being rented or leased to another. The defendant did not at any time issue an insurance policy but on June 19, 1969, the defendant sent a notice of cancellation to the plaintiff advising him that defendant was unable to continue his "automobile insurance" and that his "policy" was canceled effective June 19, 1969. Plaintiff's check for $72.70 was returned with the notice of cancellation.

Defendant's motion to dismiss was sustained at the close of plaintiff's evidence. No evidence was introduced by either party as to the terms of defendant's "regular policy" nor of any conditions, limitations, or exclusions in such regular policy.

The contentions of the parties on this appeal do not meet. The plaintiff contends that the only contract is

contained in the "binder" and that the nature of the coverages should be that orally requested by the plaintiff. The defendant contends that a "binder" which refers to the conditions given in a regular policy to be issued later is subject to the limitation provisions contained in the regular policy, and then asserts that certain limitations or exclusions which would have been in the policy, if issued, prevent recovery under the facts here. The "binder" is in evidence, but defendant's "regular policy" is not in evidence. The real issue is to determine which party had the burden of going forward with the evidence or producing the "regular policy" at the time the motion to dismiss was sustained.

The terms and provisions which control in the construction of the coverage afforded by a temporary insurance "binder" are those contained in the ordinary form of policy usually issued by the company at that time upon similar risks. 12 Appleman, Insurance Law and Practice, § 7225, p. 323. See, also, Jennings v. Illinois Automobile Club, 319 Ill. App. 587, 49 N. E. 2d 847; Altrocchi v. Hammond, 17 Ill. App. 2d 192, 149 N. E. 2d 646. The problem in cases such as this is whether recovery on the binder is precluded by the policy provisions as to the coverage assumed by the insurer. Generally speaking, courts have concluded that if the insurer would have been liable in an action on the policy, it is liable in an action on the binder or vice versa. See Annotation, Temporary Insurance, 12 A. L. R. 3d 1304.

Here the defendant's pleadings admit that the plaintiff was the named insured, the owner of the insured vehicle, and that the vehicle was damaged when it left the road and overturned. Under these facts, the loss was clearly within the usual coverage of automobile collision insurance policies. The binder here met all the requirements for temporary insurance. The defendant, not the plaintiff, was in possession and control of the form of the "regular policy" to be issued. The

plaintiff established a prima facie case of a loss covered by temporary insurance upon admission into evidence of the binder in view of the admissions of the defendant in the pleadings. The defendant relied upon an exclusion presumed to be contained in the "regular policy." Under the circumstances here, it was incumbent upon the defendant to establish the conditions and limitations of the regular policy which constituted the claimed exclusion. Broadly speaking, the burden of proving an affirmative defense in avoidance of an action on a contract for temporary insurance, like an action on an insurance policy, is upon the insurer. Where the insurer's defense is based upon an exclusionary clause in a policy, the burden is on the insurer to prove facts which bring it within the exclusion. See American Casualty Co. of Reading, Pa. v. Mitchell, 393 F. 2d 452 (8th Cir., 1968).

Here the defendant relied upon an exclusion contained in the terms of its "regular policy" and at the same time contends that the plaintiff was required to introduce in evidence not only the "binder" agreement for temporary insurance, but also the "regular policy." The burden of going forward with the evidence after the establishment of a prima facie case, was on the defendant, not the plaintiff. Under the circumstances here, sustaining the motion to dismiss was erroneous when the "regular policy" was not in evidence.

REVERSED AND REMANDED.

IN RE APPLICATION OF HARRY E. ROBINSON, DOING BUSINESS AS BIG RED MOBILE HOME TRANSPORTER, LINCOLN, NEBRASKA.

HARRY E. ROBINSON, DOING BUSINESS AS BIG RED MOBILE HOME TRANSPORTER, APPELLEE, V. NATIONAL TRAILER CONVOY, INC., ET AL., APPELLANTS.

197 N. W. 2d 633

Filed May 19, 1972. No. 38056.

1. **Public Service Commissions: Carriers: Trial: Statutes.** In granting a certificate of public convenience and necessity the Nebraska State Railway Commission, under section 75-311, R. R. S. 1943, is required to find: First, that an applicant is fit, willing, and able to perform the proposed service; and second, that the service offered is or will be required by the present and future public convenience and necessity.
2. **Public Service Commissions: Appeal and Error.** The matter of the determination of public convenience and necessity is peculiarly within the discretion and expertise of the Nebraska State Railway Commission and its action will not be disturbed by this court in the absence of a showing that such action was illegal or arbitrary, capricious, and unreasonable.
3. ———: ———. If there is evidence to sustain the findings of the Nebraska State Railway Commission, this court may not intervene. It is only where the findings of the commission are against all of the evidence that this court may hold the commission's findings are arbitrary and capricious.

