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REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 8, 1973 and MAY 22, 1974

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1973 and JANUARY TERM 1974

VOLUME CXCI

H. EMERSON KOKJER

OFFICIAL REPORTER

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1974

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By H. Emerson Kokjer, Reporter of the Supreme Court

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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Twelfth	Sherman and Buffalo	S. S. Sidner	Kearney
Thirteenth	McPherson, Logan, Lincoln, Dawson, Keith, Arthur, Grant, Hooker, and Thomas	Hugh Stuart Keith Windrum	North Platte Gothenburg
Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy	Jack H. Hendrix	Trenton
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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1973

IN RE APPLICATION OF THE LIVESTOCK CARRIERS DIVISION OF THE MOTOR CARRIERS ASSOCIATION. LIVESTOCK CARRIERS DIVISION OF THE MOTOR CARRIERS ASSOCIATION, APPELLANT, V. MIDWEST PACKERS TRAFFIC ASSOCIATION ET AL., APPELLEES.

213 N. W. 2d 443

Filed December 14, 1973. No. 39004.

1. **Statutes: Courts.** In the construction of a statute, courts must consider the preexisting law and any other laws relating to the same subject.
2. ———: ———. Courts should not give an interpretation to a statute which would have the effect of nullifying another statute when obviously that was not the clear legislative intent.
3. **Statutes.** It is a cardinal principle that statutes pertaining to the same subject matter should be construed together, as if they were one law, and effect given to every provision.
4. **Public Service Commissions: Carriers: Administrative Law.** The Nebraska Public Service Commission is without jurisdiction or authority to fix rates and charges for motor vehicle carriers engaged in the transportation of livestock in intrastate commerce.

Appeal from the Nebraska Public Service Commission. Affirmed.

James E. Ryan, for appellant.

Peterson, Bowman, Coffman & Larsen, Richard A. Peterson, A. J. Swanson, Luedke, Radcliffe, Gilmore & Evans, Wm. L. Gilmore, Marti, Dalton, Bruckner, O'Gara

& Keating, Lloyd J. Marti, and Warren K. Dalton, for appellees.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and NEWTON, JJ., and RONIN, District Judge.

NEWTON, J.

This case arose out of an application filed by the Livestock Carriers Division of the Motor Carriers Association, appellant herein, requesting the Nebraska Public Service Commission to establish minimum rates and charges, and rules and regulations, for the transportation of livestock by motor common carriers in intrastate commerce. The application was dismissed for want of jurisdiction. We affirm the order of the Commission.

Appellant contends that the Commission had jurisdiction to grant the relief prayed for and that the denial of a hearing on the merits was erroneous.

The Nebraska Motor Carrier Act was recodified in 1963. Prior to that time the statutes clearly exempted livestock carriers from the type of regulation here requested. See, former §§ 75-222, 75-223, 75-224 (4), 75-225, and 75-241, R. R. S. 1943.

Article IV, section 20, Constitution of Nebraska, provides, in regard to the powers of the Legislature and the Nebraska Public Service Commission as follows: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

The exemption of livestock carriers from the jurisdiction of the Commission has been approved by this Court. See Rodgers v. Nebraska State Railway Commission, 134 Neb. 832, 279 N. W. 800.

Since recodification of the statutes, the general power to fix rates, charges, and regulations affecting *all* common carriers in intrastate commerce is found in section

75-118, R. R. S. 1943. Chapter 75, article 3, purports to deal solely with motor carriers and defines the term "common carrier." The authority to regulate rates, etc., found in section 75-118, R. R. S. 1943, relates only to common carriers and must necessarily relate to that term as defined in section 75-302, R. S. Supp., 1972, as limited by section 75-303, R. S. Supp., 1972. The latter statute provides: "The provisions of sections 75-301 to 75-322.01 shall apply to the transportation of passengers or property by motor carriers for hire engaged in intrastate commerce except: * * *

"(5) To ranch, dairy, or farm products, including livestock, being transported by motor vehicle from or to any ranch, dairy, farm, feedlot or any market; * * *." The fact that the exemptions contained in section 75-303, R. S. Supp., 1972, are ostensibly limited to the provisions of sections 75-301 to 75-322.01 and do not specifically refer to section 75-118, R. R. S. 1943, cannot alter the obvious legislative intent. "In the construction of a statute, courts must consider the preexisting law and any other laws relating to the same subject. * * *

"Courts should not give an interpretation to a statute which would have the effect of nullifying another statute when obviously that was not the clear legislative intent. * * *

"It is a cardinal principle that statutes pertaining to the same subject matter should be construed together, as if they were one law, and effect given to every provision." Seldin v. Northland Mortgage Co., 189 Neb. 175, 202 N. W. 2d 174.

It will be noted that section 75-301, R. R. S. 1943, refers, among other things, to rates. It provides: "It is hereby declared to be the policy of the Legislature to * * * (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; * * *." It is not disputed that section 75-303,

R. S. Supp., 1972, specifically refers to section 75-301, R. R. S. 1943.

We conclude that the Nebraska Public Service Commission was without jurisdiction or authority to grant the relief sought by appellant and that a denial of a hearing on the merits of the application was without prejudice. The order of the Commission is affirmed.

AFFIRMED.

BOSLAUGH, J., concurring.

The appellant argues that section 75-303 (5), R. S. Supp., 1972, is unconstitutional, but failed to comply with Rule 18 of the rules of this court. Since a division of the court may not hear and determine cases involving the constitutionality of a statute, the constitutional questions raised by the appellant have not been decided. See Constitution of Nebraska, Article V, section 2.

KATHERINE SNIPES, A MINOR, BY HER FATHER AND NEXT FRIEND, ROBERT R. SNIPES, APPELLANT, V. FLOYD SMITH, APPELLEE, MILBANK MUTUAL INSURANCE COMPANY, INTERVENER-APPELLEE.

213 N. W. 2d 456

Filed December 14, 1973. No. 39037.

Motor Vehicles: Negligence. A driver entering an intersection is obligated to look for approaching automobiles and see those within that radius which denotes the limit of danger. If he fails to see an automobile which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar his recovery as a matter of law.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Albert C. Walsh, for appellant.

J. William Gallup, for appellee.

Robert D. Mullin, for intervener-appellee.

Heard before SPENCER, BOSLAUGH, SMITH, and CLINTON, JJ., and C. THOMAS WHITE, District Judge.

BOSLAUGH, J.

This action arises out of a collision between automobiles operated by the plaintiff and the defendant. At the close of the evidence the trial court sustained the defendant's motion to dismiss the action. The plaintiff has appealed.

The accident happened at about 1 a.m., on January 17, 1971, in Gretna, Nebraska. The plaintiff had been driving north on Bryan Street and was making a left turn onto Angus Street. The defendant was driving east on Angus Street. The collision occurred in the intersection when the left front of the defendant's automobile struck the left side of the plaintiff's automobile.

Bryan Street forms a "T" intersection with Angus Street and is not open north of Angus Street. There is a yield sign on Bryan Street at the intersection. At the time of the accident the streets were icy in spots and there was snow piled along the curbs on both streets which interfered to some extent with the vision of drivers approaching the intersection.

Angus Street is level for approximately 200 feet west of the intersection and then slopes downhill for several blocks. The record does not show the exact width of Angus Street but it was described as wide enough to accommodate a lane of parked cars near each curb and two lanes for moving traffic.

The plaintiff testified that she approached the intersection going north and stopped at the yield sign; she could not see along Angus Street because of the snowdrifts; she pulled out slowly, looked again and did not see anything; and then "tried to make it out around the corner." When the plaintiff was "almost halfway out into the intersection," she saw the defendant's automobile approaching from the west and "stepped on the gas to try and make it around him."

A driver entering an intersection is obligated to look for approaching automobiles and see those within that radius which denotes the limit of danger. If he fails to see an automobile which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar his recovery as a matter of law. Flanagin v. DePriest, 182 Neb. 776, 157 N. W. 2d 389.

Under the circumstances in this case it is clear that the defendant's automobile was in a favored position. The yield sign on Bryan Street required the plaintiff to yield the right-of-way to any vehicle approaching the intersection on Angus Street and within the limit of danger. See, Geisking v. Sheimo, 252 Iowa 37, 105 N. W. 2d 599, 2 A. L. R. 3d 268; Annotation, 2 A. L. R. 3d 275. See, also, LeMieux v. Sanderson, 180 Neb. 311, 142 N. W. 2d 557; § 39-754, R. S. Supp., 1972, effective August 27, 1971.

The plaintiff argues that it was difficult to see the defendant's automobile because the headlights appeared to be dim or dirty and did not shine brightly. The record indicates the intersection was lighted by a streetlight, and the passenger in the plaintiff's automobile testified that as the plaintiff was pulling out, "we both noticed a car coming over the hill, and that's all. After I saw the car I didn't look any more, 'cause I knew it was going to hit us."

When the plaintiff stopped at the yield sign, her vision along Angus Street was obstructed by the snowbank. It was her duty to stop, or be able to stop, at a point near the intersection where she would have a view of traffic approaching on Angus Street. She testified that she pulled out slowly and looked again but did not see anything. The plaintiff's failure to see the defendant's automobile which was within the limit of danger and in a favored position was negligence as a matter of law and sufficient to bar her recovery.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY OGDEN, APPELLANT.
213 N. W. 2d 349

Filed December 14, 1973. No. 39047.

Criminal Law: Time: Trial. In computation of the statutory period of 6 months within which the State must bring an accused to trial, periods of delay because of motions for change of venue and for a continuance granted at the request, or with the consent, of defense counsel are excluded.

Appeal from the District Court for Holt County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Edward E. Hannon, 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.

The State separately prosecuted Gary Seger, Danny Atkinson, and defendant, Gary Ogden, for the offense of having carnally known and abused a female child under age 15. The prosecutions arose out of the same affair. See, State v. Atkinson, *post* p. 9, 213 N. W. 2d 351; State v. Atkinson, 190 Neb. 473, 209 N. W. 2d 154 (1973). A jury found Ogden guilty, and he appeals.

Ogden asserts (1) insufficiency of evidence to sustain the conviction, (2) erroneous exclusion of evidence that Seger, Atkinson, and their wives were free from gonorrhea, (3) erroneous denial of his new-trial motion based on newly discovered evidence, and (4) denial of his pretrial motion for discharge inasmuch as the State did not bring him to trial within the statutory period of 6 months from the date of filing of the information. See § 29-1207, R. S. Supp., 1972.

Counsel for Ogden concedes that the testimony was substantially the same as the testimony at the jury trial in State v. Atkinson, and that a statement of the facts in detail would be of little value. The first three con-

tentions are decided against him on authority of the two cases of State v. Atkinson, *supra.*

Respecting the denial of the motion for discharge, the information was filed May 30, 1972, but trial commenced December 11 - a lapse of 6 months and 11 days. The question is whether proceedings on a motion for change of venue tolled the running of the statutory period.

Both Atkinson and Ogden were represented by Edward E. Hannon. On September 25, 1972, Ogden filed his motion for a change of venue. According to the journal of the court and a verbatim record of proceedings on October 3, hearings were held September 25 and 28 on the motion of Atkinson as well as on that of Ogden. The court denied the motions on October 3.

The verbatim record of the hearing immediately after the court announced its rulings on the motions marks the beginning of confusion. Hannon and the county attorney concurred that they had submitted the motion of Atkinson alone. Hannon added that the Ogden hearing would be premature "as long as we are going to try Danny Atkinson first." The record on that date, however, concludes: "THE COURT: . . . (Y)ou make application for additional hearing on Ogden. MR. HANNON: I will, at an appropriate time. THE COURT: All right . . . ." No further, formal application was made.

At a hearing on November 6, 1972, "to take up . . . (Ogden's) motion for change of venue," Hannon on inquiry said he had no more evidence to introduce "at this time." He added, "See, this is a continuation of the hearing, and of course, we introduced evidence at one time. . . . (W)e introduced our evidence. . . . The state, I guess, has asked . . . ." Hannon declined to concur that the evidence on the motions of Atkinson and Ogden was the same. He recalled that the State had asked for a continuance. The State introduced evidence, and the court announced it would rule that day. No such ruling, however, appears. Adjournment was

had and no other motions were made until the date of trial when Ogden moved for discharge under the limitation statute.

In computation of the 6-month limitation, periods of delay because of motions for change of venue, and a continuance granted at the request, or with the consent, of defense counsel are excluded. § 29-1207(4) (a) and (b), R. S. Supp., 1972.

Absence of a journal entry on November 6 and the ambiguity of the record weigh against the State. The statements of Hannon, however, are important. He at least consented to a continuance on October 3, pointing out the precedence of the Atkinson case. Notwithstanding the state of the journal and the proceedings on October 3, we infer from the proceedings on November 6 an implicit agreement among counsel and the court that Hannon need not renew his motion after the October 3 ruling. Denial of the motion for discharge was correct.

Other issues are resolved against Ogden, and the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANNY ATKINSON, APPELLANT.

213 N. W. 2d 351

Filed December 14, 1973. No. 39066.

Criminal Law: New Trial: Time: Evidence. In a criminal prosecution the court will grant a new trial on timely application of defendant for the reason of newly discovered evidence material for the defendant, provided, the reason materially affects his substantial rights and he could not with reasonable diligence have discovered and produced the evidence at the trial.

Appeal from the District Court for Holt County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Edward E. Hannon, 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.

After a verdict of guilty for the offense of having carnal knowledge of a female child under age 15, defendant Atkinson was sentenced. On appeal we affirmed in State v. Atkinson, 190 Neb. 473, 209 N. W. 2d 154 (July 6, 1973). On February 15, 1973, Atkinson had moved the District Court for a new trial on the ground of newly discovered evidence. According to the motion, the county attorney had misrepresented the truth—deception diagnosis of the female child in a polygraphic examination. The court overruled the motion, and Atkinson appeals.

Separate prosecutions because of the affair had also been commenced against Gary Ogden and Gary Seger. Two lawyers who respectively represented Atkinson and Seger and were the only witnesses against the county attorney testified as follows. In numerous, separate conversations with defense counsel, the county attorney had informed them of these facts. The polygraphic examination clearly disclosed the truth of the female child's answers in substance that Atkinson and the other defendants had had carnal knowledge of her. Prior to trial of Atkinson defense counsel knew nothing of a written report of the polygraphic examination in possession of the county attorney. Pretrial discovery was not attempted. See § 29-1912(1)(e), R. S. Supp., 1972.

The county attorney testified to the following facts. He had at least glanced over the written report and informed defense counsel of the absence of untruthfulness in the diagnosis by the polygraphic examiner. He could not recall whether he had informed them of the written report in his possession.

The District Court noted the conflict of testimony without finding on the issue.

The female child, age 14 years, 5 months, was a member of a special education section of the 8th grade at the time of the offense. The report and testimony of the polygraphic operator disclosed that the child was somewhat confused, but the confusion was not germane to the prosecution against Atkinson. Its occurrence at the jury trial was noted in State v. Atkinson, *supra*.

In a criminal prosecution the court will grant a new trial on timely application of defendant for the reason of newly discovered evidence material for defendant, provided, the reason materially affects his substantial rights and he could not with reasonable diligence have discovered and produced the evidence at the trial. See §§ 29-2101 to 29-2103, R. R. S. 1943.

Remand of this case for a ruling on the conflict of testimony of counsel is unnecessary. The diagnosis by the polygraphic examiner would not have been admissible in evidence. The answers of the female child to the questions asked by the operator of the polygraph are considered in context. They would not have materially affected any substantial right of Atkinson. The order overruling the motion for a new trial was correct.

Other issues are decided against Atkinson.

AFFIRMED.

BILLY B. LAUN, APPELLEE, V. DAVID B. ROACH, APPELLANT.
213 N. W. 2d 450

Filed December 14, 1973. No. 39079.

1. **Negligence: Damages.** Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry.
2. **Trial: Evidence: Motions, Rules, and Orders: Appeal and Error: Time.** Ordinarily, failure to make a motion to strike or timely objection to proffered evidence in the trial court waives the right to complain of the admission of such evidence on appeal.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate and Alan L. Plessman, for appellant.

A. James McArthur, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

WHITE, C. J.

This is a personal injury action arising out of a rear-end collision between Billy Laun, the plaintiff, and David Roach, the defendant. On September 13, 1970, Billy Laun was stopped for a traffic light at the intersection of Thirteenth and K Streets, when the defendant drove his vehicle into the rear of Laun's automobile. There was evidence from which a jury could infer that the plaintiff sustained injuries causing lower back pain. The District Court sustained the plaintiff's motion for summary judgment on the issue of liability, and therefore only the issue of damages was submitted to the jury. The jury returned a verdict in the amount of $18,750. The defendant appeals. We affirm the judgment of the District Court.

The jury was instructed to consider six elements of damage in attempting to determine an amount which would fairly and reasonably compensate the plaintiff including (1) the value of work time lost to date due to his inability or his diminished ability to work (lost earnings) and (2) the value of the loss or diminution of the power to earn in the future (lost earning capacity). The defendant's first assignment of error complains that the evidence did not warrant submission of these two items of damage to the jury.

The record clearly shows that there was sufficient evidence of lost earnings for submission of the issue to the jury. In Caster v. Moeller, 176 Neb. 30, 125 N. W. 2d 89 (1963), the evidence disclosed the plaintiff's hourly

base pay and average weekly income in addition to an estimate of the time lost from work. This evidence was sufficient to raise a jury question of the plaintiff's loss of earnings up to the time of trial. Here we similarly have testimony that the plaintiff was a senior dental student at the time of the accident. By the time of trial the plaintiff had been a practicing dentist for 1 ½ years. He estimated that he lost an average of 20 to 30 minutes of working time per day from the time he began practicing due to lower back pains. His hourly billing rate was $25 per hour. Where it has been proved that damages have resulted and the only uncertainty is the exact amount, it is sufficient if the record shows data from which the damage can be ascertained with reasonable certainty. Caster v. Moeller, *supra*. There is no merit to this contention.

The trial court also properly submitted the issue of loss of earning capacity to the jury. Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. Baylor v. Tyrrell, 177 Neb. 812, 131 N. W. 2d 393 (1964). There is ample evidence in the record concerning these factors which support submission of loss of earning capacity to the jury.

Without detailing all the medical testimony, a short summary is set forth. The plaintiff expressed difficulty in bending over the dentist chair while working on patients. Dr. Paul Goetowski, an orthopedic specialist, testified that the plaintiff had curvature of the spine and a slipped disk prior to the accident. The plaintiff stated he had never had back pains prior to the accident and Dr. Goetowski stated that the plaintiff could very likely have experienced no pain prior to the accident even with these preexisting conditions. The doctor also testified that the accident would have aggravated the back condition to the point of becoming symptomatic. Dr. Goetowski then gave his expert medical

opinion with reasonable medical certainty that the plaintiff was 10 to 15 percent permanently partially disabled. It is within the province of the jury to weigh all these elements and, guided by experience and common sense, to arrive at the proper monetary amount for loss of earning capacity. Baylor v. Tyrrell, *supra*. The trial court was correct in submitting the issue of loss of earning capacity to the jury.

The defendant claims on appeal that the opinion testimony of Dr. Goetowski was based upon facts not in evidence. The history taken by the doctor showed that the plaintiff had indicated to him the defendant's car was traveling approximately 40 miles per hour prior to the impact. On cross-examination, Dr. Goetowski testified that his opinions were based on the assumption the plaintiff was hit by a car traveling at approximately 40 miles per hour. The record clearly shows the absence of any objection to the opinion testimony of Dr. Goetowski and also shows the absence of any motion to strike the testimony on cross-examination. Failure to make a motion to strike or timely objection in the trial court waives the right to complain of the admission of such evidence on appeal. Ripp v. Riesland, 180 Neb. 205, 141 N. W. 2d 840 (1966); Law v. Gilmore, 171 Neb. 112, 105 N. W. 2d 595 (1960); Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497 (1954). We therefore need not consider the substantive issue of whether the opinion testimony would have been admissible if there had not been a waiver of the right to object to such evidence.

Lastly, the defendant assigns as error the sustaining of an objection to a question directed to the color of the traffic light as he came up to the intersection. The issue of liability was undisputed. The question is, therefore, irrelevant. The defendant was permitted to introduce testimony as to speed as it related to the force of impact and damages. It is not pointed out by an offer of proof or otherwise how such evidence could be relevant, and we point out that this was a rear-end col-

lision and that the defendant himself and his witness testified as to speed and the force of the impact. There was clearly no prejudice in the sustaining of such an objection. Here the question as to the color of the traffic light was propounded by the defendant's own counsel and no offer of proof was made. This precludes review. Bland v. Fox, 172 Neb. 662, 111 N. W. 2d 537 (1961); Huckfeldt v. Union Pacific R. R. Co., 154 Neb. 873, 50 N. W. 2d 110 (1951). There is no merit to this contention.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT L. GASCOIGEN, APPELLANT.

213 N. W. 2d 452

Filed December 14, 1973. No. 39107.

1. **Criminal Law: Words and Phrases.** Under a statute making a willful failure to return to custody a crime, the word "willful" only means "intentional" and not accidental or involuntary.
2. **Criminal Law: Indictments and Informations.** Before trial, the District Court, in its discretion, may permit the amendment of a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information, as amended, does not charge a crime other than the one on which the accused has his preliminary examination.
3. ———: ———. An amendment adding an omitted allegation of a substantive element of the offense sought to be charged does not "change the offense."
4. **Criminal Law: Indictments and Informations: Time.** The District Court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

T. Clement Gaughan and Richard L. Goos, for appellant.

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

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

MCCOWN, J.

The defendant, an inmate of the Nebraska Penal and Correctional Complex, was found guilty by a jury of willful failure to return to custody. The District Court imposed a 1-year sentence to be served consecutively to his present sentence. The defendant has appealed. We affirm.

The defendant was serving a 2 to 3-year term in the Nebraska Penal and Correctional Complex. He requested a furlough to go to Omaha to see his daughter. He signed a furlough agreement upon a form which included a statement that failure to return on time constituted escape. The furlough was from 8 a.m. to 8 p.m. on October 14, 1972. It was to be spent at the home of his parents in Omaha where he was required to remain until time for his return. The defendant left the prison complex in Lincoln for his furlough on the morning of October 14, 1972. Defendant's mother telephoned the penitentiary that evening indicating that the defendant was not returning. Defendant made no contact. The authorities waited 1 hour beyond the scheduled termination time and at 9 p.m. notified the Omaha police and requested them to pick the defendant up. On the morning of October 16, 1972, an Omaha policeman found the defendant hiding in an attic storage area of a house some distance away from his parents' house. The defendant appeared to be in full command of his faculties and not suffering from a disability of any kind.

Complaint was filed in the county court on October 18, 1972, and the public defender was appointed as counsel for the defendant. Thereafter preliminary hearing

was waived and defendant was bound over to the District Court on November 21, 1972. On December 19, 1972, an information was filed in the District Court charging that: "(O)n or about the 14th day of October, A.D., 1972 in the County of Lancaster, and the State, aforesaid, then and there being, the said Robert Lee Goscoigen, an inmate of the Nebraska Penal and Correctional Complex was granted a furlough on October 14, 1972, from 8:00 a.m. to 8:00 p.m., that he did not return to the Nebraska Penal and Correctional Complex and was apprehended in Omaha, Nebraska, on October 16, 1972, and returned to the Nebraska Penal and Correctional Complex, contrary to the form of the statutes in such cases made and provided, * * *."

On January 24, 1973, defendant filed a motion to dismiss and demurrer to the information upon the ground that it "does not allege facts constituting an offense punishable by the Laws of this State, and does not allege the requisite intent." On the morning of January 30, 1973, the motion to dismiss was overruled, and the defendant entered his plea of not guilty. After the impaneling of the jury had begun, apparently during a recess, and before any evidence was introduced, the county attorney requested and was granted leave to amend the information by inserting the word "willfully" before the words "did not return" in the information. By inadvertence counsel for the defendant was not notified of the amendment and did not know of it until he examined the instructions at the time of the instruction conference. Defendant's counsel objected upon the ground that the amendment constituted a material variance but the objection was overruled. The case was submitted to the jury on instructions which required the State to prove a willful failure to return.

Section 83-184, R. R. S. 1943, authorizes furloughs and subsection (4) provides: "The willful failure of a person to remain within the extended limits of his confinement or to return within the time prescribed to a faci-

lity designated by the Director of Corrections shall be deemed an escape from custody punishable as provided in section 28-736."

The defendant contends that the omission of the word "willfully" made the information fatally defective because it did not include an essential element of the alleged crime, and that the information could not be amended after trial had begun.

The strict rule of the common law against amendment of indictments lends foundational support to the defendant's argument. The fact that under Nebraska statutes informations are generally subject to the same requirements as are indictments furnishes support by analogy. See §§ 29-1601 to 29-1604, R. R. S. 1943. These statutes have remained virtually untouched since 1885. In most states the strict rules of the common law are generally held to be inapplicable to informations. Amendment of informations is generally provided for by statute and usually by leave of court an information may be amended in matters of substance as well as of form after a plea of not guilty has been entered and before the trial is begun and in matter of form after the trial has begun. See 4 Wharton's Criminal Law and Procedure, § 1880, p. 739.

Nevertheless, prior decisions of this court as well as another statute dealing with indictments generally and in effect since before 1885, point the answer to the defendant's contentions in this case. Section 29-1501, R. R. S. 1943, provides in part: "No indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings be stayed, arrested or in any manner affected" by numerous specified omissions or allegations, and concludes with the language "nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

We have consistently held that an information or indictment must inform the accused, with reasonable certainty, of the charge being made against him in order

that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to later prosecution for the same offense, and that it is generally sufficient to allege the crime in the language of the statute and that it is not necessary to state the detailed particulars of the crime in the meticulous manner prescribed by the common law. See State v. Adams, 181 Neb. 75, 147 N. W. 2d 144.

It should be pointed out here that under a statute making a willful failure to return to custody a crime, the word "willful" only means "intentional" and not accidental or involuntary. See Sall v. State, 157 Neb. 688, 61 N. W. 2d 256. Where the crime is wholly statutory as this one is, we are not dealing with a crime requiring a specific or even a general criminal intent but only a volitional act, or failure to act.

We have also many times followed the rule that the District Court, before trial, in its discretion, may permit the county attorney to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information, as amended, does not charge a crime other than the one on which the accused has his preliminary examination. See Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649.

The determinative fact here is that there was no prejudice to the substantial rights of the defendant. The addition of the word "willful" to the language of the information did not alter the burden of the State to prove beyond a reasonable doubt every essential element of the offense with which the defendant was charged. Neither did it change the nature or identity of the offense charged. "It has been held in a variety of contexts that an amendment adding an ommitted allegation of a substantive element of the offense sought to be charged does not 'change the offense.'" People v. Crosby, 25 Cal. Rptr. 847, 375 P. 2d 839. A fortiori, the addition of a formal or nonessential allegation does not do so either. To treat the addition of the single word "will-

ful" as a substantive and critical amendment in this case exalts form over substance.

No explanation is offered as to why the original information did not contain the title of the offense nor contain a reference to the specific statute under which the offense was charged. Neither is there any explanation for the delay in requesting permission to make the amendment involved here after the defendant had called specific attention to the alleged deficiency by motion. We do not condone such procedure but we remain convinced that no substantial rights of the defendant here were prejudiced. We hold that the District Court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.

The defendant also asserts that jurisdiction of this offense was in Douglas County and not in Lancaster County. The argument assumes that a crime must be an act of commission and that the acts of the defendant were committed in Omaha, Douglas County. This overlooks the fact that a crime may be either an act or an omission. See State ex rel Brito v. Warrick, 176 Neb. 211, 125 N. W. 2d 545. In this case the defendant failed to perform his duty to return to the penal complex in Lincoln, Lancaster County, and venue was clearly in Lancaster County. Arguably, it may have been in Douglas County also.

The judgment of the District Court was correct in all respects and is affirmed.

AFFIRMED.

WHITE, C. J., and BOSLAUGH, J., concur in result.

CHARLES E. GRANTHAM ET AL., APPELLANTS, V. GENERAL TELEPHONE COMPANY OF THE MIDWEST, A CORPORATION, ET AL., APPELLEES.

213 N. W. 2d 439

Filed December 21, 1973. No. 38969.

1. **Summary Judgments.** Motion for summary judgment is to be granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.
2. **Contracts.** When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it.
3. **Contracts: Trial: Summary Judgments.** The meaning of an ambiguity in a contract is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment.
4. **Contracts: Trial.** When a contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, interpretation of the contract is a matter of law.
5. **Contracts: Negligence: Damages.** Performance of a contract for appraisal of damage to property of A. by reason of a building that contractors of B. were to construct on B.'s adjoining property with temporary work on A.'s property, and for payment of the appraisal by B., may afford a defense to A.'s claims against B.'s architect and contractors and a subcontractor for negligent damage to A.'s property.

Appeal from the District Court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellants.

Ross & Schroeder, Luebs, Tracy, Huebner, Dowding & Betzer, and Tye, Worlock, Tye, Jacobsen & Orr, for appellees.

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

SMITH, J.

Charles E. Grantham and wife sought recovery for

negligent damage to their service station from construction of a building on adjacent property owned by defendant General Telephone Company of the Midwest. Prior to the beginning of the work the parties had agreed that the architect would appraise damage to the Grantham property from the project. On remand in Grantham v. General Telephone Co., 187 Neb. 647, 193 N. W. 2d 449 (1972), Granthams abandoned their claim for loss of profits. On motions of all defendants the District Court then entered summary judgments. Granthams appeal.

Granthams assert that (1) the contractor, Roeder Brothers Construction, the architect, Helleberg and Helleberg, and a subcontractor, Francis Young, defendants, were only incidental beneficiaries of the above agreement, (2) the District Court erroneously interpreted the agreement to immunize defendants from liability for negligent damage to their property, although at least Granthams intended only damage from non-negligent conduct, and (3) performance of the alleged arbitration agreement was not final at common law.

Under the agreement, dated June 11, 1969, Granthams granted General Telephone an easement for the contractor to drive sheet piling along and 1 foot inside the property line of Granthams. They also granted the company, its agents, and contractors ingress and egress for performance of the project. Pulling and removal of the pilings was to occur after the wall and foundation of the building had set. The provision for appraisal read: "Helleberg and Helleberg, Architects, shall inspect the improvements upon Grantham's premises above described immediately before construction and immediately after the contractor pulls the piling, and any damage to said buildings and improvements which in the opinion of the architects are caused by said construction shall be the liability of the Company to Grantham and the Company shall pay to Grantham the amount of said damage, if any, as certified by said

architects in full settlement and satisfaction of any claim hereunder."

The construction work began approximately June 12, 1969. The pilings were driven and pulled by Young under supervision of Roeder Brothers. All parties concur that the work damaged the service station. Helleberg inspected the property in accordance with the agreement.

On April 29, 1970, Helleberg certified that pursuant to the Granthams-General Telephone agreement, $3,000 was owing Granthams for the damage. General Telephone and Roeder Brothers then paid $3,000 into the registry of the District Court for the benefit of Granthams. No one contends that commencement of this action preceded the certification by Helleberg.

Motion for summary judgment is to be granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. § 25-1332, R. R. S. 1943.

When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it. § 25-1217, R. R. S. 1943. The meaning of an ambiguity in a contract is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment. When a contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, however, interpretation of the contract is a matter of law. Bishop Cafeteria Co. v. Ford, 177 Neb. 600 at 615 to 617, 129 N. W. 2d 581 at 591, 592 (1964).

Respecting the first assertion of Granthams, no defendant fits common definitions of a creditor or donee beneficiary. See Restatement, Contracts, § 133 (1932). In addition privity of contract is not inferable from the record.

On the question of negligence the agreement was not

a license for anyone to damage the property of Granthams at will. It freed Granthams, however, from proof of negligence in order for them to recover damages, and it did not imply that determination by Helleberg was to be subject to any questions of negligence. The agreement was to protect all defendants from liability for claims of negligent damage to the Granthams' property from the work, provided Helleberg would have made an effective appraisal.

Defendants have admitted liability and the amount of the appraisal lies in the registry of the District Court for the benefit of Granthams. The latter have not asserted lack of good faith on the part of Helleberg, and the agreement is not unconscionable. Cf. § 2-302, U. C. C. (1971). The appraisal of Helleberg was final and conclusive. It foreclosed these claims of Granthams against all defendants as a matter of law.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent. I feel there is a jury question of rather clear and substantial magnitude concerning whether Granthams released or limited any of their rights by virtue of this contract. Consequently, summary judgment was improvidently granted. I also do not agree that the appraisement of Helleberg and Helleberg was final and conclusive or that it foreclosed all claims Granthams had against the other defendants.

The amended petition pleaded failure to comply with the city code in several particulars, and alleged negligent acts of commission and omission which could not have been in the contemplation of the parties in the execution of the contract. However, even assuming Granthams released their normal tort remedies, this would not dispose of my objections to the majority opinion. Such matters as completing the construction improperly and particularly failing to construct the drainageway which is specifically required by paragraph

5 of the contract indicate the inadequacy of the summary judgment procedure.

All defendants argue they can rely upon the contract as a defense, but they disagree as to the reasons. Generally they err in terming this an arbitration agreement. More importantly, they beg the primary question because an arbitration agreement wherein plaintiff does not agree this will be his sole recourse is of no more consequence than an appraisement agreement that has no such limitation of remedies. Hellebergs' argument concerning the fixing of damages is similarly of no consequence unless Granthams agreed to be bound thereby. General Telephone's assertion that this is a contract of indemnity is conclusory and unconvincing. Even if General Telephone did agree to indemnify plaintiffs for all damages caused by the construction, it is quite clear that the terms of this indemnification were rather limited. The question is whether plaintiffs agreed this would be their sole recourse in the matter.

In order for the contract to constitute a defense for any of the parties, it is incumbent upon them to show that plaintiffs by this agreement released their rights to sue for damages (assuming the contractual agreement was performed on General Telephone's part). This requires an examination of the contract. At the outset, it is to be noted that the document contains no provision which states Granthams agree all damages shall be the sole responsibility of General Telephone, and there is also no provision that Granthams release their right to sue for any such damages or words of similar import. The document was drawn by General Telephone. It should be construed most strictly against General Telephone. So construed, one could say there was no such release or limitation. At the very least, this would seem to present a jury question.

The word "hereunder" appearing in the provision for appraisal set out in the majority opinion refers in my judgment to General Telephone's liability under the

contract. The question of whether Granthams agreed to accept this "in full settlement and satisfaction" of all damages caused to their property, ought to be for the jury. General Telephone wrote the contract. If that was the intention, it could have expressed itself as clearly upon this issue as it did on other aspects of the contract.

By virtue of the contract, Granthams granted an easement to General Telephone to drive sheet piling along and 1 foot inside their property line, as well as giving General Telephone, its agents, and contractors ingress and egress for performance of the project. In return for the right to construct upon their land, Granthams received a new remedy from General Telephone in addition to their normal tort remedies and those existing by virtue of the city code. I find nothing in the contract to indicate they released their preexisting remedies as the majority opinion concludes.

I reiterate, there is no express release or limitation of Granthams' rights against General Telephone or any of the other defendants. I also suggest General Telephone's greatest potential liability may be under the code, and even if that could be released I would require more precise language. I would not read such an inference into the contract which should be construed against General Telephone.