Appeal from the Nebraska State Railway Commission. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate, David R. Parker, Everett C. Pilcher, and Pilcher, Howard & Dustin, for appellants.

James E. Ryan, for appellee.

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

WHITE, C. J.

This is an appeal from an order of the Nebraska State Railway Commission granting a certificate of public

convenience and necessity for the transportation of mobile homes to the appellee, Harry E. Robinson. The three protestants, National Trailer Convoy, Inc., Morgan Drive Away, Inc., and Mike's Trailer Service, Inc., are licensed common carriers of mobile homes and trailers.

The record shows that Robinson, the appellee herein, has been involved in the transportation of mobile homes and trailers for many years, starting about 1946. At one time he worked for one of the protestants. The record also shows that recently he obtained an interest in a mobile home sales business in Lincoln, Nebraska. Consequently, he has a need to transport mobile homes incident to his business.

Robinson filed his application on December 4, 1969. At the hearing on the application, Robinson produced evidence to prove that he was experienced in the business of transporting mobile homes; that he owned special equipment for such purposes; and that he was financially able to perform the proposed service. The Commission found that the appellee was fit, willing, and able to properly perform the proposed service.

The statute requires: First, that an applicant be fit, willing, and able to properly perform the proposed service; and second, that the service offered is or will be required by the present and future public convenience and necessity. § 75-311, R. R. S. 1943.

The major issue appears to be whether the proposed service offered by Robinson is or will be required by the present and future public convenience and necessity. As we have often said, this determination by the Commission is a matter peculiarly within its expertise and involves a breadth of judgment and policy determination that will not be disturbed by this court in the absence of a showing that the action of the Commission was illegal or arbitrary, capricious, and unreasonable. The striking of the balance between the competing interests of legitimate competition and the

protection of the public interest are matters of legislative and administrative determination peculiarly resting in the judgment of the Commission. Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756. This authority in the Commission arises from both the Constitution and the delegated authority of the Legislature.

We recently said in Neylon v. Petersen & Petersen, Inc., 181 Neb. 143, 147 N. W. 2d 488, as follows: "The determination of the public interest in such a case is one that is peculiarly for the determination of the commission. If there is evidence to sustain the finding of the commission, this court cannot intervene. It is only where the finding of the commission is against all the evidence that this court may hold that the commission's finding on the evidence is arbitrary and capricious."

We review the evidence briefly to ascertain if there is a rational basis for the Commission's conclusions. Representatives of several mobile home sales businesses in the Lincoln area testified that the demand for transporting mobile homes around the Lincoln area was growing and was expected to continue to grow due to increased sales and revised zoning ordinances. One such witness complained that there was such a "crying need" for transportation services about the Lincoln area that the granting of authority to the appellee would still leave the demand for such services high above the available supply.

Several other witnesses not in the mobile home sales business testified concerning problems they encountered in moving mobile homes to or from the Lincoln area. Several complained of difficulty in even contacting the existing carriers and many who established contact found that it was several days or weeks before an existing carrier could transport their mobile home.

A representative for each of the three appellants in this case appeared at the hearing to protest a granting of authority to the appellee. The thrust of their tes-

timony was that the demand for service was seasonal; that delays during the peak of the season could be expected from time to time; and that if the demand could be anticipated in advance, additional equipment could be scheduled for intrastate transporting of mobile homes in Nebraska.

Based upon this evidence, the Commission concluded that the public convenience and necessity required the appellee's application for authority be granted in part and denied in part. While the appellee requested and was granted authority to make shipments both originating and terminating at points within the state other than the Lincoln area, the Commission limited the grant to a terminal site in the Lincoln metropolitan area only.

It is apparent, even from this brief review, that there was conflicting testimony on this basic issue. The Commission is charged with the responsibility of supervising common carriers in the areas involved and may draw upon its general knowledge and familiarity in determining the needs and requirements of transporting mobile homes. It could reasonably have found, under the evidence, that there was a public need for transportation services in the Lincoln area and restricted the grant to a terminal site in the Lincoln metropolitan area only. There is evidence in this record which would support the conclusion that even after the granting of the authority to Robinson, the demand for such transportation services would be above the available supply. It could reasonably have found that there was a peculiar problem connected with the peak or seasonal loads in the mobile home sales business in the Lincoln area. That being true, it is not for this court, sitting as a court of review, to disturb its judgment that the grant herein was in the public interest. Neylon v. Petersen & Petersen, Inc., *supra*.

Turning to the issue of fitness the protesting appellants point to the following as evidence as to a lack of fitness: The appellee's lengthy association with the ap-

pellant Morgan Drive Away, Inc., was terminated after the appellee was involved in an accident while moving a mobile home; the appellee submitted an allegedly incomplete and inaccurate financial statement to the Commission; the appellee transported mobile homes for the mobile home sales business in which he has an interest and, according to the appellants, such uncertified carriage was a violation of section 75-309, R. R. S. 1943; and the obligation to move his own business property conflicts with the appellee's common carrier obligations.