STATE OF NEBRASKA, APPELLEE, V. MONICA JOHNSON, APPELLANT.

214 N. W. 2d 14

Filed December 21, 1973. No. 39005.

Criminal Law: Sentences. A sentence within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion.

Appeal from the District Court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Eugene D. O'Sullivan, for appellant.

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

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

NEWTON, J.

Defendant was convicted of uttering a no-account check in the sum of $2,635 and sentenced to serve 18 months to 2 years in the Nebraska Division of Corrections. She asserts the sentence is excessive.

This is the defendant's first felony conviction but she has a lengthy history of issuing no-account and insufficient fund checks. At the time of the commission of this offense, she was on probation out of the county court of Custer County, Nebraska, for issuing 9 insufficient fund checks and she had served 10 days in the Buffalo County jail on similar charges. She had at times issued numerous other such checks. The lady appears to be rather incorrigible.

"A sentence within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion." State v. Welton, 190 Neb. 600, 210 N. W. 2d 925.

No abuse of discretion appears and the judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CARLOS HENRY, ALSO KNOWN AS SHEDRICK L. GARRETT, APPELLANT.
213 N. W. 2d 733

Filed December 21, 1973. No. 39023.

1. **Post Conviction: Attorney and Client.** For post conviction relief on the ground of ineffective assistance of counsel, it must appear that counsel's assistance was so grossly inept as to shock the conscience of the court.
2. **Post Conviction: Sentences: Criminal Law.** Matters relating to

sentences imposed within statutory limits are not a basis for post conviction relief.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Lawrence R. Brodkey, for appellant.

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

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

COLWELL, District Judge.

This post conviction appeal concerns the application and claim of the defendant, Carlos Henry, filed May 2, 1972, in the District Court for Douglas County, Nebraska, that (1) he was afforded ineffective assistance of counsel at the time sentence was imposed, and (2) excessive sentence raised in brief on appeal. Defendant was granted a full evidentiary hearing. We affirm the judgment of the District Court dismissing defendant's application for post conviction relief.

Defendant, aged 18 years, was adjudged guilty of grand larceny on his guilty plea entered August 10, 1970. After a presentence investigation, defendant was granted probation for a 2-year term by order entered September 4, 1970. In November of 1970 defendant was convicted of driving a motor vehicle on a suspended license. On formal information filed alleging violation of probation terms, the defendant was arraigned and entered his plea of guilty admitting his violation of probation terms. A supplemental presentence investigation was made. During all the proceedings defendant was represented by an attorney from the Douglas County public defenders staff. The defendant and his attorney advised the court that at the time of his last arrest the defendant had been regularly employed. Defendant requested his attorney to obtain a letter from his employer. Defendant's attorney informed the court: "He is referring to

a Mr. Hamburger who is his employer. I would feel if we contact him he would say that Carlos has been employed. At this point it seems irrelevant in the case." The letter was not obtained. On May 21, 1971, defendant was sentenced to serve a period of 4 to 7 years in the Nebraska Penal and Correctional Complex. There was no direct appeal from that conviction.

At the post conviction hearing defendant was represented by independent counsel; a letter from the Carmichael Construction Company of Hastings, Nebraska, dated July 7, 1972, was made a part of the evidence, in part stating: "Mr. Henry was employed with us for about two months, and in that time we considered him to be a faithful and responsible employee. Although we did not know him very well, his foreman said that he was a very good worker." From the denial of defendant's post conviction application the defendant perfects his appeal to this court.

A review of all the records shows defendant was at all times fully and effectively represented by counsel; the failure of counsel to obtain a letter does not either shock or challenge the conscience of this court. State v. Putnam, 182 Neb. 185, 153 N. W. 2d 456.

Defendant had a juvenile record and misdemeanor record beginning in 1965; he had no prior felony convictions. The sentence imposed was within the statutory limits and is not a basis for post conviction relief. State v. Birdwell, 188 Neb. 116, 195 N. W. 2d 502.

AFFIRMED.

BETTY J. FRITCH, APPELLEE, V. JACK L. FRITCH, APPELLANT.
213 N. W. 2d 445

Filed December 21, 1973. No. 39056.

1. **Appeal and Error.** There can be no appeal to the Supreme Court until there has been a judgment or final order in the District Court.

2. **Trial: Judgments: Records.** No judgment is rendered until the pronouncement thereof is noted on the trial docket.

Appeal from the District Court for Saunders County: HOWARD V. KANOUFF, Judge. Appeal dismissed.

William L. Walker and Earl Ludlam, for appellant.

Richard E. Scott and Bauer, Galter, Scott & Geier, for appellee.

Heard before SPENCER, SMITH, and CLINTON, JJ., and KUNS and FLORY, District Judges.

KUNS, District Judge.

This is an appeal from two orders in contempt proceedings and an oral allowance of attorney's fees in connection therewith.

Both parties sought to have the other held in contempt for failure to obey previous orders of the court in a divorce proceeding. The trial court ordered that plaintiff appellee be held in contempt "unless she pay defendant the sum of $150.00 on or before March 15, 1973." In a separate order, the trial court ordered that defendant appellant "will be found in contempt if such payments are not made by March 15, 1973." Both orders are conditional. They are not final and are not subject to appeal. § 25-1911, R. R. S. 1943; Essay v. Essay, 180 Neb. 291, 142 N. W. 2d 337.

The bill of exceptions shows that the trial court made an oral pronouncement of an allowance of attorney's fees to appellee's attorney at the conclusion of the contempt hearings. No notation thereof was made on the trial docket. This was not the rendition of a judgment in accordance with the statute. § 25-1301, R. R. S. 1943.

For the reasons stated above, the appeal is dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. REGINALD MCCOWIN, APPELLANT.

213 N. W. 2d 724

Filed December 21, 1973. No. 39099.

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

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Edward F. Fogarty of Swenson, Guilfoyle & Fogarty, 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.

WHITE, C. J.

This is a direct appeal from an indeterminate sentence of from 3 to 9 years in the Nebraska Penal and Correctional Complex upon a plea of guilty to an information charging an assault with intent to inflict a great bodily injury. It is claimed that the sentence is excessive. We affirm the judgment and the sentence of the District Court.

A detailed review of the facts, however, is unnecessary. As the defendant concedes, the assault on the victim in this case, was entirely unprovoked, and "of the ambush variety." Before the court accepted his plea of guilty to Count III, the defendant and his attorney agreed that the victim Mark Clark was knocked unconscious. The assault was upon a complete stranger to the defendant, and was occasioned by a trip to North High School, Omaha, Nebraska, to pick up his sister. While there he met some friends, also involved in assaults upon other students. The assault took place in the high school hall

and the only occasion for it was, as the defendant himself said, "I was looking at this one boy and he was looking at me."

The defendant, only 16 years of age, is no stranger to the law. At age 12 he ran away from home five times for periods of 1, 7, 7, 12, and 6 days. He was placed on probation by the juvenile court. In the probationary period he ran away two times. He took money from his mother without permission. His incorrigibility on probation resulted in his being committed to the Boys Training School at Kearney. His commitment was suspended so that he could be placed in the custody of the Omaha Home for Boys. At the Omaha Home for Boys he ran away twice. At age 14, on May 15, 1970, he left the Home for Boys and was again placed on probation from the juvenile court for 1 year. Nevertheless, he continued his running-away from home pattern, refused to attend school regularly, and refused to obey curfews set by his own parents and refused to advise his parents of his whereabouts and activities. This conduct led only to an extension of his probationary period for about 8 months. During this period he was arrested for attempted burglary on October 25, 1971, at age 15½ and received an extension of his juvenile court probation to January 1973. There are other indications of serious misconduct on the part of the defendant that appear in his presentence investigation and in the résumé by the court in the disposition of this case.

The trial court conducted an extensive hearing in connection with the sentencing of this defendant. At the end of the hearing his findings were to the effect that the defendant was dangerous to society, that rehabilitation and probation in the normal context had failed, and that the defendant could be better provided rehabilitation in an institution. The crime the defendant committed was a serious one and violent. It also appears that besides the present offense, the defendant com-

mitted another unprovoked assault at about the same time as the first one.

From what we have said it is apparent there was no abuse of discretion by the District Court in imposing the sentence that it did.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WAYNE DETWEILER, APPELLANT.
214 N. W. 2d 14

Filed December 21, 1973. No. 39111.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

T. Clement Gaughan and Richard L. Goos, for appellant.

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

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

NEWTON, J.

Defendant, while an inmate of the Penal and Correctional Complex, escaped custody. The offense for which he had been committed represented his fifth felony conviction. On the charge of escaping custody he was sentenced to serve 1 year to run consecutive to the sentence he was then serving.

He maintains the sentence is excessive.

State v. Williams, 187 Neb. 708, 193 N. W. 2d 570, is determinative of the issue. See Rule 20.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HERBERT L. RICHTER, APPELLANT.

214 N. W. 2d 16

Filed December 21, 1973. No. 39117.

1. **Criminal Law: Witnesses: Constitutional Law.** Standards relating to the privilege against self-incrimination are not affected by the circumstance that the witness is called by the defense and not by the State.
2. **Criminal Law: Trial: Records.** The District Court may permit inspection of a presentence report or examination of parts of the report by the offender or his attorney or other person having a proper interest whenever the court finds it is in the best interest of the offender.
3. ———: ———: ———. Should the court in the exercise of its discretion permit inspection of all or part of a presentence report, it may at the request of defendant hold an in camera hearing.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Charles F. Fitzke and James T. Hansen, for appellant.

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

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

SMITH, J.

A jury in a criminal prosecution found Herbert L. Richter guilty of assault with intent to inflict great bodily injury and of assaulting or resisting a law enforcement officer. Richter appeals. He contends that the court erred (1) in ruling that testimony of a defense witness would waive the self-incrimination privilege invoked by the witness, and (2) in refusing him and his counsel permission to examine the presentence report. Other contentions are not persuasive.

The first contention is not that the witness, who also occupied the equivalent of the chair of a codefendant, waived his privilege. Richter argues that the

single difference between a witness for the State and a witness for the defendant should affect standards relating to the privilege against self-incrimination. The argument is not well taken. See State v. Holloway, 187 Neb. 1, 187 N. W. 2d 85 (1971) (by implication).

The second contention is based upon a statutory provision that a presentence report is privileged. Under the provision the "court may permit inspection of the report or examination of parts thereof by the offender or his attorney, or other person having a proper interest therein, whenever the court finds it is in the best interest of a particular offender." § 29-2261(5), R. S. Supp., 1972.

The statutory provision codifies a rule of discretion in the trial court. The predicament faced by a court with that discretion has been noted:

"It seems an unusual kind of discretion to give, for it is difficult for the court to exercise it in an intelligent fashion. The reason for disclosure is the fear that the report may be incomplete or inaccurate, and yet these flaws will hardly appear on the face of the document." 2 Wright, Federal Practice and Procedure, § 524, p. 399 (1969). Compare United States v. Carden, 428 F. 2d 1116 (8th Cir., 1970); ABA Standards Relating to Sentencing Alternatives and Procedures, Approved Draft, 1968, § 4.4, p. 213; ALI, Model Penal Code, § 7.07(5), p. 118 (1962), and Tentative Draft No. 2, Comment at 54 (1954).

The District Court possesses a discretion, but no good reason comes to mind for denying defendant or his attorney access to that part of the report which notes any prior record of arrests and convictions. Should the court grant access to the report or part of it, the court at the request of defendant may hold an in camera hearing.

The court sentenced Richter to imprisonment for a period of 2 years on Count I and to pay a fine of $500 on Count II. The minimum and maximum punishments

for the offense charged in Count I are imprisonment for 1 to 20 years, and in Count II, a fine up to $500, imprisonment up to 1 year, or both. §§ 28-413 and 28-729.01, R. S. Supp., 1972.

We have examined the presentence report relating to Richter and have concluded that the trial court erred in denying defendant or his counsel access to the part relating to the record of prior arrests and convictions. Under the circumstances, however, the error was harmless. Otherwise the ruling was within the discretion of the court.

Attention is invited to our Rule 7h as amended December 6, 1973: "In all cases where a presentence report may be material on appeal, the defendant, his counsel, or counsel for the State, may request the sentencing judge to forward it to the Clerk of the Supreme Court. In each instance, the sentencing judge shall forward it with the record to the Clerk in a separate sealed envelope. The defendant, his counsel, or counsel for the State may examine the report but it may not be removed from the office of the Clerk."

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND L. MOSS, APPELLANT.

214 N. W. 2d 15

Filed December 21, 1973. No. 39128.

1. **Post Conviction: Appeal and Error.** An issue which has been fully litigated by direct appeal cannot be relitigated by a motion for post conviction relief.
2. **Post Conviction: Judgments: Constitutional Law.** Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the defendant such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

James M. Kelley and Kelley & Thorough, for appellant.

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

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

BOSLAUGH, J.

The defendant was convicted of sodomy, robbery, and use of a firearm in the commission of a felony. The conviction was affirmed in State v. Moss, 187 Neb. 391, 191 N. W. 2d 543.

The defendant now seeks relief under the Post Conviction Act. His principal contention is that the trial court should have suppressed the identification testimony of two eyewitnesses who were the victims of the crimes. This issue was the principal matter considered on the first appeal. State v. Moss, *supra*. It has been fully litigated and cannot be relitigated by a motion for post conviction relief. State v. Franklin, 187 Neb. 363, 190 N. W. 2d 780.

The other assignments of error relate to the sufficiency of the evidence; the instructions to the jury; and the failure to limit impeachment by use of prior felony convictions. None of these contentions afford a basis for post conviction relief.

Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the defendant such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. State v. Bullard, 187 Neb. 334, 190 N. W. 2d 628. Post conviction relief is not a substitute for appeal.

The judgment of the District Court denying post conviction relief is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES A. SWIFT, APPELLANT.

213 N. W. 2d 736

Filed December 21, 1973. No. 39130.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

T. Clement Gaughan and Richard L. Goos, for appellant.

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

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

CLINTON, J.

The defendant was charged with the felony offense of robbery. He pled guilty and was sentenced to 8 to 12 years in the Nebraska Penal and Correctional Complex. He appeals. The issue here is whether the sentence is excessive.

A brief résumé of the circumstances of the offense is pertinent. The defendant and a companion forced their way into a residence in the city of Lincoln. The companion was armed and the statements of witnesses indicated that the defendant was too, although he denied it. The family was bound and the home ransacked. A small amount of money and some rings were taken.

The defendant is now 24 years old. He has three prior felony convictions and has been incarcerated a great deal of the time since age 16.

We cannot say the trial court abused its discretion. See State v. Arp, 188 Neb. 493, 197 N. W. 2d 703.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LYLE W. GRIFFITH, APPELLANT.

213 N. W. 2d 735

Filed December 21, 1973. No. 39134.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Samuel A. Boyer, Jr., for appellant.

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

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

NEWTON, J.

Defendant was convicted of unlawfully possessing amphetamines and sentenced to serve 2 years in the Nebraska Penal and Correctional Complex. He asserts that incorrect information was given the probation officer and reflected in the presentence report. Examination of the presentence report and the record fails to substantiate this contention. Neither does it disclose an abuse of discretion in denying probation. On the contrary, it discloses that this was not his first felony conviction.

This case falls within the purview of State v. Dovel, 189 Neb. 173, 201 N. W. 2d 820. The judgment of the District Court is affirmed.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1974

GEORGE F. SWARTZ, APPELLEE, V. ROBERT ANTHONY TOPPING, APPELLANT.
213 N. W. 2d 718

Filed January 4, 1974. No. 38963.

1. **Negligence: Motor Vehicles: Pedestrians.** Ordinarily, the failure of a pedestrian with the right-of-way to see an approaching car within the limit of danger is not contributory negligence as a matter of law.
2. **Release: Contracts: Mistake.** To avoid a written release of damages for personal injuries on grounds of mutual mistake of the parties, the mistake must relate to facts that are material to the contract of settlement and not to an opinion as to future conditions as the result of present known facts.
3. **Release: Contracts: Negligence.** A party who has the capacity and opportunity to read a release of claims for personal injuries but fails to do so is estopped by his own negligence from claiming that the release is not binding on him.
4. **Release: Contracts.** Mere inadequacy of consideration alone is generally not considered to be a ground upon which a release may be avoided. It is a factor which may be considered along with other circumstances.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded with directions to dismiss.

Harold W. Kauffman and Eugene P. Welch of Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellant.

Dana C. Bradford and Richard J. Coenen of Bradford & Bloch, for appellee.

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

BOSLAUGH, J.

The plaintiff was injured in an automobile-pedestrian accident on August 2, 1970. He was attempting to cross Capitol Avenue in Omaha, Nebraska, when he was struck by an automobile operated by the defendant. The defendant appeals from a verdict and judgment in favor of the plaintiff in the amount of $38,600.

The accident happened at about 1 a.m., while it was raining. The plaintiff intended to cross Capitol Avenue on the east side of Eighteenth Street. Capitol Avenue is 84 feet wide at that place. The plaintiff testified he could see no traffic in either direction when he started across Capitol Avenue in the cross-walk. After he had started to cross Capitol Avenue he heard the car coming and turned toward the car just as he was hit. The point of impact was 15 to 18 feet south of the north curbline of Capitol Avenue, approximately halfway across the westbound traffic lanes. A police officer testified the defendant told him the accident occurred about even with the east curbline of Eighteenth Street.

The defendant contends the plaintiff was guilty of contributory negligence as a matter of law sufficient to bar his recovery. The contention is based upon the plaintiff's admission that he failed to see the defendant's automobile before the accident and other evidence which indicated the plaintiff was not in the crosswalk when the impact occurred.

The evidence was in conflict as to where the accident happened, but the jury could have found that the impact occurred in the crosswalk. Ordinarily, the failure of a pedestrian with the right-of-way to see an approaching car within the limit of danger is not contributory negligence as a matter of law. Baker v. Daly, 188 Neb. 156, 195 N. W. 2d 755; Zawada v. Anderson, 181 Neb. 467, 149 N. W. 2d 329; Beck v. Trustin, 177 Neb. 788, 131

N. W. 2d 425. We conclude the trial court was correct in submitting the issue of contributory negligence to the jury.

The defendant further contends the plaintiff is bound by a release executed and delivered by the plaintiff to a representative of the defendant's insurer and is barred from any further recovery against the defendant.

The release was executed by the plaintiff on September 1, 1970, while he was in the hospital. The release is entitled "Final Release of all Claims" and acknowledges the receipt of $500 in full settlement and satisfaction of all claims of the plaintiff against the defendant arising out of the accident of August 2, 1970.

The plaintiff's amended reply alleged the release had been procured by misrepresentation and fraud; the consideration for the release was inadequate; and the minds of the parties did not meet. The trial court submitted the validity of the release to the jury upon the issue of mutual mistake and instructed the jury that grossly inadequate consideration might be considered, with other circumstances, as tending to show the plaintiff was overreached and the minds of the parties did not meet. The defendant contends there was no issue of mutual mistake under the pleadings and the evidence and the release was valid as a matter of law.

To avoid a written release of damages for personal injuries on grounds of mutual mistake of the parties, the mistake must relate to facts that are material to the contract of settlement and not to an opinion as to future conditions as the result of present known facts. Simpson v. Omaha & C. B. St. Ry. Co., 107 Neb. 779, 186 N. W. 1001; La Rosa v. Union P. R. R. Co., 142 Neb. 290, 5 N. W. 2d 891. In the usual case the controversy relates to the nature and extent of injuries sustained in the accident.

In this case the release was executed approximately 1 month after the accident happened. The plaintiff had

sustained a comminuted fracture of the left jaw, a comminuted fracture of the left knee, and a comminuted fracture of the right femur. His left patella had been removed 3 days after the accident and an open reduction performed on the right femur. The nature and seriousness of his injuries were apparent and the plaintiff does not contend otherwise.

The plaintiff claims he did not understand the nature of the transaction and thought he was signing a "receipt" for the $500 which was paid to him. The plaintiff admits, however, that even without glasses he could read the heading at the top of the release which was in bold type and read: "Final Release of all Claims." The rule is well established that a party who has the capacity and opportunity to read a release of claims for personal injuries but fails to do so is estopped by his own negligence from claiming that the release is not binding on him. Osborne v. Missouri P. Ry. Co., 71 Neb. 180, 98 N. W. 685.

The consideration for the release that was paid to the plaintiff by the defendant's insurer was grossly inadequate if the case is considered as one of clear liability. The plaintiff had been hospitalized for 30 days when the release was executed and his medical and hospital expenses alone to that time were very substantial.

The defendant's insurer, however, considered the case as one of no liability. There was substantial evidence which indicated the impact had not occurred in the crosswalk and the fact that the jury eventually found for the plaintiff does not establish that the case should have been considered as one of clear liability at all times.

Mere inadequacy of consideration alone is generally not considered to be a ground upon which a release may be avoided. See 66 Am. Jur. 2d, Release, § 11, p. 685. It is a factor which may be considered along with other circumstances. See Armbruster v. Stanton-Pilger Drainage Dist., 169 Neb. 594, 100 N. W. 2d 781.

This is a case in which an injured party entered into what proved to be an improvident settlement. However, private litigants are not required to seek the advice of counsel before they enter into binding contracts.

There was no competent evidence of a mutual mistake of fact which would afford a basis upon which the release could be avoided. The judgment is reversed and the cause remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

SMITH, J., dissents.

VAKOC CONSTRUCTION CO., A CORPORATION, ET AL., APPELLANTS, V. CITY OF WAYNE, NEBRASKA, A A MUNICIPAL CORPORATION, ET AL., APPELLEES.
213 N. W. 2d 721

Filed January 4, 1974. No. 39017.

1. **Equity: Appeal and Error.** On an appeal in an action in equity, this court will try the issues of fact complained of de novo.
2. **Equity: Estoppel: Municipal Corporations.** Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of a governmental function, but exceptions can be made where right and justice so demand.
3. **Equity: Estoppel.** In order to establish an equitable estoppel against one asserting his title or claim to real property, the party attempting to raise it must show an actual fraudulent representation, concealment, or such conduct or negligence as will amount to a fraud in law, and that the party claiming such estoppel relied thereon and was actually misled thereby to his injury.

Appeal from the District Court for Wayne County: GEORGE W. DITTRICK, Judge. Affirmed.

Budd B. Bornhoft, for appellants.

John V. Addison, for appellees.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and NEWTON, JJ., and RONIN, District Judge.

RONIN, District Judge.

This is an action in equity by plaintiffs subdividers to enjoin the City of Wayne and its officers, defendants, from maintaining water and sewer lines across two lots in plaintiffs' new addition to the City of Wayne, Nebraska. The facts are not in dispute and the sole issue is the validity of the easement for these utility lines. The trial court held that the city had a valid utility easement. We affirm.

Plaintiffs Wingett are nominal plaintiffs by reason of being record owners of Lots 15 and 16 in The Knolls Addition to the City of Wayne, having contracted to sell them to the Vakoc Construction Co., a corporation, hereinafter designated as plaintiff. In 1969 plaintiff subdivided and annexed to the City of Wayne a new addition called The Knolls Addition. The City of Wayne shall hereinafter be designated as defendant.

Consolidating Engineers, an engineering firm, was at all times the city engineer for the defendant, and was also employed and paid by plaintiff to draft the plats and to handle the engineering work in connection with The Knolls Addition for the plaintiff. Consolidating Engineers prepared five preliminary plats prior to the final plat of The Knolls Addition. The disputed east-west water and sewer easement across Lots 15 and 16 does not appear on any of the preliminary plats, nor is there any evidence of it being discussed at either the planning commission or the city council meetings when the proposed Knolls Addition was before them.

The last of the preliminary plats, exhibit 20, was informally before the city council in the early part of November 1969, at which time certain restrictions and protective covenants were to be removed from the plat by the Consolidating Engineers. Thereafter the final plat, exhibit 1, was prepared by the Consolidating Engineers at plaintiff's request. In addition to deleting the restrictions and protective covenants, certain other

changes were made. Plaintiff's engineering firm, Consolidating Engineers, assumes that the disputed utility easement lines were placed on Lots 15 and 16 at this time, although its employee has no independent recollection as to why the easement was inserted on the plat and whether or not the plaintiff was advised of it, neither do they deny placing the utility easement lines on the plat.

The surveyor's certificate was executed by said engineering firm on exhibit 1 and acknowledged before plaintiff's attorney on November 25, 1969. Plaintiffs also on the same date executed their dedication of The Knolls Addition and their request for annexation which included their certification as to its correctness, which instruments were on the final plat and the acknowledgments taken by their attorney. It is apparent that the plaintiffs, their engineer, and their attorney all had the opportunity to examine the final plat for its correctness at this time. Thereafter on the same day plaintiff filed the final plat with the city council, which accepted and adopted it by resolution and ordinance. Early in 1970, plaintiff first learned that the City of Wayne was claiming an easement for utilities running east and west across its aforesaid lots. At this time the defendant had dug a trench 35 feet long preparatory to laying sewer pipe. Plaintiff made its complaint to defendant as to the validity of its easement without avail and thereafter commenced this action.

The testimony of the president of the plaintiff company is to the effect that at the time he affixed his signature to exhibit 1, he did not know that the disputed easement lines had been placed on the plat, and that the Consolidating Engineers whom he had employed and paid to prepare the plat had not advised him of this change, and that had he known of the change he would not have approved it. Plaintiff asserts no claim of misrepresentation or fraud on the part of the defendants.

There is no evidence that the disputed easement lines were inserted after plaintiff had signed the plat, and plaintiff in its brief assumes that the easement lines had been drawn in prior to the signing of the plat.

An examination of the statutory provisions for platting a subdivision of a city by landowners places the duty on the owner to make a plat of such subdivision and to describe the lots by number and by dimensions. § 17-415, R. R. S. 1943. It is further required that each plat shall contain a statement that the subdivision "is made with the free consent and in accordance with the desire of the undersigned owners" and shall be duly executed and acknowledged. § 17-416, R. R. S. 1943. The statutes further provide that such acknowledgment and then recording of such plat is equivalent to a deed in fee simple to those portions set apart for streets or other public use. § 17-417, R. R. S. 1943.

This being an appeal in an action in equity, this court will try the issues of fact complained of de novo. Satterfield v. Dunne, 180 Neb. 274, 142 N. W. 2d 345.

Plaintiff seeks to invoke the doctrine of estoppel in pais under the facts in this case. In May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448, we held: " 'The doctrine of estoppel in pais has application to municipal corporations, and city councils or public authorities will be estopped or not as justice and right may require.' " In the May case cited by plaintiff the question involved was whether the city council had the authority to issue general obligation bonds to pay for an electric light and power plant belonging to Consumers Public Power District. The electors had voted to acquire the system on the representation of the city officials of Kearney that the city would pay for the property by the issuance of revenue bonds. Thereafter the city voted to issue general obligation bonds in violation of its promises to the people. Our court upheld the action to enjoin the issuance of the bonds applying the doctrine of estoppel

in pais against the City. In the May case, *supra*, and others cited by plaintiff in its brief, there was positive evidence of misrepresentations or inequitable conduct on the part of the governmental body which was relied on by the injured party in good faith and to his detriment.

The general rule in applying the doctrine of estoppel to municipal corporations is stated in 28 Am. Jur. 2d, Estoppel and Waiver, § 129, p. 794: "Although there are instances in which the doctrine of estoppel is applicable against a municipal corporation, the doctrine is to be applied with caution and only in exceptional cases under circumstances clearly demanding its application to prevent manifest injustice." See, also, 31 C. J. S., Estoppel, § 141, p. 696; City of Grand Island v. Willis, 142 Neb. 686, 7 N. W. 2d 457; Abernathy v. City of Omaha, 183 Neb. 660, 163 N. W. 2d 579.

The elements necessary for the application of the doctrine of equitable estoppel to either a natural person or a municipal corporation and involving an interest in real estate are set forth in 28 Am. Jur. 2d, Estoppel and Waiver, § 81, p. 724: "As a general thing, in order to establish an equitable estoppel against one asserting his title or claim to real property, the party attempting to raise it must show an actual fraudulent representation, concealment, or such conduct or negligence as will amount to a fraud in law, and that the party setting up such estoppel relied thereon, and was actually misled thereby to his injury."

The record in this case fails to disclose that the defendants made any representations with regard to the disputed easement, nor does it disclose any concealment, or any conduct or negligence which would amount to a fraud. Under the statutes previously cited, it was the duty of the plaintiff to submit an accurate and suitable plat of its proposed subdivision. In the preparation of the final plat which contained the disputed easement

for the first time, the firm, Consolidating Engineers, was acting in the employment of the plaintiff. The statutory procedures for dedicating plats for new additions constitute a safeguard against usual errors and misunderstandings and when accepted and recorded possess the legal equivalent of a deed in fee simple.

We hold that the evidence in this case does not contain any inequitable conduct on the part of the defendants and that by reason thereof the doctrine of equitable estoppel is not available to plaintiff and the equitable relief prayed for must be denied.

We affirm the judgment of the trial court.

AFFIRMED.

PETER KIEWIT SONS CO., APPELLANT, V. O'KEEFE ELEVATOR CO., INC., APPELLEE.

213 N. W. 2d 731

Filed January 4, 1974. No. 39073.

1. **Contracts: Indemnity.** The general rules governing contracts or interpretation of contracts other than indemnity contracts apply in construing indemnity contracts and in determining rights and liabilities of the parties thereunder.
2. ———: ———. An indemnity contract should be construed so as to ascertain and give effect to the intention of the parties to it, if that can be done consistent with legal principles.
3. ———: ———. An indemnitee may be indemnified against his own negligence if the contract contains express language to that effect or contains clear and unequivocal language that that is the intention of the parties.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

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

Pilcher, Howard & Dustin, for appellee.

Heard before SPENCER, SMITH, and CLINTON, JJ., and KUNS and FLORY, District Judges.

FLORY, District Judge.

One Ward, an employee of the defendant, O'Keefe, appellee here, obtained a judgment against the plaintiff, Kiewit, appellant here, in an action for personal injuries sustained on a construction site where Kiewit was the general contractor and O'Keefe the subcontractor. In that action Kiewit's negligence and Ward's contributory negligence and assumption of risk were the issues submitted to the jury which returned a verdict for Ward. Kiewit paid the judgment.

Kiewit then brought this action against O'Keefe for indemnity under the contract between them which was prepared by Kiewit. Each party moved for summary judgment. The trial court sustained O'Keefe's motion and overruled Kiewit's motion and dismissed the action. Kiewit appealed.

This results in a situation wherein Kiewit seeks indemnity against O'Keefe for Kiewit's negligence.

The indemnity provision in the subcontract provided: "Section 10. Indemnification. The Subcontractor further specifically obligates himself to the Contractor in the following respects; to wit: . . . (b) To indemnify the Contractor against and save him harmless from any and all claims, suits or liability for injuries to property, injuries to persons including death, and from any other claims, suits or liability on account of any act or omission of the Subcontractor, or any of his officers, agents, employees or servants. . . .

"And the Subcontractor shall indemnify the Contractor and the Owner against, and save them harmless from, any and all loss, damage, costs, expenses and attorneys' fees suffered or incurred on account of any breach of the aforesaid obligations and covenants, and any other provision or covenant of this Subcontract."

The general rules governing construction and interpretation of contracts other than indemnity contracts apply in construing indemnity contracts and in deter-

mining rights and liabilities of the parties thereunder. Currency Services Inc. v. Passer, 178 Neb. 286, 133 N. W. 2d 19.

An indemnity contract should be construed so as to ascertain and give effect to the intention of the parties to it, if that can be done consistent with legal principles. Currency Services Inc. v. Passer, *supra.*

Kiewit argues that the restrictive language "on account of any act or omission of the Subcontractor . . ." applies only to ". . . from any and all claims, suits or liability . . ." leaving claims for property damage and personal injury free of the restriction and cites numerous cases from other jurisdictions that have similar factual situations but different indemnity provisions. For example: Mississippi Power Co. v. Roubicek, 462 F. 2d 412 (5th Cir., 1972), "in whatever manner the same may be caused"; Halverson v. Campbell Soup Co., 374 F. 2d 810 (7th Cir., 1967), "arising from work performed"; General Acc. F. & L. Assur. Corp. Ltd. v. Smith & Obey Co., 272 F. 2d 581 (6th Cir., 1959), "arising from any cause or for any reason whatsoever in or about the premises where the work is performed"; Aluminum Co. of America v. Hully, 200 F. 2d 257 (8th Cir., 1952), "whether such injury, loss or damage shall be caused by the negligence of the Contractor, a subcontractor hereunder, Owner, or otherwise."

These cases stand for the general proposition that an indemnitee may be indemnified against his own negligence if the contract contains express language to that effect or contains clear and unequivocal language that that is the intention of the parties.

In Hanley v. James McHugh Constr. Co., 444 F. 2d 1006 (7th Cir., 1971), a summary judgment was affirmed in favor of a subcontractor as to the general contractor's third party complaint for indemnity where injury to an employee of the subcontractor was caused by negligence of the general contractor. The general contractor

argued that the agreement providing for indemnity for "Contractor's contractual or legal liability . . . on account of any acts or omissions of Sub-contractor . . . regardless of whether or not such act or omission constitutes negligence" removed the case from the holding in Westinghouse Co. v. LaSalle Monroe Building Corp., 395 Ill. 429, 70 N. E. 2d 604, which held that the language "the contractor agrees to indemnify and hold the owner . . . wholly harmless from any damages, claims . . . arising out of any acts or omissions by the Contractor . . . in the course of any work done" was not sufficiently inclusive to provide for indemnification of indemnitee's own negligence. However, the United States Court of Appeals held in Hanley that the Westinghouse decision applied. The court distinguished Halverson v. Campbell Soup Co., 374 F. 2d 810. United States Fidelity & Guaranty Co. v. Mason & Dulion Co., Inc., 274 Ala. 202, 145 So. 2d 711, involved the following provision: "The Subcontractor covenants to indemnify and save harmless and exonerate the Contractor and the Owner of and from all liability, claims and demands for personal injury and property damage arising out of the work undertaken by the Subcontractor, its employes, agents, its subcontractors, and arising out of any other operation no matter by whom performed for and on behalf of the Subcontractor." The court noted the general rule that the parties are presumed to intend that the indemnitee shall not be indemnified for a loss occasioned by his own negligence unless the language of the contract affirmatively expresses an intent to indemnify for such loss and said: "We do decide the contract is ambiguous and must be construed against the contractor who wrote it. So construed, the contract does not disclose a right in the contractor to recover for a loss occasioned by contractor's negligence."

In this case we interpret the indemnity provision to restrict the right of the indemnitee, Kiewit, to recover

from the indemnitor, O'Keefe, to acts or omissions of O'Keefe. Even if the indemnity provision could be said to be ambiguous, it would necessarily have to be construed against the contractor who wrote it.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. OSCAR LEE JOHNSON, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. RUFUS D. JONES, APPELLANT.

213 N. W. 2d 716

Filed January 4, 1974. Nos. 39088, 39089.

Criminal Law: Sentences. Where the punishment of an offense is left to the discretion of a court to be exercised within certain statutorily prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

Appeals from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed as modified.

Frank B. Morrison, Sr., and Stanley A. Krieger, 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.

SPENCER, J.