We observe that these claims on the part of the appellants are either denied or explained by Robinson and the weight to be given to them is clearly a matter of judgment to be exercised by the Commission. In substance, the Commission rejected the contention that Robinson could not be properly supervised and would not be responsive to legal orders and regulations of the Commission. On the other hand, the record clearly shows that Robinson has sufficient experience, equipment, and finances to justify the Commission's conclusion that he could willingly and ably perform the proposed service.

Under these circumstances we think it inappropriate for this court, sitting in review, to balance or weigh the credibility of the detailed evidence. As we have stated before, it is within the authority of the Commission exercising its judicial powers to weigh this evidence along with all of the other evidence in the record and reach a determination as to fitness. Our function in review is only to determine whether it has a rational basis and is not arbitrary, capricious, or unreasonable. Furstenberg v. Omaha & C. B. St. Ry. Co., *supra*. On the record as a whole we hold that the Commission's determination was within its authority, reasonable, and not arbitrary or capricious.

We, therefore, hold that the order of the Nebraska State Railway Commission granting limited authority

to the appellee, Harry E. Robinson, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY PAUL KENNEDY, APPELLANT.

197 N. W. 2d 633

Filed May 19, 1972. No. 38235.

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

Gary Paul Kennedy, pro se.

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.

Defendant appeals from his conviction on a guilty plea to the charge of larceny from the person. The only issue on appeal is the excessiveness of the sentence. Defendant was sentenced to 2 to 4 years in the Nebraska Penal and Correctional Complex.

Defendant's counsel had made a plea for probation because of defendant's age. The trial court reminded defendant that he had been charged eight times with felony violations, and had spent time in the Boys' Training School where, because he was so troublesome, he was transferred to the Penal Complex for safekeeping.

Under the circumstances, defendant received a minimal sentence and there was no abuse of discretion.

Judgment affirmed. See Rule 20.

AFFIRMED.

WALTER PETERS, APPELLEE, V. HARVEY LANGREHR ET AL., APPELLANTS.
197 N. W. 2d 698

Filed May 19, 1972. No. 38280.

1. **Waters: Statutes.** Waters which may be discharged into a natural depression, or draw, or watercourse without liability under the provisions of section 31-201, R. R. S. 1943, do not include waste irrigation waters in quantities which are injurious to neighboring land.
2. **Injunction.** Injunctive relief is a discretionary remedy dependent upon the circumstances of the case.
3. **Waters: Easements: Time.** An easement for the discharge of waste irrigation waters into a natural depression, draw, or watercourse flowing through the land of another cannot be acquired until it has been freely exercised without material change under a claim of right for the full period of 10 years.

Appeal from the district court for Howard County: WILLIAM F. MANASIL, Judge. Reversed and remanded with directions.

William G. Blackburn of Cunningham & Blackburn, for appellants.

Arthur C. Mayer of Mayer & Mayer, for appellee.

Heard before WHITE, C. J., BOSLAUGH, McCOWN, and CLINTON, JJ., and COLWELL, District Judge.

CLINTON, J.

This is an action to permanently enjoin the defendants from discharging upon the land of the plaintiff waste irrigation waters. Defendants denied generally, but they also pled the statute of limitations, section 25-202, R. R. S. 1943, apparently claiming a prescriptive right to make the discharge, and also pled laches. After trial the court entered an order in which the defendants were "permanently enjoined from permitting excess irrigation water from defendants' irrigation system from running upon any portion of the plaintiff's premises." We modify the decree and remand the cause to the district court with directions.

The principal issues for decision on this appeal are: (1) The extent of the right, if any, of a landowner to discharge waste irrigation water into a drainway on his own land and through the drainway to neighboring land; and (2) whether the evidence justified relief by injunction.

We, of course, consider the matter de novo here. In so doing, however, where the evidence is in irreconcilable conflict we consider the fact that the trial court saw and heard the witnesses and must have accepted one version of the facts rather than the other. Town of Everett v. Teigeler, 162 Neb. 769, 77 N. W. 2d 467.

The defendants are the owners of the east half of the northwest quarter, and the southwest quarter of the northwest quarter of Section 26, Township 13 North, Range 9 West of the 6th P. M., in Howard County, Nebraska. The plaintiff owns most of the rest of Section 26 and his land abuts the entire boundary of the defendants' land on the south and east. Part of the southeast quarter of Section 26, owned by the plaintiff, is pastureland and it is the alleged ponding of waste irrigation waters at the outlet of a drain in this pastureland which gives rise to this litigation. The drain, ditch, or natural depression in the state of nature begins in the northwest quarter of Section 27, west of the defendants' tract, meanders easterly and southerly over the defendants' land, and enters the plaintiff's land on the northern boundary of the southwest quarter of Section 26. At that point, by reason of the improvements and changes made by the plaintiff, it flows straight south for a distance, then turns at a right angle to the east, passes through two culverts in the farmstead road, and empties into the pasture in question. Before the changes were made by the plaintiff 8 or 9 years before trial, the last portion of the drain, instead of turning at a right angle and going straight east, meandered southeasterly, passed under the farmstead road at a point further south through another culvert, and

joined a meandering continuation of the drain which then ran northeasterly across the plaintiff's pasture where it joined a larger drain on adjacent land to the east.