Defendants, Oscar Lee Johnson and Rufus D. Jones, appeal their convictions on guilty pleas to one count of robbery and one count of using a firearm in the commission of a felony. We affirm each sentence as modified.

Defendants, with a Freddie Lee Williams who pro-

cessed a separate appeal, were apprehended in the commission of a robbery at Buehler Brothers Market in Omaha, Nebraska, on February 27, 1973. Pursuant to plea bargains, each defendant pled guilty to one robbery count and the use of a firearm in the commission of a felony. A second robbery count was dismissed pursuant to plea bargains, and the county attorney agreed that no other charges would be filed on offenses then under investigation.

Defendant Jones was sentenced to a term of 10 to 30 years in the Nebraska Penal and Correctional Complex on the robbery offense. He was also given a consecutive term of 5 years for use of a firearm in the commission of a felony.

Defendant Johnson was sentenced to a term of 15 to 45 years on the robbery count, and to a consecutive term of 5 years for use of a firearm in the commission of a felony.

Both defendants, who at all stages were represented by the same counsel, assign as error the excessiveness of the sentences.

The penalty for robbery is imprisonment in the Nebraska Penal and Correctional Complex for a term of not less than 3 years nor more than 50 years. § 28-414, R. R. S. 1943. The penalty for the use of firearms in the commission of a felony is imprisonment in the Nebraska Penal and Correctional Complex not less than 3 years nor more than 10 years, and such sentence shall be consecutive to any other sentence imposed. § 28-1011.21, R. S. Supp., 1972.

The offenses to which the defendants pled guilty are very serious ones. Defendants predicate their claim of excessiveness on a comparison of sentences given other defendants who have been convicted of the same crimes. The sentences here are severe but are clearly within the range prescribed by the statutes. The rule is well established that where the punishment of an offense is

left to the discretion of a court to be exercised within certain statutorily prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

A review of the presentence reports establishes defendant Jones had no police record other than traffic offenses prior to his arrest herein. Defendant Johnson served 6 months in the county jail for a burglary, was investigated in some other instances, and served 10 days on a misdemeanor. Johnson was 21 at the time of his arrest, and Jones 26. The records indicate drug use may have been a contributing factor to their problems.

It is apparent that Johnson's sentence was more severe than the one meted out to Jones because of information in the presentence report identifying him as a participant in a robbery then under investigation. The defendants pled guilty pursuant to plea bargains. Considering their ages, and the fact that their crime careers are of recent origin and drug related, they should be good prospects for a rehabilitation program. This we believe may be more probable with a realistic sentence. As we view the record, justice would be served by a sentence of 5 to 15 years imprisonment in the Nebraska Penal and Correctional Complex on the robbery count.

The judgment of the District Court is so modified in each instance to provide that the sentence on the robbery count shall be imprisonment in the Nebraska Penal and Correctional Complex for 5 to 15 years. Each judgment in all other respects is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. FREDDIE LEE WILLIAMS, APPELLANT.

213 N. W. 2d 727

Filed January 4, 1974. No. 39090.

1. **Criminal Law: Guilty Plea.** A plea of guilty made with full knowledge of the charge and the consequences of the plea will not be permitted to be withdrawn in the absence of fraud, mistake, or other improper means used in its procurement.
2. **Criminal Law: Attorneys at Law.** It must appear that counsel's assistance was so grossly inept as to shock the conscience of the court before relief on the ground of ineffective assistance of counsel will be granted.

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

Wincel C. Nelson, Jr., 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 charged with two counts of robbery and one count of use of a firearm in the commission of a felony. All these counts were based on a robbery at Buehler Brothers Market in Omaha, Nebraska, on February 27, 1973. Pursuant to a plea bargain the defendant pleaded guilty to one robbery count and use of a firearm in the commission of a felony. The second robbery count was dismissed. The defendant was sentenced to imprisonment for 15 to 45 years on the robbery charge and 5 years' imprisonment for the use of a firearm, the sentences being consecutive. He has appealed and claims the trial court should have permitted him to withdraw his plea of guilty; his counsel was inadequate; and the sentence was excessive.

The defendant was arraigned and a plea of guilty entered on March 7, 1973. A sentencing hearing was held on

March 21, 1973. When the trial court inquired whether the defendant wished to say anything before sentence was pronounced, the defendant stated that he wanted to enter a plea of not guilty. No showing was made in support of the request to withdraw the guilty plea and there is nothing in the record which indicates the request should have been granted. A plea of guilty made with full knowledge of the charge and the consequences of the plea will not be permitted to be withdrawn in the absence of fraud, mistake, or other improper means used in its procurement. State v. Cunningham, 185 Neb. 488, 176 N.W. 2d 732.

Throughout the proceedings in the District Court the defendant was represented by an assistant public defender. The same counsel also represented two other men, Rufus D. Jones and Oscar Lee Johnson, who had participated in the robbery. The defendant argues that he should have had separate counsel because there were differences in statements of the three men as to what took place at the time of the robbery. Since the defendant was convicted upon a plea of guilty, there was no prejudice to the defendant because his counsel also represented the other men involved in the robbery.

The record before us does not show inadequate representation of the defendant. The plea bargain was fully performed and the defendant's counsel recommended that each defendant receive a minimum sentence. It must appear that counsel's assistance was so grossly inept as to shock the conscience of the court before relief on the ground of ineffective assistance of counsel will be granted. State v. Putnam, 182 Neb. 185, 153 N.W. 2d 456.

The defendant is 26 years of age, married, and has five children. He attended school through the eleventh grade and had been employed as a packinghouse worker. He has not been convicted of any other offense except driving while intoxicated in 1971.

The witnesses in the store at the time of the robbery on February 27, 1973, stated that all three men were

armed. At least one shot was fired by Jones and there was some physical abuse of the employees. The crime was in progress when the police arrived and arrested the defendant and the other two men. The police recovered $1,421.31 that belonged to the store and $405.95 and two watches that had been taken from the employees.

On February 24, 1973, 3 days before the robbery at the grocery store, there was an armed robbery by three men at a beauty salon in which money and other property were taken from the employees and patrons in the salon. The defendant denied participating in that robbery but was positively identified by four witnesses as being one of the participants.

It is clear from the record that the robbery at the grocery store on February 27, 1973, was a very serious offense. The defendant should receive a sentence that is commensurate with that offense. The penalty for robbery is imprisonment for 3 to 50 years. § 28-414, R. R. S. 1943. The penalty for the use of firearms in the commission of a felony is imprisonment for 3 to 10 years, and the sentence must be consecutive to any other sentence. § 28-1011.21, R. S. Supp., 1972.

The sentence which was imposed on Count I in this case approaches the maximum authorized by the statute. Some consideration should be given to the fact that the defendant had no previous convictions for felony. As we view the record, justice would be served by a sentence of 5 to 15 years' imprisonment on Count I.

The judgment of the District Court is modified to provide that the sentence on Count I shall be imprisonment for 5 to 15 years. The judgment in all other respects is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD GEE, APPELLANT.
213 N. W. 2d 726

Filed January 4, 1974. No. 39102.

Criminal Law: Guilty Plea. The Standards Relating to Pleas of Guilty promulgated by the American Bar Association outline what should be the minimum procedure in the taking of pleas of guilty or no contest in this state.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Reversed and remanded.

Frank B. Morrison, Sr., 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.

PER CURIAM.

The defendant was convicted, on a plea of nolo contendere, of uttering an insufficient fund check in the amount of $1,454.90 with intent to defraud. He has appealed and claims the procedure followed in the District Court failed to satisfy the requirements for accepting a plea of guilty or no contest set forth in Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274. Specifically, the defendant points out nothing was said concerning a waiver of trial, the penalty that might be imposed, or whether there had been any coercion.

The Standards Relating to Pleas of Guilty promulgated by the American Bar Association outline what should be the minimum procedure in the taking of pleas of guilty or no contest in this state. State v. Turner, 186 Neb. 424, 183 N. W. 2d 763. The procedure which was followed in this case fell far short of compliance with these standards.

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. MARY ROSE BROWN, APPELLANT.

213 N. W. 2d 712

Filed January 4, 1974. No. 39150.

1. **Constitutional Law.** Embedded in the traditional rules governing constitutional adjudication is that a person to whom a statute may be constitutionally applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the court.
2. **Criminal Law: Sentences.** A sentence imposed by a trial court within statutory limits ordinarily will not be disturbed on appeal in the absence of an abuse of discretion.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Walter J. Matejka, for appellant.

Herbert M. Fitle, Gary P. Bucchino, and Richard J. Epstein, for appellee.

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

SPENCER, J.

Defendant, Mary Rose Brown, appeals her conviction of violating an ordinance of the city of Omaha, which reads as follows: "25.133.020. Indecent, lewd or filthy acts. It shall be unlawful for any person to commit any indecent, lewd or filthy act in any place in the City, or to utter any lewd or filthy words, or to sing any song, the words of which are suggestive of indecency or immorality, or use any threatening or abusive language in the hearing of other persons publicly, or to make any obscene gesture to or about any other person or persons publicly." We affirm.

Defendant, in her brief, argues the sufficiency of the evidence, the overbreadth of the ordinance, and the excessiveness of the penalty. The evidence is fairly conclusive that defendant was engaged in oral copulation.

The difficulty with defendant's argument on overbreadth is that the issue was not raised in the trial court. Actually, the ordinance is not to be found in the record. We have set it out herein from the defendant's brief. The question is not properly before us. However, it is patent that the act complained of is within the terms of the ordinance set out in defendant's brief. Her conduct clearly was an indecent, lewd, or filthy act. Even if properly raised, the defense of unconstitutionality would not be available herein. Embedded in the traditional rules governing constitutional adjudication is that a person to whom a statute may be constitutionally applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the court. Broadrick v. Oklahoma (1973), 413 U. S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830.

Defendant was sentenced to the maximum jail term of 6 months. She contends this was excessive. The maximum penalty is 6 months in the county jail and a fine of $500. Our law is well settled that a sentence imposed by a trial court within statutory limits ordinarily will not be disturbed on appeal in the absence of an abuse of discretion. State v. Curry (1969), 184 Neb. 682, 171 N. W. 2d 163. We cannot say on this record that the trial judge abused his discretion.

The judgment is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

I dissent. The ordinance is so vague and contains so many constitutional infirmities as to be void on its face.

STATE OF NEBRASKA, APPELLEE, V. MARY ROSE BROWN, APPELLANT.

213 N. W. 2d 713

Filed January 4, 1974. No. 39151.

Trial. The findings of a court in an ordinance violation have the same weight as a verdict of a jury.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Walter J. Matejka, for appellant.

Herbert M. Fitle, Gary P. Bucchino, and Richard J. Epstein, for appellee.

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

SPENCER, J.

Defendant appeals her conviction for violating ordinance No. 25.75.020 of the city of Omaha. We affirm.

Ordinance No. 25.75.020 is set out in plaintiff's brief as follows: "It shall be unlawful for any person purposely or knowingly to engage or agree to engage in an act of prostitution." Defendant argues only the sufficiency of the evidence and the vagueness of the ordinance.

The evidence adduced was sufficient to sustain a verdict of guilty. The arresting officer was the chief witness for the State. The issue is clearly one of credibility. While this is an ordinance violation tried without a jury, we apply the same rule for review on appeal as in jury waiver cases. The findings of a court in an ordinance violation have the same weight as a verdict of a jury. See State v. Crowley (1962), 174 Neb. 291, 117 N. W. 2d 488. The trial court had the witnesses before it and was in a better position to determine the sufficiency and the credibility of the evidence than we.

The ordinance defendant is attempting to attack in this court is not preserved in the record. We have set out the ordinance as it appears in defendant's brief. Ignoring the fact that the defense was not presented in the trial court

and is not properly raised, it is evident the act complained of is well within the terms of the ordinance as set out in defendant's brief.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TRACY PITTMAN, APPELLANT.
213 N. W. 2d 715

Filed January 4, 1974. No. 39152.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Affirmed as modified.

Walter J. Matejka, for appellant.

Herbert M. Fitle, Gary P. Bucchino, and Richard J. Epstein, for appellee.

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

SPENCER, J.

Defendant appeals her conviction of violating ordinance No. 25.133.020 of the city of Omaha. We affirm.

This is a companion case to State v. Brown, No. 39150, *ante* p. 61, 213 N. W. 2d 712. In this case, however, the officer did not see the performance of the act. Rather, he described the position of the parties and the state of undress which suggested an interruption of the act. In any event, the evidence clearly indicated unlawful conduct within the provisions of the ordinance.

Defendant has raised the same three assignments of error discussed in State v. Brown, *supra*. What we said there is equally applicable herein as to the first two assignments of error.

Defendant's third assignment of error is that the sentence imposed on her was excessive. Mary Rose Brown

was sentenced to a term of 6 months in the Douglas county jail, whereas defendant Tracy Pittman was sentenced to a term of 6 months in the Penal Complex. We see no reason for the different treatment of the two defendants and modify the sentence of the defendant Tracy Pittman to imprisonment for a period of 6 months in the Douglas county jail.

The judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

McCOWN, J., dissenting.

I dissent. The ordinance is so vague and contains so many constitutional infirmities as to be void on its face.

STATE OF NEBRASKA, APPELLEE, V. TRACY PITTMAN, APPELLANT.

213 N. W. 2d 716

Filed January 4, 1974. No. 39153.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Walter J. Matejka, for appellant.

Herbert M. Fitle, Gary P. Bucchino, and Richard J. Epstein, for appellee.

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

SPENCER, J.

Defendant, Tracy Pittman, appeals from a conviction of soliciting prostitution under Omaha municipal ordinance No. 25.75.030. She was sentenced to 90 days in the Douglas county jail. We affirm.

The appeal herein is patently frivolous. Defendant infers entrapment, because the police officer made himself available for solicitation by the defendant. There is no merit to defendant's assignments.

The judgment is affirmed.

AFFIRMED.

GLENWOOD JAMES BOYLES, APPELLEE, V. RUBY JOYCE BOYLES, APPELLANT.

213 N. W. 2d 729

Filed January 4, 1974. No. 39162.

1. **Divorce: Parent and Child.** In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children.
2. **Divorce: Parent and Child: Infants.** A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action.
3. ———: ———: ———. The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Fisher & Fisher, for appellant.

Wade H. Ellis, for appellee.

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

NEWTON, J.

This is a child custody proceeding brought by defendant, the mother of David Lee Boyles. The divorce decree awarded custody of the child to Melvin and Faye Boyles, husband and wife. The court refused to change the child's custody. We affirm the judgment entered.

David was born May 6, 1968, to plaintiff and defendant who subsequently married on April 19, 1969. They

were divorced May 5, 1972. Custody of David was awarded to plaintiff's brother and sister-in-law who reside in Arthur, Nebraska. Both are school teachers and they have two daughters of their own. It is conceded that they have provided a good home for David and taken good care of him.

After plaintiff and defendant separated defendant lived with Raymond Stites under the name of Stites. A boy was born to them on July 27, 1971, and a second boy was born to them a few days after the marriage of defendant and Raymond Stites on November 13, 1972.

It is defendant's contention that there has been a change in circumstances since she has now remarried and has a home provided by her present husband. She further urges that as his natural mother she is entitled to David's custody.

It is true that ordinarily a natural parent is preferred when questions regarding child custody arise. However, the paramount issue is the welfare of the child. "In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children." Broadstone v. Broadstone, 190 Neb. 299, 207 N. W. 2d 682.

A detailed recital of the evidence would serve no purpose. It is apparent that the child now has an excellent home in stable surroundings. He is well and lovingly cared for in all respects. At the time of the hearing in the trial court, defendant's marriage to her present husband had existed for about 5 months. In view of defendant's past moral habits and instability, it is difficult to ascertain how her present marital venture will turn out and whether or not she can maintain a proper home for the child.

"A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is un-

fit for that purpose or that the best interests of the children require such action.

"The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence." Gilman v. Riis, 190 Neb. 409, 209 N. W. 2d 173.

It clearly appears that the persons presently having custody of David are fit for that purpose and it does not appear that his best interests require a change of custody. We fail to find an abuse of discretion by the District Court and the judgment of that court is affirmed.

AFFIRMED.

EMIL J. LORENCE, APPELLEE, V. OMAHA PUBLIC POWER DISTRICT, APPELLANT, IMPLEADED WITH IMPERIAL OUTDOOR ADVERTISING COMPANY, A CORPORATION, APPELLEE.

214 N. W. 2d 238

Filed January 11, 1974. No. 38991.

1. **Electricity: Negligence.** Power companies engaged in the transmission of electricity, especially electricity of high voltage, are charged with the duty of exercising a very high degree of care to safeguard those whose lawful activities expose them to the risk of inadvertent contact with the electric lines but they are not insurers and not liable for damages in the absence of negligence.
2. **Negligence.** One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.
3. ———. To constitute want of due care it is not required that a person should have anticipated the exact risk which occurred, or that the peril was a deadly one; it is sufficient that he places himself in a position of a known danger where there was no need for him to be or that he knew or should have known that substantial injury was likely to result from his act.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Reversed and dismissed.

Fraser, Stryker, Marshall & Veach, for appellant.

Martin A. Cannon of Matthews, Kelley, Cannon & Carpenter, for appellee Lorence.

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

WHITE, C. J.

This is an action for damages for bodily injuries resulting from electrical shock and burns. The injuries occurred while the plaintiff, Emil J. Lorence, was working on a billboard sign located near an electric power line constructed and maintained by the defendant, Omaha Public Power District. The jury verdict was for the plaintiff. The defendant has appealed from the overruling of the motion for directed verdict and judgment notwithstanding the verdict. We find that the plaintiff was contributorily negligent as a matter of law and reverse and dismiss.