We find that the drainway or depression in its natural state does not qualify as a watercourse as defined in section 31-202, R. R. S. 1943, but does qualify as a natural depression or draw under the provisions of section 31-201, R. R. S. 1943, and it appears that it does ultimately pass into a watercourse known as Prairie Creek and thence into the Platte River. It is such a natural depression or draw as would entitle the defendants to have surface waters empty from their land. See, Bussell v. McClellan, 155 Neb. 875, 880, 54 N. W. 2d 81; Town of Everett v. Teigeler, *supra*, at p. 776. One of the questions which we must answer here is whether the discharge of excess irrigation water into the drainway comes within the right when the water discharges on the plaintiff's land and ponds there.

The evidence justifies the following findings: The defendants drilled their first irrigation well in 1949 and used it until 1955 when they replaced it with another. During that period there was some discharge of waste irrigation water by defendants into the drain and onto the plaintiff's land, but there is nothing to justify any finding as to the quantity passing onto the plaintiff's land, or the frequency, or the effect thereof. It does appear, however, that such discharge would be into the draw in its natural state rather than ending in the pasture where it now does by reason of the change in direction of the drain made by the plaintiff 8 or 9 years before trial. In 1955 the defendants drilled and began to use a third irrigation well. Excess irrigation waters, from what are designated in the record as fields 2, 3, and 4, all run into the drainway on the defendants' land. The defendant Harvey Langrehr testified that this occurred every year from 1955 on and that the excess water went onto the plaintiff's land, but

again there is nothing to justify any finding as to the frequency, quantity, or effect. In 1968 the defendant made some changes in his fields and in his irrigation methods. He straightened the natural drain where it passes through field 2 and placed the drain along the north edge of the field. He leveled a portion of this field, including the former site of the drainway, and began thereafter to irrigate by gravity irrigation the portion of field 2 which he had formerly watered by a sprinkler system. The evidence justifies a finding that these changes increased the quantity of waste irrigation water discharged into the drain.

The evidence justifies the finding that in the years 1969 and 1970 excess irrigation waters from fields 2, 3, and 4 passed into the drainway and onto the plaintiff's pastureland in quantities greater than ever before, resulting in the ponding of waters in the pastureland to the extent of an area of about 2 acres and up to a foot in depth; because his cattle stood in this water they developed a foot disease; and therefore he removed the cattle from the pasture for about 6 weeks in each of the years 1969 and 1970. It appears from the evidence that the plaintiff in these years asked the defendant to so irrigate as to prevent excessive flow of waters onto the plaintiff's land but the defendant indicated he would make no changes.

The defendant testified he could prevent the passage of all waste irrigation water from the plaintiff's land through the drainway by erecting two concrete catch basins 100 feet wide, 200 feet long, and 5 feet deep, and by the use of a pump and pipeline he could reuse this water on his own fields. He estimated the cost of such method at about $3,000. He further testified the plaintiff could cure the ponding of water on the pastureland at a cost of about $200 by cutting channels from the ponds to the natural drains which go on to the east. There is nothing in the record from which a determination can be made as to what the effect, if any,

on plaintiff's land would be if the waste water passed onto the plaintiff's land through the former natural drain into the pasture at the point further south where it would have gone before the changes made by plaintiff, except that it does appear it would in all probability have made unusable at times a portion of one cultivated field through which the drain in its natural state passed before the plaintiff made the right-angle turn in this drainway. We consider this change, for reasons which appear hereafter, irrelevant to the decision in the case.

In the recent case of Muff v. Mahloch Farms Co., Inc., 184 Neb. 286, 167 N. W. 2d 73, this court approached the question here presented to us but did not directly answer then because in that case the evidence did not show that the excess irrigation water which might in the future be cast upon the plaintiff's lands would be in other than negligible amounts and because the defendant agreed that if for any reason water was accumulated and cast upon the plaintiff's lands he would install a works and pump and reuse the water for irrigation purposes. The court in that case denied injunctive relief conditioned upon the defendant fulfilling his promise, if necessary, to construct a ditch and terrace to catch the waste water and install a pump to reuse it. It then authorized the lower court to make findings that the fulfillment of the promise was a condition upon which the defense to injunctive relief was founded. That case at least impliedly held that waste irrigation waters are not surface waters such as are contemplated to come within the protection afforded by section 31-201, R. R. S. 1943. Neither the common law nor civil law rules applicable to drainage apply to water artifically applied to the land. F. Trelease, Water Law, p. 95 (1967); Vantex Land & Development Co. v. Schnepf, 82 Ariz. 54, 308 P. 2d 254. See, also, § 46-635, R. R. S. 1943, defining ground water. An examination of the cases considered by this court in connection with the above-mentioned section 31-201, R. R. S. 1943, leads

us to believe that statute was not intended to include the discharge of waste irrigation waters in injurious quantities. Nichol v. Yocum, 173 Neb. 298, 113 N. W. 2d 195; Nickerson Township v. Adams, 185 Neb. 31, 173 N. W. 2d 387; Town of Everett v. Teigeler, *supra;* Muff v. Mahloch Farms Co., Inc., *supra.* We hold that the defendants have a right to discharge into the drainway only surface waters and only such waste irrigation waters as can be discharged and borne away without injury to the plaintiff's land. Provident Irr. Dist. v. Cecil, 126 Cal. App. 2d 13, 271 P. 2d 157. There is evidence in the record that in addition to surface waters which pass into the drainway some water from a spring in the draw on the defendants' land contributes to the flow. The quantity is not shown. The evidence also shows that some irrigation water from land further west enters the draw. None of these, however, appears to us to be a contributing factor to the incidents which give rise to plaintiff's claim.

We point out that the injunctive relief in cases of this kind is discretionary with the court and dependent upon the circumstances, nature, and extent of the threatened damage, and the probability of its continuance. Prosser, Law of Torts (4th Ed.), § 90, p. 602. Here we believe the trial court was justified in granting some relief to prevent the discharge of irrigation waters into the drainways in injurious quantities and which practice if continued could ripen into a prescriptive right. The defendants in this case have failed to prove a prescriptive right to discharge waste irrigation waters onto the plaintiff's land because they have failed to show the extent without material change of such alleged adverse user for the prescriptive period of 10 years. Hagadone v. Dawson County Irr. Dist., 136 Neb. 258, 285 N. W. 600; Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N. W. 2d 768.

As already indicated, we think the scope of the injunction granted is too broad. It prohibits absolutely

the discharge of waste irrigation waters onto the plaintiff's land at any time, in any quantity whether injurious or not, and at any point. It is not just limited to the waters which pass into the drainway and then onto the plaintiff's land in injurious quantities. The evidence shows that at one time in 1969 irrigation waters from field 1, which we have not heretofore mentioned and which does not empty into the drainway, broke through a dike and passed onto the plaintiff's field to the east. The defendants at that time at the plaintiff's request built a better dike. There is no threat of continuance. Injunctive relief is not justified as to this possible threat of damage.

We recognize the possibility that implementation of justified relief may depend upon any proposals the defendants may have to prevent the continued recurrence of the damage. See, Nickerson Township v. Adams, *supra;* Muff v. Mahloch Farms Co., Inc., *supra.*

We reverse the judgment and remand the cause to the district court for proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM JOHNSON, APPELLANT.
197 N. W. 2d 638

Filed May 19, 1972. No. 38296.

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 Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Frank B. Morrison, Sr., 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.

NEWTON, J.

This is an appeal from an alleged excessive sentence. The judgment and sentence are affirmed.

Defendant was convicted of receiving stolen property valued in excess of $100. A stolen automobile was stripped in a garage owned by defendant's father. Defendant made arrangements for the use of the garage in exchange for parts of the automobile. His father did not appear to be implicated. Defendant was also charged with being an accessory to the theft but the record fails to disclose how this charge was disposed of. Presumably it was dropped on entry of a plea of guilty to the charge of receiving stolen property. Defendant was placed on probation and 3 days later was again arrested on charges of being an accessory to breaking and entering an automobile and carrying a concealed weapon. The order of probation was set aside and defendant sentenced to not less than 5 nor more than 7 years in the Nebraska Penal and Correctional Complex.

It appears that this was the first felony conviction of defendant. As a result, the court dealt lightly with him and ordered probation. His immediate violation of the order by the commission of two more offenses conclusively demonstrated a fixed criminal tendency and contempt for the leniency shown him. The sentence was within statutory limits and there has not been an abuse of discretion.

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. Gamron, 186 Neb. 249, 182 N. W. 2d 425.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HENRY RICKY BRIONEZ, APPELLANT.

197 N. W. 2d 639

Filed May 19, 1972. No. 38334.

1. **Criminal Law: Rape.** Previous chastity is an essential element of the offense of statutory rape of a female child under age 18 but over age 15.
2. **Criminal Law: Rape: Words and Phrases.** A woman who is chaste is one who has never had unlawful sexual intercourse with a male person. An act of sexual intercourse without her consent and against her will if she is capable of consent does not destroy her chastity.

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

Charles F. Fitzke and James T. Hansen, for appellant.