Lorence was employed by Imperial Outdoor Advertising Company on April 29, 1969, the day of the accident. Lorence had been employed by that company or its predecessors since the late 1940's as a sign painter, painting foreman, and plant superintendent. He had served as plant superintendent for several months prior to the accident. This position involved supervision of all outdoor billboard signs. Lorence testified that he had been up on a lot of illuminated signs over the years.

On the day of the accident, Lorence was showing a newly hired electrician, Paul Brown, various signs. During the morning, Lorence and Brown had worked on several signs. They worked out of a pickup truck equipped with various electrical materials. A 40-foot extension ladder in two 20-foot sections was carried on the racks of the pickup. After lunch, Lorence and Brown

went to Forty-second and F Streets and parked the truck in a large parking lot underneath a sign to see if the lights were working.

The sign was erected in 1964. The face of the sign runs east and west and located at the bottom of the sign face are two footruns. Workmen stand on these footruns while working on the face of the sign. There is a footrun on the north and the south side of the sign face. Approximately 8 feet below the footruns is an x-shaped cross member which helps support the sign structure. There is a permanently affixed ladder which runs from the cross member up to the footruns. The bottom of this affixed ladder and the cross member are 20 feet above the ground. The sign is illuminated by lights which run parallel to the face of the sign and approximately 6 feet away. The light fixtures are supported by braces running horizontally from the top of the sign out to the fixtures. These fixtures are approximately 12 feet above the footruns.

The primary line is located to the north of the sign and runs east and west. Below the primary line there are several secondary overhead lines running east and west. The primary line is lower than the top of the sign. The distance from the light fixture on the north side of the sign to the primary line is 8 feet while the distance from the footrun to the primary line is about 9 feet.

Lorence and Brown turned on the sign lights. Upon looking up at the sign, they observed that the lights on the south side of the sign were working, but the lights on the north were out. They took one 20-foot section of the ladder off the truck and Lorence laid it up against the sign structure so he could climb up to the permanently affixed ladder and the cross member. He climbed up until he was standing on the x-shaped cross member. While standing on this cross member below the footrun, Lorence reached down and pulled

the 20-foot extension ladder up vertically through the space between the footrun and the northern face of the sign. He had one arm looped through the permanently affixed ladder leading to the footrun. Brown testified that while Lorence was holding on with one arm, he reached down and pulled the ladder up with his other arm and pushed the ladder vertically through the opening between the sign and the footrun. Just prior to the contact with the primary line, the topmost part of the ladder was extended approximately 15 feet vertically into the air Lorence held on with one arm looped through the permanently affixed ladder and the other arm holding the 20-foot extension ladder. It was a windy day. Brown saw the bottom of the ladder tilt towards the south. As the top of the ladder hit the primary power line carrying 8,000 volts of electricity, Brown saw a flash of light like a bolt of lightning go down the ladder and strike Lorence. The burn mark on the ladder where it made contact with the primary line was 10 inches from the top end of the ladder. Lorence was holding the ladder 14 feet 8 inches from the point of contact with the primary line. The vertical height from the ground to the burn marks on the primary line was 31 feet 9 inches.

Brown admitted that in looking up to see if the lights were on he saw the overhead lines. There was also testimony by Brown that Lorence had warned him that morning to be careful of overhead lines. The plaintiff's own expert testified that he would not bring a 20-foot extension ladder anywhere near an 8,000 volt line.

The plant supervisor over Lorence at the time that the sign was constructed testified that employees under his supervision were given lectures on safety practices and procedures and it was emphasized very strongly to absolutely stay away from power lines. Lorence did not help with the construction of this sign nor had he

ever been on this particular sign. Lorence testified that the last thing he remembers prior to the accident was eating lunch.

The plaintiff alleged that the defendant was negligent in (1) maintaining an uninsulated and unguarded conductor unreasonably close to an outdoor advertising sign; (2) failing to make reasonable inspection of the distribution line; and (3) failing to relocate the distribution line to provide reasonable clearance from the sign.

Power companies engaged in the transmission of electricity, especially electricity of high voltage, are charged with the duty of exercising a very high degree of care to safeguard those whose lawful activities expose them to the risk of inadvertent contact with the electric lines but they are not insurers and not liable for damages in the absence of negligence. Gillotte v. Omaha Public Power Dist., 185 Neb. 296, 176 N. W. 2d 24 (1970).

As this court stated in Roos v. Consumers Public Power Dist., 171 Neb. 563, 106 N. W. 2d 871 (1961): "Such companies, being engaged in the transmission of a dangerous commodity, must anticipate and guard against events which may reasonably be expected to occur, and a failure to do so is negligence." There is a close question whether there was sufficient evidence on the issue of the defendant's negligence to go to the jury, however, we need not decide that issue, because we hold that the plaintiff was contributorily negligent more than slight as a matter of law, therefore barring any recovery.

One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. Disney v. Butler County Rural P. P. Dist., 183 Neb. 420, 160 N. W. 2d 757 (1968): Omaha Nat. Bank v. Omaha P. P. Dist., 186 Neb. 6, 180 N. W. 2d 229 (1970).

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

The lack of ordinary care by the plaintiff is self-evident. The primary line was open and obvious. The plaintiff was capable of understanding and discretion. He knew or should have known that the power lines were located in close proximity to the sign. He had been on numerous signs over the years and admitted he knew that electricity was dangerous.

The only inference which can reasonably be drawn from the evidence is that the plaintiff failed to exercise ordinary care for his own safety. Plaintiff was working 20 feet above the ground. While balancing himself on a cross member and holding onto the permanently affixed ladder, he additionally attempted to lift a 20-foot extension ladder weighing 50 pounds vertically up into the air 15 feet or more in close proximity to power lines on a windy day. Part of the time he attempted to raise and hold onto the extension ladder with one arm. The plaintiff clearly placed himself in a position of danger within close proximity to open and obvious power lines when he knew or should have known that substantial injury was likely to result from his activities in the manner by which he performed them. The only inference which can be reasonably drawn from the evidence is that the plaintiff was contributorily negligent as a matter of law.

The judgment of the District Court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

MID-AMERICA DAIRYMEN, INC., A CORPORATION, APPELLANT, V. NEWMAN GROVE COOPERATIVE CREAMERY COMPANY, INC., A CORPORATION, APPELLEE.

214 N. W. 2d 18

Filed January 11, 1974. No. 39020.

1. **Security Interests: Mortgages: Uniform Commercial Code.** A chattel mortgage may serve both as a "security agreement" and a "financing statement" under the Nebraska Uniform Commercial Code, provided it complies with the requirements for said instruments, and contains the necessary information, as set out in the Uniform Commercial Code.
2. **Security Interests: Uniform Commercial Code.** Under section 9-402, U. C. C., there are two formal requisites of a "financing statement," i. e., (1) the signatures and addresses of both parties; and (2) a description of the collateral by type or item. A financing statement substantially complying with the requirements of the section is effective even though it contains minor errors which are not seriously misleading.
3. **Security Interests: Notice: Uniform Commercial Code.** The address of the secured party to be set out in the financing statement under section 9-402, U. C. C., must be such an address as to enable one interested in searching the records to contact the party in question for the purpose of obtaining information concerning the security interest. An address must be sufficiently complete to enable a prudent person using reasonable care to locate the secured party.
4. ———: ———: ———. The question of the sufficiency of the address of the secured creditor required under section 9-402, U. C. C., is a question of fact.
5. **Security Interests: Notice: Mortgages: Uniform Commercial Code.** Where, under the evidence, the chattel mortgage filed as a "security agreement" and "financing statement" is deficient as to address of secured party, it does not put subsequent purchaser on notice of outstanding security interest.

Appeal from the District Court for Madison County: MERRITT C. WARREN, Judge. Affirmed.

Richard E. Mueting, for appellant.

Jewell, Otte, Gatz, Magnuson & Collins, for appellee.

Heard before SPENCER, SMITH, and CLINTON, JJ., and BRODKEY and HASTINGS, District Judges.

BRODKEY, District Judge.

This is a case of first impression in Nebraska and involves an interpretation of the Nebraska Uniform Commercial Code. In this case, the plaintiff seeks to recover possession of a certain milk tank covered by a chattel mortgage as security for the payment of a promissory note. The case was tried to the court upon facts stipulated by the parties to this action, no evidence being received, other than certain documentary evidence introduced and received by stipulation of the parties, principally the promissory note and chattel mortgage in question. The trial court entered judgment for the defendant. We affirm.

So far as material to a decision in this case, the parties stipulated the facts to be as follows: Plaintiff, Mid-America Dairymen, Inc., is a Kansas corporation, licensed and qualified as a foreign corporation to transact business in the State of Nebraska; and is the successor in interest to Central States Dairy Cooperative (non-stock), a Nebraska corporation, by virtue of articles of merger executed and filed in the manner provided by law. By the terms of such articles of merger the plaintiff is successor in interest to, and owner of, all the property of Central States Dairy Cooperative (non-stock), real, personal, and mixed, including all bills receivable, promissory notes, and security interests of every kind and nature.

On or about November 25, 1969, one William H. Gallentine, of Aurora, Hamilton County, Nebraska, for value received, executed and delivered to Central States Dairy Cooperative (non-stock), Omaha, Nebraska, as payee, his promissory note in the amount of $3,081.90; and as security for said note executed and delivered to the payee, a security instrument captioned a chattel mortgage, on the following described property as collateral: One farm bulk milk pick-up tank, 1966, Kari-Kool plastic 2,100 gallon; and which was filed by the county clerk of Hamilton County, Nebraska, on the 16th day of Decem-

ber 1969. The parties further stipulated that subsequent to December 16, 1969, the defendant, Newman Grove Cooperative Creamery, "did purchase, or otherwise acquire possession" from William H. Gallentine a 1966 farm bulk milk pick-up tank Kari-Kool plastic 2,100 gallons, which tank was the identical property described as collateral in the instrument captioned a chattel mortgage, previously referred to. The parties further stipulated that on or about March 18, 1970, the said William H. Gallentine failed and neglected to make the payment then due and payable upon said obligation; that despite formal demands he has made no further payments on said note pursuant to said agreement; that the said William H. Gallentine is in default in the payment of the note referred to; and that the balance due and owing on said promissory note is $1,797.10.

Finally, it was stipulated by the parties that on April 8, 1970, plaintiff's attorney made formal demand in writing upon the defendant, Newman Grove Cooperative Creamery Co., Inc., for the delivery of the possession of said collateral to the plaintiff; and that the defendant has refused to do so and still detains said property from the plaintiff.

The only issue is one of law pertaining to the legal effect that the filing of the chattel mortgage in question in Hamilton County, Nebraska, has upon a subsequent purchaser under the laws of the State of Nebraska.

The chattel mortgage involved herein, and received in evidence as exhibit 1, is a regular printed chattel mortgage form, commonly obtainable at most stationery stores or other establishments selling stock legal forms. The only handwritten signature appearing on the form is that of the mortgagor, "Wm H Gallentine Jr," appearing at the bottom of the instrument. The name of the mortgagor is typed in at the top of the form and appears as "William Gallentine—Aurora, Nebraska." The name of the mortgagee is also typed in at the top of the form,

in the space provided therefor, as "Central States Dairy Cooperative—Omaha, Nebraska." Also typed on the form is a description of the collateral covered by said mortgage, as previously described.

At the outset, we wish to comment that the stipulation of facts entered into by the parties to this action is deficient in many respects which would be enlightening and helpful to the court in disposing of this controversy. Among these deficiencies are the nature of the property involved, i.e., whether the milk tank covered by the chattel mortgage would fall into the category of "consumers goods," "equipment," "farm products," or "inventory." Separate provisions are contained in the Nebraska Uniform Commercial Code dealing specifically with and governing the rules relating to the various types of property mentioned. Also missing from the stipulation are facts as to the nature of the transaction and the background relating to same. For example, whether the property was purchased by the Central States Dairy Cooperative (non-stock) from the plaintiff, Mid-America Dairymen, Inc., a corporation, and the note and chattel mortgage given at that time in payment therefor; or whether there was an outright loan made from the plaintiff to Central States Dairy Cooperative. Also the status of the defendant, Newman Grove Cooperative Creamery Company, Inc., as a bona fide purchaser for value and without notice is open to question under the stipulation of facts, said stipulation merely stating that the defendant "did purchase or otherwise acquire possession for a valuable consideration" the collateral covered by the chattel mortgage. However the parties have not raised the issues which a complete revelation of the facts might have suggested, and we shall not do so. The case was briefed and orally argued to this court on appeal upon the sole issue of the sufficiency of the chattel mortgage filed with the county clerk of Hamilton County, Nebraska, to serve both as a security agreement and financing

statement under the Uniform Commercial Code, and particularly whether it complies with the requirements of section 9-402, U. C. C.; and we shall confine our discussion to those issues.

There is little or no doubt that the Nebraska Uniform Commercial Code applies to chattel mortgages, and traditional distinctions of security devices are not retained. § 9-101, Comment, U. C. C.; § 9-102, Comments 1 and 2, U. C. C. As between the parties, a chattel mortgage is a "secured transaction" under the Uniform Commercial Code. Strevell-Paterson Finance Co. v. May, 77 N. M. 331, 422 P. 2d 366 (1967); Anderson v. First Jacksonville Bank, 243 Ark. 977, 423 S. W. 2d 273 (1968). "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. § 1-201 (37), U. C. C. "Security Agreement" is an agreement which creates or provides for a security interest. § 9-105 (1) (h), U. C. C. The only requirement for the enforceability of nonpossessory security interest in cases not involving land are (a) a writing; (b) the debtor's signature; and (c) a description of the collateral or kinds of collateral. § 9-203, U. C. C., and Comment 1 thereunder. There is little doubt that the chattel mortgage signed by the debtor in this case and thereafter filed, complies with all the foregoing requirements. A copy of the security agreement is also sufficient as a financing statement if it contains the information required by section 9-402, U. C. C., and Comments thereunder. See, also, Benedict v. Lebowitz, 346 F. 2d 120 (1965); Kaiser Aluminum & Chemical Sales, Inc. v Hurst, 176 N. W. 2d 166 (Iowa, 1970). It has also been held that a financing statement may also serve as a security agreement if it meets the requirements of the statute defining a security agreement. Evans v. Everett, 279 N. C. 352, 183 S. E. 2d 109 (1971). This latter case also holds that although the Uniform Commercial Code contemplates the execution of two separate writings, it

does not prohibit the combination of a security agreement and the financing statement.

We now devote our attention to a consideration of section 9-402, U. C. C., which sets forth the formal requisites of financing statements, to determine whether or not the chattel mortgage filed in the instant case complies with such requirements. That section provides, among other things, as follows: "(1) A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown or goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned. A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties. . . . (5) A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading." See also the official Comments to the above section which are enlightening and of assistance in understanding and interpreting section 9-402, U. C. C.

It is clear from the above section that the formal requisites of a financing statement are two: (1) The signatures and addresses of both parties; and (2) a description of the collateral by type or item. Subsection (5) of the above section also makes it clear that a financing statement substantially complying with the requirements of the section is effective even though it contains minor errors which are not seriously misleading. A comment to subsection (5) is as follows: "Sub-

section (5) is in line with the policy of this article to simplify formal requisites of filing requirements and is designed to discourage the fanatical and impossibly refined reading of such statutory requirements in which courts have occasionally indulged themselves. As an example of the sort of reasoning which this subsection rejects, see General Motors Acceptance Corporation v. Haley, 329 Mass. 559, 109 N. E. 2d 143 (1952)." In the instant case defendant claims that the plaintiff's chattel mortgage was insufficient under the laws of the State of Nebraska, particularly under section 9-402, U. C. C., to place the defendant on notice of any security interest that the plaintiff may have had in the collateral for two principal reasons: (1) The lack or insufficiency of the address of the secured party from which information concerning the security interest may be obtained; and (2) the absence of the creditor's signature. We address ourselves first to a consideration of the sufficiency of the address of the secured party, which is one of the requirements set forth in section 9-402, U. C. C.

As previously stated, the only reference to such address contained in the chattel mortgage in question is the typewritten portion designating the name of the mortgagee on said form as "Central States Dairy Cooperative—Omaha, Nebraska." No street address of the creditor is set out anywhere in or on said chattel mortgage. Likewise there is no signature of the creditor appearing on the document unless the typed name of the mortgagee, as filled in on said form, may be considered as such signature.

The trial court held that the address "Omaha, Nebraska" was not a substantial compliance with the requirements of section 9-402, U. C. C., with reference to providing the address of secured party; and that the filing of exhibit 1 in Hamilton County on December 16, 1969, was insufficient to give notice of creditor's

security interest to a subsequent purchaser. We agree.

The obvious purpose of requiring an address of the secured party on a financing statement is to enable a credit searcher to contact the party in question for the purpose of obtaining information about the security agreement. In re Raymond F. Sargent, Inc., 8 U. C. C. Rptng. Serv. 583 (U. S. D. C., D. Me., 1970). Section 9-402, U. C. C., adopts the system of "notice filing." See Comment 2 under the above section. The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral described; and further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. The issue to be determined is how much additional inquiry must a creditor or credit searcher make under the above statute. Carried to its ultimate conclusion, it might be argued that once a searcher of the record is made aware of an outstanding security interest in the collateral, an absolute duty would devolve upon him to locate the creditor and obtain the pertinent information from him, even to the point of hiring a private detective to do so. Obviously this is not required, even though the avowed purpose of the Uniform Commercial Code was to liberalize such requirements and minimize the amount of information which the records themselves must disclose. In re Carlstrom, 3 U. C. C. Rptng. Serv. 766, (U. S. D. C., D. Me., 1966); In re Excel Stores, Inc., 341 F. 2d 961 (1965). On the other hand excess liberality in interpretation might well result in an unworkable system for giving notice to third parties, and place an undue and unreasonable burden upon those searching the records, and defeat the very purpose of the Uniform Commercial Code. The cases appear to be evenly divided as to whether a literal compliance with the language of the statute is necessary, or whether the omission or failure to comply with the statute regarding setting forth the address of the

creditor are minor errors, particularly if they do not seriously mislead anyone. Decided cases fall into two groups. One group appears to adopt a strict construction and require literal, or almost literal, compliance with the words of the statute, and appear to conclude under the particular facts of the case that the compliance involved was deficient as a matter of law. Another group appears to be more liberal, attempting to follow the avowed purpose of the statute, and have held under the facts of the particular case that the omissions of addresses, or complete address, are not necessarily fatal errors. These cases treat the problem as a question of fact, that is, the omission will be fatal only if, under the facts of the case, it effectively precludes the notice function of the statement.

The case of Strevell-Paterson Finance Co. v. May, 77 N. M. 331, 422 P. 2d 366 (1967), is illustrative of the first group of cases and appears to treat the omission of the street address of the creditor, and consequent unperfection, as a matter of law. Strevell-Paterson Finance Co. v. May, *supra*, is very similar to the present case. In that case the defendant had executed an instrument entitled a chattel mortgage in favor of the plaintiff, and plaintiff's address did not appear on the instrument, nor did plaintiff sign it. The court held that where the instrument was denominated a chattel mortgage and was executed by the buyer and recorded, and when the seller's address did not appear on the instrument, said instrument was then defective and did not perfect the seller's security interest. The court reasoned that if the secured party's address did not appear, it would be an undue burden on the person seeking such information to find him. A similar result was reached in the case of In re Smith, 205 F. Supp. 27 (Pa., 1962), which however involved the lack of the debtor's address from the financing statement. The court held that this was not a substantial compliance

with the formal requirements of the code. Other cases suggest in dicta they would follow that result. See, In re Childress, 6 U. C. C. Rptng. Serv. 549 (U. S. D. C., E. D. Tenn., 1969); In re Raymond F. Sargent, Inc., 8 U. C. C. Rptng. Serv. 583 (U. S. D. C., D. Me., 1970). Of special interest is the case of Burlington Nat. Bank v. Strauss, 50 Wis. 2d 270, 184 N. W. 2d 122 (1971), in which the Supreme Court of Wisconsin held that although the creditor's signature appeared in the body of the installment conditional sales notes securing debtor's purchases of cattle from creditor, where notes only had name of town after name of creditor, who in fact lived outside the town, information contained in notes was not sufficient to substantially comply with the statute setting forth formal requisites of financing statements; and thus creditor did not perfect its security interest by filing the notes, and was not entitled to priority protection against the after-acquired clause of security instrument of bank which had made loan to debtor, even if bank might have, in fact, known of creditor, his identity, and residence, and was not mislead. In its opinion the court stated: "However, we do not think that Strauss' name without an address fulfills the second purpose of identification. In Strevell the lack of signature was held not to be a fatal defect but the lack of an address was because the filing system provided by the code could not perform its intended function of identifying the secured debtor. It is true, three of the notes had the word 'Harvard' after Strauss' name and were dated in Harvard, Illinois. However unless Harvard, Illinois, is sufficiently small or Strauss is sufficiently well known, two points not covered by the record, a creditor located outside of Harvard, Illinois, would have a difficult task trying to contact Strauss for information concerning his security interest. Strauss in fact did not live in Harvard but on rural route two. An address must be sufficiently complete to enable a

prudent man using reasonable care to locate the secured party. We hold the information contained in the conditional sales notes is not sufficient to substantially comply with sec. 409.402 (1) (a), Stats., because it does not fulfill the purposes of the information and notice contemplated by that section. It is immaterial that the bank may have, in fact, known of Strauss, his identity and residence and was not misled; the financing statements are deficient."

On the other hand, other jurisdictions have taken a more liberal view of the matter and have held that deficiencies in the address of the secured creditor contained in the financing statement, or complete lack of such address, are not necessarily fatal. In the case of In re Bengston, 3 U. C. C. Rptng. Serv. 283 (U. S. D. C., D. Conn., 1965), the court held that since the purpose of the requirement of the address of the secured party in the financing statement is to give an address from which information concerning the security interest may be obtained, the address of the secured company given as "Coca-Cola Bottling Co., East Hartford, Conn.," was not insufficient, there being only one company of that name in East Hartford or in the telephone directory of greater Hartford so that no creditor would have difficulty in reaching the secured party and no reasonable person would be "seriously misled" by the address given. In Silver v. Gulf City Body & Trailer Works, 432 F. 2d 992 (1972), the court held that under sections of Alabama's Uniform Commercial Code mandating liberal interpretation and uniformity among states, the address "Box 2146, Fort Worth, Texas" as found on the financing statement, was in substantial compliance with the code provision that a financing statement is sufficient if it gives an address of the secured party from which information concerning the secured interest may be obtained. In its opinion the court noted: "An examination of this law quickly discloses

the annals of Uniform Commercial Code litigation are bare of any challenge to the sufficiency of an address with such postal cogency." The court also stated: "No creditor would have any difficulty in reaching the secured party with the information contained in the financing statement. No reasonable person would be 'seriously misled' by this address of the secured party." The court also held that since the record did not disclose there was more than one post office box No. 2146 in Fort Worth, Texas, the address in that case was an equally efficient direction to one interested in acquiring additional details.

The case of Rooney v. Mason, 394 F. 2d 250 (1968), has gone further than any other case in the direction of liberality in sustaining the validity of a financing statement. In that case a "Notice of Agreement" to sell a drugstore was filed as a financing statement under the Wyoming Uniform Commercial Code. Neither the address of the debtor or creditor appeared on the document. The court stated: "The Wyoming Courts might reasonably hold that a creditor examining the records is put on notice to make further inquiry upon seeing the notice of the agreement. Further, the fact that the addresses of both parties were readily available and known by virtually all creditors could reasonably be found sufficient to make unnecessary the listing of the addresses of the parties." In its opinion the court stated: "The court took as established that Thomas Mason was a resident of Cheyenne, Wyoming, and had lived there and been in business in Cheyenne for many years prior to and continuously since December 31, 1962, and had maintained both telephone and Cheyenne City Directory listing for both his residence and business addresses during all the above time; that he knew and dealt with the suppliers of inventory items for the drugstore while operated by him, the same suppliers who were listed by the bankrupts as creditors in their schedules to

their petition in bankruptcy and further that these creditors knew or could readily have known the address of Thomas F. Mason. The court further stated that from December 31, 1962, the creditors listed by the Johnsons knew the business and home addresses of James and Dolores Johnson and were in continual contact with them at such addresses." In the Rooney case the court also cited and discussed Strevell-Paterson Finance Co. v. May, *supra,* and In re Smith, *supra,* and made the following comment with respect to them: "Either of the courts might have created an exception had, as in the present case, the addresses been readily available and known to all creditors."

In the case of Silver v. Gulf City Body & Trailer Works, *supra,* the court commented on the Rooney case stating: "The overall thrust of Rooney and other cases in this area is to uphold validity if sufficient information can reasonably be gleaned from the filing to enable those desiring to reach the secured party to do so." See, also, In re Bennett, 6 U. C. C. Rptng. Serv. 995 (U. S. D. C., W. D. Mich., 1969), which discusses the Rooney case and contains an analysis of the conflicting lines of decisions.

We think it is clear from the cases above cited that the question of the sufficiency of the address of the secured creditor in a financing statement should be a question of fact rather than a question of law. Justice would so dictate. An address consisting of the city and state only might well suffice in one set of circumstances, and yet be totally insufficient under another set of facts. In the instant case there is nothing in the facts stipulated between the parties, or any other evidence, touching upon this problem. There is nothing in the record from which the court can ascertain whether the secured creditor in this case, Central States Dairy Cooperative, was or was not listed in the Omaha city directory or in the Omaha telephone book, or for

that matter whether any of the interested parties had knowledge of the address of the secured creditor, or any other information which would have facilitated contacting said secured creditor. In the absence of such evidence, the court must conclude that the address of the secured creditor in this case was insufficient to comply with the requirements of section 9-402, U. C. C.

The defendant has also contended that the financing statement was defective because of the absence of the creditor's signature. In view of the finding of the court with reference to the insufficiency of creditor's address, it is unnecessary for us to decide this point. We note in passing, however, the definition of "signed" in section 1-201 (39), U. C. C. It is there stated that: " 'Signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing." Assuming, without deciding, that the typewritten name of the mortgagee in the chattel mortgage involved in this case might possibly suffice as a signature of the creditor, nevertheless, there is nothing in the facts stipulated by the parties, or in the record, which in any way throws any light on the intention of the secured creditor to use his typed name as mortgagee in the financing statement as his signature in compliance with the requirements of the statute. A similar situation was involved in the case of Maine League Federal Credit Union v. Atlantic Motors, 250 A. 2d 497 (Me., 1969). The facts in that case were even stronger than those in the instant case, but the court there held that the case did not come within the bounds of an intended use of a symbol as a signature, stating: "The question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing."

We conclude that the trial court was correct in its decision in this case and we affirm that decision.

AFFIRMED.

BERNARD H. EITING, APPELLANT, V. ELDON GODDING ET AL., APPELLEES.

214 N. W. 2d 241

Filed January 11, 1974. No. 39046.

1. **Evidence: Witnesses: Trial: Injury.** In personal injury cases where the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary.
2. ———: ———: ———: ———. Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries.
3. ———: ———: ———: ———. When symptoms from which personal injury may be inferred are subjective only, medical testimony is required.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

Johnston, Grossman & Johnston, for appellant.

Nelson, Harding, Marchetti, Leonard & Tate and Richard H. Williams, for appellees.

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

MCCOWN, J.

This is an action for damages resulting from an automobile accident. The District Court directed a verdict for the plaintiff for $1,190.90 for damages to plaintiff's automobile and $35 for a designated medical bill. The court directed a verdict for the defendants on all other elements of damages. Plaintiff has appealed.

The accident here occurred on October 29, 1969, at about 8:45 a.m., on a rainy morning. Plaintiff was proceeding east and defendant driver was proceeding west on U. S. Highway No. 136 at a point some distance east

of Hebron, Nebraska. The plaintiff observed defendant's car "fishtailing" as it approached. Plaintiff reduced his speed to 15 to 18 miles per hour, but was unable to get out of the way because of a guard rail along that portion of the highway. The left rear of defendant's car collided with the left rear of plaintiff's car and plaintiff's car spun across the road and the left front struck the guard rail on the opposite side of the highway.

Following the accident, plaintiff felt somewhat "woozy" but had no sensation of pain. He started his car and backed it out of the way. He had no cuts, bruises, or contusions. He told defendant he didn't have any broken bones and "didn't feel too bad." Plaintiff told the investigating deputy sheriff that he was not injured.

Plaintiff testified that he noticed some pain and stiffness about 45 to 50 minutes after the accident and began to have a headache some 3 hours later. He was examined by Dr. Hanigan, the family doctor, the following day and X-rays were taken. Two or three days after the accident he began to feel pain of sufficient severity to cause him difficulty in sleeping. The pain was in his head, neck, and back, extending to his left leg. He saw Dr. Hanigan again in November and was referred to Dr. Getscher, an orthopedic specialist. Dr. Getscher gave him an injection and a prescription which he had filled only once. These three occasions were the only times plaintiff consulted a doctor in the few weeks following the accident and he was not told by either doctor to return for further treatment. Plaintiff received some treatment from a chiropractor in April or May of 1972, some 2½ years later. No medical evidence or testimony from any doctor was received at the time of trial.

Plaintiff testified that the pain in his neck continued for almost a year. He still had some headaches at the

time of trial, movement of his neck was limited, and he experienced difficulty on steps. He became extremely nervous, jumpy, and short tempered. He also testified that he could no longer carry on some physical activities which he had performed prior to the accident.

Plaintiff took a leave of absence from work for about a month following the accident. His employment was later terminated. Plaintiff claimed the termination was due to his inability to perform the job because of his physical condition following the accident. The division manager of plaintiff's employer testified that plaintiff was discharged for failure to make required reports.

Plaintiff's sister, a retired nurse, who, with her husband, shared a duplex residence with the plaintiff and his daughter, testified that plaintiff appeared to be in shock and in pain when she saw him on the day of the accident. She also testified that she had observed certain changes in her brother's physical activities and conduct since the accident. This testimony was in the nature of a lay witness and she was not asked to express any expert or professional opinion as to any causal relationship between the accident and the conditions she observed in her brother.

The District Court found as a matter of law that the defendant was liable for any damages proximately resulting from the accident and directed a verdict for plaintiff in the amount of $1,190.90 for property damage, towing, and storage, and for $35 for Dr. Hanigan's examination and X-rays on the day following the accident. The court also directed a verdict for defendant on all other elements of damages alleged by plaintiff on the ground that there was no evidence that any such other damages were a proximate result of the accident.

The pivotal issue on this appeal is whether or not expert medical testimony is required to establish the causal connection between the injuries allegedly sustained by the plaintiff and the negligence of the defend-

ant. In that connection it should be noted that in this case there is no evidence of any obvious injury, such as a scratch, cut, bump, or bruise. The evidence of personal injury is essentially subjective, grounded almost exclusively on the testimony of plaintiff.

The burden rests upon the plaintiff in an action based upon alleged negligence to prove by a preponderance of the evidence each essential element of the claim he asserts. This includes proof that the negligence charged was the proximate cause of the injury alleged. Fulmer v. United States, 133 F. Supp. 775.

In personal injury cases where the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary. Clark v. Village of Hemingford, 147 Neb. 1044, 26 N. W. 2d 15.

Courts generally limit such cases to those where the causal connection is clearly apparent from the injury itself and the circumstances surrounding it or where the cause of the injury relates to matters of common experience, knowledge, and observation of laymen. See Wilhelm v. State Traffic Safety Commission, 230 Md. 91, 185 A. 2d 715.

Evidence of an obvious wound, cut, or bruise, or an immediate bleeding, would justify an inference by a layman that the injury was caused by the accident. See Bertram v. Wunning (Mo. App.), 385 S. W. 2d 803.

This court has also noted the distinction between subjective and objective evidence of injury. In Yount v. Seager, 181 Neb. 665, 150 N. W. 2d 245, we said: "The question of the necessity of expert evidence to warrant submission to the jury of the issue as to the permanency of an injury or as to future pain or suffering, depends, in a large measure, upon the character of the injury involved, whether it is subjective or objective."

Where the claimed injuries are of such a character

as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. See Howard v. Mansell (Okla.), 430 P. 2d 9. When symptoms from which personal injury may be inferred are subjective only, medical testimony is required. Daniels v. Bloomquist, 258 Iowa 301, 138 N. W. 2d 868. There was no medical evidence to support the required causal connection here. The evidence is therefore insufficient to establish that the personal injuries alleged to have been suffered by the plaintiff were caused by the accident. The medical expense incurred for examination and X-rays on the day following the accident was sufficiently connected and was allowable.

The judgment of the District Court is affirmed.

AFFIRMED.

SIEGFRIED RITZAU, DOING BUSINESS AS SIEGFRIED RITZAU PAINTING AND DECORATING AND ALSO KNOWN AS SIEGFRIED RITZAU PAINTING-DECORATING, APPELLEE AND CROSS-APPELLANT, V. WIEBE CONSTRUCTION CO., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, IMPLEADED WITH HOUSING AUTHORITY OF THE CITY OF OMAHA ET AL., APPELLEES AND CROSS-APPELLEES.

214 N. W. 2d 244

Filed January 11, 1974. No. 39059.

1. **Trial: Evidence.** It is the duty of the trial court to rule upon the admissibility of evidentiary facts when they are offered in evidence. Their relevancy should then appear or the court should be informed as to the connection in which they will become relevant.
2. **Trial: Evidence: Work and Labor.** There being no specific

standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced.

3. **Trial: Evidence: Work and Labor: Witnesses.** The opinion of a qualified witness as to the value of services is admissible to prove such value when his testimony will aid the jury.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Wayne J. Mark of Fraser, Stryker, Marshall & Veach, for appellant.

Richard J. Coenen and Charles L. Titus of Bradford & Bloch, for appellee Ritzau.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

COLWELL, District Judge.

This is an action by plaintiff-appellee, Siegfried Ritzau, to recover from defendant Wiebe Construction Co., Inc., the reasonable value of labor performed and materials furnished at the oral request of that defendant, all in addition to the terms of and consideration for a written contract between those same parties. Plaintiff also claims prejudgment interest and attorney's fees. The St. Paul Fire and Marine Insurance Company was a defendant in the original pleadings and trial. All defendants answered by their general denial. On trial, judgment was entered for plaintiff against defendant Wiebe on a jury verdict for $16,326.25. Wiebe appeals; we affirm. The trial court denied plaintiff's motion for prejudgment interest and attorney's fees. Plaintiff cross-appeals. We affirm.

In 1968, the Housing Authority of the City of Omaha contracted with Wiebe as general contractor to build two separate 13-story housing facilities for the elderly in Omaha, Nebraska. Wiebe as principal and the St. Paul Fire and Marine Insurance Company as surety executed

a performance bond as provided by section 52-118, R. R. S. 1943. Subsequently plaintiff, as a subcontractor, undertook to paint the interior of the two buildings, except ceilings and kitchen cabinets, pursuant to a written contract with Wiebe for the agreed consideration of $60,000. Plaintiff commenced work in January or February 1970. On May 23, 1970, Paul Knoble as the clerk of the works, who supervised the construction generally for the Housing Authority, prepared a "punch list" which detailed the construction errors and omissions to be corrected by Wiebe as the general contractor before completion and acceptance. Wiebe, in turn, related the punch list to his respective subcontractors, who had the duties of compliance. There is a conflict in the evidence as to when the plaintiff completed his subcontract. Plaintiff asserts it was performed on or before June 12, 1970. Wiebe contends it was performed in October 1970, except $300 in items never performed or furnished and that all work done and materials furnished by plaintiff were in performance of the written contract.