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., and Randall E. Sims, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

SMITH, J.

A jury found Henry Brionez guilty of statutory rape, and the court imposed a sentence of 5 years. Brionez appeals. He assigns for error insufficiency of the evidence.

A jury might properly find as follows. The victim, age 17 and a college student, visited Scottsbluff, intending to spend the night with Hopie, a girl friend. During her visit she met a close friend, Mike, and two of his companions, Raymond and Gabby, ages 17. At Mike's home the group played music, danced, and drank the contents of 23 cans of Budweiser beer which Mike's

mother had purchased. The victim, who had drunk beer only on two previous occasions, consumed the contents of 4 cans over a period of 3 hours. As the group prepared to depart, Brionez, age 19 and a stranger to the victim, entered in company with Mike's brother.

The group without Brionez departed in a four-door Ford Falcon automobile ostensibly to transport the victim to Hopie's home. The automobile proceeded to the sugar mill, where Brionez entered it, Brionez having traveled there in his own automobile. It then proceeded to a cornfield 1 ½ miles from Scottsbluff. En route Mike kissed and embraced the victim but went no farther. At the cornfield Mike requested sexual intercourse, but the victim, who was chaste, refused. Mike said, "It's either me or all of us." She was adamant. Mike continued, "All right, guys," and the other three crawled over the seat into the back seat. They pawed under her clothing. Mike reiterated his threat. The frightened victim was crying, screaming, and struggling. Mike said, "If you don't shut up, we're going to . . .," finishing the sentence with slang that the victim did not understand. Her inquiry brought this answer: "Well, if you don't be quiet, you're going to find out." Relying on Mike's promise to keep the others away, she submitted to him, helping slightly in her disrobement.

After sexual intercourse with Mike the victim was held down. Each of the others engaged in sexual intercourse with her. Brionez was the fourth one to do so. Some repeated the process under the same conditions. The victim was then transported to Hopie's home.

Damage to the clothing of the victim was negligible. A physician who examined her found redness and swelling of the labia and surrounding area of the vulva but no other evidence of physical harm.

The evidence is said to be insufficient in that the previous chastity of the victim was lost by the act of sexual intercourse with Mike. Previous chastity is an

essential element of statutory rape. See § 28-408, R. S. Supp., 1969. A woman who is chaste is one who has never had unlawful sexual intercourse with a male person. An act of sexual intercourse without her consent and against her will if she is capable of consent does not destroy her chastity. See, State v. Vicars, 186 Neb. 311, 183 N. W. 2d 241 (1971); Marchand v. State, 113 Neb. 87, 201 N. W. 890 (1925); 1 Anderson, Wharton's Criminal Law and Procedure, § 318, p. 659 (1957). The evidence of previous chastity in the present case was sufficient.

Other assignments of error relate to instructions and excessiveness of the sentence. On the latter assignment we have examined the presentence report. A summary of its contents would serve no useful purpose. The assignments of error are without merit.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BILL MULLEN, APPELLANT.
197 N. W. 2d 651

Filed May 19, 1972. No. 38344.

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

Bill Mullen, pro se.

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.

SMITH, J.

Affirmed. See Rule 20.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN L. ANDERSON, APPELLANT.

197 N. W. 2d 697

Filed May 19, 1972. No. 38346.

1. **Statutes: Constitutional Law.** Ordinarily, if an amendatory act is invalid, the original statute remains in effect.
2. **Statutes: Criminal Law: 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.

Appeal from the district court for Kearney County: FRED R. IRONS, Judge. Affirmed in part, and in part reversed and remanded.

Steven L. Anderson, pro se.

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.

SPENCER, J.

Defendant pled guilty to three counts of possession of drugs on December 8, 1970. Count I involved possession of narcotics, as defined in section 28-451(14), R. S. Supp., 1969; Count II, possession of marijuana and hashish; and Count III, possession of a depressant or stimulant drug. Defendant was fined $750 and sentenced to 2 to 3 years in the Nebraska Penal and Correctional Complex on Count I; sentenced to 7 days in the county jail on Count II; and fined $750 and sentenced to 2 to 3 years in the Nebraska Penal and Correctional Complex on Count III.

Defendant's assignments of error are as follows: (1) The unconstitutionality of sections 28-451, 28-487, 28-489, and 28-499, R. S. Supp., 1969; and (2) the excessiveness of the sentences.

Defendant's first assignment of error was adequately

answered in State v. Greenburg (1971), 187 Neb. 149, 187 N. W. 2d 751. In that case, we held: "Ordinarily if an amendatory act is invalid, the original statute remains in effect."

There is merit to the defendant's second assignment of error, in that he was sentenced under sections 28-470 and 28-472.04, R. S. Supp., 1969, as they existed at the time the offense was committed. These sections were repealed by Laws 1971, LB 326, § 31, R. S. Supp., 1971, which became effective May 26, 1971.

The defendant withdrew his not guilty plea and pled guilty to the offenses on September 21, 1971, and the hearing was continued until October 4, 1971, for a presentence report. It is evident from the record the defendant entered into a plea bargain on the assumption that if probation was not granted he would be sentenced under section 28-4,125, R. S. Supp., 1971. LB 326 repealed the provisions under which the defendant was sentenced. This case is controlled by State v. Roberts (1972), *ante* p. 209, 196 N. W. 2d 118, in which we held: "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."

Where the record does not clearly indicate what sentence would have been given if the trial judge had proceeded under the amendatory act, the case should be returned to him for resentencing. The sentences rendered herein as to Counts I and III are set aside, and the case is remanded to the district court for resentencing on those counts, in accordance with this opinion. The sentence on Count II is affirmed.

Judgment affirmed as to Count II, and remanded for resentencing on Counts I and III.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH DUANE ARP, APPELLANT.

197 N. W. 2d 703

Filed May 19, 1972. No. 38362.

Criminal Law: Sentences: Appeal and Error. A sentence within the limits prescribed by statute will not be disturbed in the absence of an abuse of discretion.

Appeal from the district court for Howard County: WILLIAM F. MANASIL, Judge. Affirmed.

Shaughnessy, Shaughnessy & Shaughnessy, for appellant.

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

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and BRODKEY, District Judge.

WHITE, C. J.

The sole question involved in this case is the contention that the sentence was excessive. The defendant was sentenced on two counts of burglary under section 28-532, R. R. S. 1943, which provides for a penalty of not less than 1 year nor more than 10 years. On one count he received an indeterminate sentence of 3 to 5 years, and on the other count a concurrent sentence of 1 to 3 years. We observe the defendant in this case does not contend that he is entitled to probation; nor at any time does he discuss any particular facts or circumstances surrounding the commission of the offense or his personal record. His sole contention seems to be that the court did not properly consider certain philosophical considerations which are currently popular in the field of criminal jurisprudence.

There is nothing in the record to show that the sentence and the imprisonment of the defendant was not a legitimate exercise of the district court's judicial discretion to consider "the nature and circumstances of

the crime and the history, character and condition of the offender." § 29-2260(2), Laws 1971, L.B. 680, § 15.

The sentence is well within the limits provided by the statute and is concurrent, and there is nothing of any nature whatsoever to show an abuse of discretion on the part of the district court. A sentence within the limits prescribed by statute will not be disturbed in the absence of an abuse of discretion. State v. Middleton, 187 Neb. 821, 194 N. W. 2d 568.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HARVEY RUFAS HOWARD, APPELLANT.
197 N. W. 2d 641

Filed May 19, 1972. No. 38379.

1. **Criminal Law: Searches and Seizures: Affidavits.** An affidavit for a search warrant is not defective simply because it is based on hearsay, so long as the affidavit discloses a substantial basis for crediting the hearsay.
2. ———: ———: ———. Firsthand knowledge of an informant, acquired by sight or hearing, is self-corroborating and tends to fulfill both aspects of the Aguilar test.

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

Leo M. Bayer, for appellant.

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

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

WHITE, C. J.

The sole issue in this case is whether a search warrant was issued without sufficient showing of probable cause. The defendant was found guilty of possessing

LSD and argues here that the district court committed reversible error in denying defendant's motion to suppress evidence seized under the search warrant in question. We affirm the judgment of the district court.

The information brought to the attention of the magistrate who issued the search warrant was contained in an affidavit sworn to by the county attorney of Dawes County, Nebraska. The affiant stated: "* * * that an informant of known reliability whose information has been dependable in the past, and who has co-operated with this affiant in the past, and who has co-operated with the Chadron City Police in the past has advised that one Harvey Howard has in his possession on his person or in his luggage or personal effects that he carries with him when travelling certain narcotic capsules or narcotic substances believed to be mescaline; that the informant states that he observed the said Harvey Howard while in said Harvey Howard's room at Kent Hall on the Chadron State College Campus emptying capsules of gelatin; that said Harvey Howard informed him that the capsules were going to be filled with mescaline; that he, the said Harvey Howard, was going to try to make 300 capsules of mescaline; that he, the said Harvey Howard, was cutting the mescaline with chocolate milk; that the capsules were to be sold for $2.00 or $2.50 apiece but that if less than 300 of them were made, they would have to sell them for a higher price; that further, said Harvey Howard told said informant that he was taking some of the mescaline capsules home with him the first time he went home; that said informant knows that said Harvey Howard has not gone home since the 31st of January, 1971, the date upon which the above stated conversation and observations took place; that said informant knows that said Harvey Howard is going home the afternoon of February 5, 1971; the (sic) he will be a passenger in a 1969 Green Chevrolet Nova automobile with license No. Nebraska 65-C594; and that said informer was told by

said Harvey Howard that said Harvey Howard had purchased one quarter ounce of mescaline for $100.00 that was being used to make the capsules * * *."

We observe that an affidavit for a search warrant is not defective simply because it is based on hearsay, so long as the affidavit discloses a substantial basis for crediting the hearsay. Jones v. United States, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697; United States v. Harris, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723; Coyne v. Watson, 282 F. Supp. 235 (D. C., Ohio). It is also well established that affidavits for search warrants are to be construed in a common-sense manner. State v. LeDent, 185 Neb. 380, 176 N. W. 2d 21.

In substance, the defendant contends that the affidavit for the search warrant is insufficient to demonstrate probable cause; this because the affidavit is based on hearsay and because the informant was not identified and is not corroborated. Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723.

We reject this contention. We observe that in this case we not only have an eyewitness informant, but an informant the affiant, the county attorney, knew personally. It seems clear to us that the reliability of the informant is established by a simple reading of the affidavit, and further that the affidavit recites sufficient details and circumstances to justify the underlying belief that narcotics would be found in the defendant's possession.

On the matter of corroboration, we observe that we have an eyewitness informant. In the case of an informant who speaks from personal observation by way of sight or hearing, the courts generally have held that such firsthand knowledge is self-corroborating and tends to fulfill both aspects of the Aguilar test contended for by the defendant.

In McCreary v. Sigler, 406 F. 2d 1264, the court affirmed the United States District Court for Nebraska in a conviction for theft of a telephone booth coin box.

A search warrant had been obtained on the basis of an affidavit reciting information obtained from an unidentified individual who had personally observed the defendants in the telephone booth and overheard the sound of coins in a box. In concluding that the account of an eyewitness informant need not be otherwise corroborated, the Eighth Circuit Court of Appeals said: "However, reliability of an informant may be demonstrated to the magistrate in many collateral ways. Cf. United States v. Bozza, 365 F. 2d 206, 225 (2 Cir. 1966). Petitioner urges error because the informant was not identified in any way. Yet mere identification by name does not establish reliability of the person. Even if the informant's occupation were given, this would not by itself lend 'credibility' to what he says. In some instances where it is alleged that the informant was known to the affiant or had passed on previous information, this has been held to be a sufficient test of the reliability of the informant. Rugendorf v. United States, 376 U. S. 528, 84 S. Ct. 825, 11 L. Ed. 2d 887 (1964); Jones v. United States, 362 U. S. 257, 271, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960). However, where the affiant officer does not know the informant it would be impossible for the affiant to vouch as to the informer's reliability.

"Under such circumstances reliability of an informant may best be established by the affiant relating some corroboration of the story which the informant tells. Furthermore, the underlying circumstance even without corroboration may have built-in credibility guides to the informant's reliability. *The essence of reliability may be found in an informant's statement of facts rather than an allegation of mere conclusory suspicion. An informant who alleges he is an 'eyewitness' to an actual crime perpetrated demonstrates sufficient 'reliability' of the person.* In direct accord, see e. g., Coyne v. Watson, 282 F. Supp. 235 (S. D. Ohio 1967), aff'd 392 F. 2d 585 (6 Cir. 1968). These facts provide a

similar standard in determining probable cause for arrest without a warrant. Probable cause for an arrest may exist where an unknown citizen makes complaints, as a victim or eyewitness to a crime, where the underlying circumstances demonstrate his firsthand personal knowledge." (Emphasis supplied.)

The contention of the defendant is without merit, and the judgment and sentence of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICCARDO L. SILVACARVALHO, APPELLANT.
197 N. W. 2d 637

Filed May 19, 1972. No. 38400.

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

Riccardo L. Silvacarvalho, pro se.

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.

In this appeal defendant maintains a sentence of 2 years for burglary is excessive. He had several prior felony convictions and was subject to a habitual criminal charge. See State v. Holoubek, 187 Neb. 163, 188 N. W. 2d 439.

The judgment of the district court is affirmed. See Rule 20.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES RANSOM, APPELLANT.
197 N. W. 2d 637

Filed May 19, 1972. No. 38425.

Criminal Law: Post Conviction. Where the files and records show that the defendant is not entitled to post conviction relief the motion is properly denied.

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

Charles Ransom, 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.

BOSLAUGH, J.

In his motion for post conviction relief the defendant alleged he had been sentenced to imprisonment on a count charging he was a habitual criminal and that the sentence was void under Gamron v. Jones, 148 Neb. 645, 28 N. W. 2d 403. See, also, State v. Tyndall, 187 Neb. 48, 187 N. W. 2d 298.

The record shows clearly that the defendant was sentenced on separate counts of burglary. The motion was properly denied. State v. Gero, 186 Neb. 379, 183 N. W. 2d 274.

The judgment is affirmed.

AFFIRMED.