Wiebe does not claim error in the submission to the jury of the questions of an oral contract between the parties and the implied promise to pay reasonable value for the work and materials. The jury could find from the evidence that between June 1 and June 10, 1970, Wiebe orally requested plaintiff to repaint a part of the interior of the two buildings required because of drywall construction repairs made by the drywall contractor, which made the painting on those surfaces unacceptable, after plaintiff had painted the original drywall surfaces; that there was an implied promise of Wiebe to pay plaintiff the reasonable value for this extra work and material; that plaintiff did perform extra work and furnish added material as requested in addition to the provisions of the written contract; and that plaintiff did repaint about 30 percent of the two buildings.

Wiebe contends it was error for the trial judge to ad-

mit into evidence over objections certain of plaintiff's payroll records covering the period of June 12 to November 1970, claiming the evidence did not conform to section 25-12,109, R. S. Supp., 1972, of the Uniform Business Records as Evidence Act. The record shows that when these payroll records were offered, Wiebe did not object to the offer for the reason now asserted, but, rather, objected in substance that: (1) The records did not conform to the conditions of the general contract; (2) they were uncertified as required by the contract; and (3) they were copies and not the best evidence. The trial judge made proper inquiry as to the unavailability of the originals. Wiebe cannot now on appeal for the first time assert a new objection to the offer of the evidence. We find no prejudicial error in the ruling of the court. See, § 25-853, R. R. S. 1943; Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751.

When Wiebe offered the punch list on the direct examination of witness Knoble, plaintiff challenged the offer on the ground that the punch list related to the written contract and was not relevant. The objection was sustained. Wiebe urges this as prejudicial error. The punch list was in two volumes, exhibits 14 and 15, containing 218 legal-length typewritten pages and about 6,000 separate requirements for Wiebe's correction. The list specified areas and locations where the corrections were required, but no subcontractor was identified on the punch list by name therein or otherwise. At the time of the offer there was no direct evidence in the record connecting the punch list or any item therein with the issues. The court was not informed by Wiebe's counsel of any proposed connection to be later offered to establish relevancy. To allow the punch list to be a part of the evidence at that time, without further foundation, would provide the jury with a source of speculation. "* * * it is the duty of the court to rule upon the admissibility of evidentiary facts when they are offered in

evidence, their relevancy should then appear or the court should be informed as to the connection in which they will become relevant; and where necessary, proper connecting proof should be made or offered, * * *." 1 Jones on Evidence (6th Ed.), § 4:60, p. 513. The trial court within its discretion properly denied admission of the exhibits into the record. The exhibits were not later reoffered. There was no prejudice to Wiebe. See § 25-853, R. R. S. 1943.

The last claim of error made by Wiebe is that the evidence was insufficient to support a jury verdict for damages with reasonable certainty. He argues that in this case it was necessary for plaintiff to present evidence with particularity of the number of labor hours spent and the cost of materials used. Plaintiff's proof on damages was supported by evidence of payroll records; purchase orders of material; and a statement and claim made to Wiebe for labor and material dated September 16, 1970, for $16,326.25 for submission by Wiebe to Omaha Housing Authority. Plaintiff testified as to the reasonable value of the labor and material based upon his 18 years of experience in that trade. Donald A. Nickels and Jack Jones, foreman for plaintiff on the two building sites, gave their opinion as to the reasonable value of the labor performed and materials furnished based upon their experience in that line of work. The evidence also includes a letter dated October 23, 1970, from Wiebe Construction Company, signed by Russell E. Cook, project engineer, and sent to the Housing Authority of the City of Omaha, as follows:

"Re: Claim for Additional Painting

Dear Lee:

Please accept this as our Claim in the amount of $16,351.00 for painting required over and above the contract requirements. The breakdown of this amount is as follows:

Ritzau Claim	$15,425.00
Markup	926.00
TOTAL	$16,351.00

A copy of Ritzau Painting's letter dated September 16, 1970, is enclosed to substantiate the above information. Your early action on this matter will be appreciated."

Witness Cook explained that the item of "Markup $926.00" represented Wiebe's 6 percent charge for handling and presenting plaintiff's claim to the Omaha Housing Authority.

"There being no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced." Sorensen Constr. Co. v. Broyhill, 165 Neb. 397, 85 N. W. 2d 898. "The opinion of a qualified witness as to the value of the services is admissable to prove such value when his testimony will aid the jury. * * *." Comstock v. Evans, 159 Neb. 739, 68 N. W. 2d 351. There was no error in submitting this issue to the jury, and the record supports the verdict and judgment of $16,326.25 for plaintiff against defendant Wiebe.

Plaintiff's cause of action against Wiebe was founded in quantum meruit on his claim for the fair and reasonable value of labor performed and materials furnished. On the evidence and the record, there was a reasonable controversy as to plaintiff's right to recover and the amount thereof. The plaintiff's claim was unliquidated. The denial of plaintiff's motion for prejudgment interest was correct. See Lundt v. Parsons Constr. Co., 181 Neb. 609, 150 N. W. 2d 108.

Plaintiff urges that he should be allowed a reasonable attorney's fee as provided in section 44-359, R. S. Supp., 1972, and the terms of the performance bond given by Wiebe as principal to the Omaha Housing Authority. Section 44-359, R. S. Supp., 1972, provides: "In all cases

where the beneficiary, or other person entitled thereto, brings an action *upon any type of insurance policy* * * * against any company, person or association doing business in this state, the court, *upon rendering judgment against such company, person or association,* shall allow the plaintiff a reasonable sum as an attorney's fee. * * *. * * * the appellate court shall likewise allow a reasonable sum as an attorney's fee * * *." (Emphasis supplied.) Here the issue of the liability of the defendant St. Paul Fire and Marine Insurance Company, Inc., as surety on the performance bond was not presented to the jury by the court's instructions. The jury verdict and the judgment entered by the court were against only defendant Wiebe. The trial court's denial of plaintiff's motion for an attorney's fee was correct and no fees are recoverable in this court.

AFFIRMED.

CLINTON, J., dissents.

GRAND ISLAND HOTEL CORPORATION, A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. SECOND ISLAND DEVELOPMENT COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLEE, BOSS HOTELS COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT.

214 N. W. 2d 253

Filed January 11, 1974. No. 39084.

1. **Conveyances: Acknowledgments: Records: Property.** It is not necessary for a lease of nonhomestead land to be acknowledged in order for it to be good as between the parties. Neither is it necessary for a lease to be recorded to take effect against a subsequent purchaser with notice.
2. **Alteration of Instruments.** Where a written instrument shows on its face a material and obvious alteration, the presumption of law is that such alteration was made before the instrument was finally executed and delivered.
3. **Landlord and Tenant: Notice: Property.** A purchaser is charged with notice of a tenant's rights when the tenant is in actual possession of the real estate.

4. ———: ———: ———. Possession of the land is notice to the world of the possessor's rights therein and of all possessory interests of which inquiry of the possessor would elicit knowledge.
5. **Landlord and Tenant: Notice: Words and Phrases: Conveyances: Covenants.** A lessee of real estate under a written lease for a term of 25 years, notice of which is duly recorded, is an "assignee" within the meaning of section 76-208, R. R. S. 1943, and may enforce covenants of title involving possessory rights contained in a prior conveyance of the real estate to his lessor.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded with directions.

Luebs, Tracy, Huebner, Dowding & Beltzer and D. Steven Leininger, for appellant.

Gerald B. Beuchler, for appellee Boss Hotels Co.

Cunningham, Blackburn & Von Seggern, for appellee Second Island Development Co.

Heard before WHITE, C. J., MCCOWN, and NEWTON, JJ., and LYNCH and WARREN, District Judges.

MCCOWN, J.

This is an action by plaintiff, Grand Island Hotel Corporation, against the defendants, Boss Hotels Company and Second Island Development Company, to recover the cost of acquiring the outstanding leasehold interest of a prior lessee of a portion of the premises identified as the Yancey Hotel in Grand Island, Nebraska. Plaintiff's cause of action is based upon breach of covenants under a lease and a warranty deed. The District Court dismissed plaintiff's causes of action against both defendants. Plaintiff has appealed and defendant, Boss Hotels Company, has cross-appealed.

Most of the facts are stipulated. The defendant, Boss Hotels Company, for some years owned the property in Grand Island, Nebraska, commonly referred to as the Yancey Hotel. Boss sold the hotel property to the de-

fendant, Second Island Development Company, and on June 30, 1968, executed a warranty deed to the property naming Second Island as grantee. The deed contained standard covenants under which Boss, as grantor, covenanted "with the grantee and with grantee's heirs and assigns that grantor is lawfully seised of said premises; that they are free from encumbrance (except two designated mortgages); that grantor has good right and lawful authority to convey the same; and that grantor warrants and will defend the title to said premises against the lawful claims of all persons whosoever."

The plaintiff, Grand Island Corporation, commenced operation of the Yancey Hotel on July 1, 1968, under an arrangement with Second Island Development Company and Boss did not operate the hotel for any purpose after July 1, 1968.

On April 30, 1969, Second Island, as lessor, executed a written lease with Grand Island, as lessee, covering the entire Yancey Hotel property. The lease agreement provided that it was retroactive to the 1st day of July 1968, and the lease was for a term of 25 years ending June 30, 1993.

Second Island, as grantor, "demised and leased" the real estate described. The habendum clause covered the buildings and improvements and "the rights, privileges and appurtenances thereunto belonging or appertaining * * *." The lease agreement contained no specific covenant or warranty of quiet enjoyment by the lessor. It did contain a provision that "Lessee has examined the demised premises and agrees that no statement, representation, or promise with reference to the demised premises has been made that is not contained in this instrument."

In December 1961, while it was the owner and operator of the Yancey Hotel, the defendant, Boss Hotels Company, as lessor, had executed a written lease with

Mrs. Vera Coons, as lessee, covering some space in the Yancey Hotel. The leased portion was on the street floor level of the Yancey Hotel building and Mrs. Coons owned and operated a beauty shop on these premises. She continued to own and operate the beauty shop and was in possession of the premises at all times relevant here. Mrs. Coons' lease with Boss commenced on January 1, 1962, and was for a period of 10 years. The lease was not recorded in the office of the register of deeds of Hall County.

The Coons lease was prepared by Boss. It was on a form containing 31 printed paragraphs, and some typed additions. Three of the printed paragraphs and a portion of a fourth had been deleted by lining through the printed language. Paragraph No. 12 was one of these. It provided: "In the event of the sale of said property, or if possession thereof shall be required for the purpose of more permanently improving, altering or remodeling the building on said premises or any part thereof, or if possession shall be required so as to enable lessor to lease said premises for a term of more than five years or in case said premises shall be condemned for public purposes, then lessee agrees to vacate and surrender possession of said premises within thirty (30) days after notice in writing to quit."

Vera Coons' attorney testified that the deletions had been recommended by him previously, and that the deletions were on both copies of the lease at the time Mrs. Coons signed it. The officer of Boss Hotels who signed two copies of the lease in Des Moines, Iowa, testified that he did not make the deletions and that they were not made in his presence. Mrs. Coons' copy of the lease was introduced in evidence. Boss did not produce any other copy. The secretary of Boss Hotels Company testified that he was unable to find its copy of the lease or anything pertaining to it.

Prior to May 1, 1969, although Mrs. Coons was in

possession, neither the plaintiff nor the defendant, Second Island, had actual knowledge of the lease from Boss to Vera Coons. Plaintiff did not make any inquiries of Vera Coons as to the conditions of her occupancy prior to April 30, 1969. After plaintiff discovered the written lease, Vera Coons refused to move her beauty shop on demand based upon her written lease agreement with Boss. Plaintiff was kept out of possession until an agreement was reached between Vera Coons and the plaintiff to move the beauty shop to a new location in the basement of the hotel in the summer of 1969. After the lease to Vera Coons was discovered by defendant Second Island and the plaintiff, demand was made by them on the defendant, Boss Hotels Company, to pay the cost of purchasing the lease and defendant Boss refused. Thereafter, plaintiff expended a total sum of $6,998.40 to remodel space in the basement of the hotel and to move Vera Coons and relocate her business. It is stipulated that the cost was fair and reasonable and that because remodeling and renovation of the hotel had begun, substantially greater expense would have been required to permit the beauty shop to remain in its former location. It was also stipulated that in the event of a judgment in favor of plaintiff and against the defendant Boss, the amount should be $6,998.40.

A jury was waived and the case was tried to the court. The District Court found that the lease agreement between defendant Boss Hotels Company and Vera Coons contained no recordable legal description; was not acknowledged and was not recorded or recordable; and was void as to defendant Second Island Development Company. The court also found that plaintiff was on notice that Vera Coons was in possession of a portion of the premises under some claim of right; that notwithstanding this fact, plaintiff accepted a lease agreement which contains no provisions as to tenants

in possession and provides no recourse for plaintiff. Based on those findings, the court found the plaintiff had no cause of action against the defendants or either of them and dismissed the action against both.

A critical foundation issue here is whether or not the lease of the beauty shop premises to Mrs. Coons was a valid subsisting 10-year lease and therefore paramount to the interests of both plaintiff and Second Island, and also whether or not the deleted lease provision authorizing its termination on 30-days written notice was effective. The District Court made no specific finding as to the validity or provisions of this lease as between the parties to it, but found only that it had not been recorded and was not recordable because of a lack of recordable legal description and an acknowledgement, and for those reasons found it void as to Second Island. It was not necessary for the lease to be acknowledged in order for it to be good as between the parties. Martin v. Martin, 76 Neb. 335, 107 N. W. 580. Neither was it necessary for the lease to be recorded to take effect against a subsequent purchaser with notice. See § 76-238, R. R. S. 1943.

The facts as to the Coons lease are persuasive and the evidence is not in substantial dispute except as to the deleted portion of paragraph No. 12. The evidence establishes that the signatures of both parties are authentic and that the term of the lease was for 10 years beginning January 1, 1962. The only issue which is inferentially in conflict is whether or not the 30-day termination clause in event of a sale had been deleted before or after the lease was executed and delivered. On that score, the evidence by Mrs. Coons' attorney is uncontradicted that the deletion had been made at the time Mrs. Coons executed the lease copies. The evidence of the corporate officer who executed the lease for Boss was that at the time he signed the lease he did not make the deletions nor were they made in his

presence and that he did not know who made them. He did not testify as to whether Mrs. Coons' signature was on the lease copies at the time he signed them or not. He did testify that under general procedure of Boss Hotels Company a lease would ordinarily be signed by the lessee first and then returned to Boss for the lessor's signature. He also testified that the two copies he signed were forwarded to the manager of the Yancey Hotel in Grand Island and that he was authorized to deliver a copy to Mrs. Coons. Objections were sustained to a question as to whether the manager of the hotel had any authority to make any alterations. No copy of the lease without the deletions was ever produced by anyone.

Where a written instrument shows on its face a material and obvious alteration, the presumption of law is that such alteration was made before the instrument was finally executed and delivered. Collins v. Hughes & Riddle, 134 Neb. 380, 278 N. W. 888. In the absence of any evidence, that presumption would compel a finding that the deletion was made before the lease was finally executed and delivered. The evidence here compels such a finding beyond serious question, and establishes the validity of the paramount interest of Mrs. Coons in the beauty shop premises.

Although the 10-year lease of the beauty shop was not recorded, neither the plaintiff nor Second Island can be treated as purchasers in good faith without notice under the recording statutes in view of the actual possession and operation of the beauty shop by Mrs. Coons at all the times relevant here. A purchaser is charged with notice of a tenant's right when the latter is in actual possession of the real estate at the time it is sold. Ogden v. Garrison, 82 Neb. 302, 117 N. W. 714. Possession of the land is notice to the world of the possessor's rights therein and of all possessory interests of which inquiry of the possessor would elicit knowledge.

Blum v. Voss, 139 Neb. 233, 297 N. W. 84.

Under the facts here, the lease of the beauty shop to Mrs. Coons created a legal interest in that portion of the Yancey Hotel property paramount to the interests of either the plaintiff or Second Island. Section 76-207, R. R. S. 1943, provides: "Covenants of quiet enjoyment and covenants of warranty in conveyances of real property may be breached by an eviction, actual or constructive, by reason of the hostile assertion of a paramount title holder. A constructive eviction occurs in the following situations: (1) Where the covenantee is kept out of possession by the paramount title holder; (2) where the covenantee surrenders possession to the paramount title holder; and (3) where the covenantee in order to retain possession is forced to and buys off the paramount title holder."

The covenants of warranty and title contained in the deed from Boss Hotels Company to Second Island Development Company were breached by the existence of the paramount interest of Mrs. Coons under the beauty shop lease. The trial court inferentially determined that even though Second Island might have an action against Boss for breach of the covenants in the deed, the plaintiff had no cause of action against Boss since it was not a party to the deed. The trial court also determined that plaintiff's lease agreement with Second Island contained no provisions as to tenants in possession and provided no recourse for plaintiff against Second Island. The execution of a lease of real estate ordinarily raises an implied covenant that the lessee shall have the quiet and peaceable possession and enjoyment of the leased premises as against anyone asserting a title paramount to the lessor unless there is some express covenant of a more limited character inconsistent with such a covenant. Nevertheless, that issue becomes immaterial if the plaintiff is in position to enforce the covenants contained in the deed by Boss to Second Island.

At common law, a breach of covenants for title occurring at the time of the conveyance was personal to the grantee and conveyed no right of action to a subsequent purchaser. See Bryant v. Mosher, 96 Neb. 555, 148 N. W. 329. That rule was changed by statute in Nebraska in 1923. Section 76-208, R. R. S. 1943, provides in part: "Unless such intention is expressly negatived by the language in the instrument, all covenants for title in conveyances of real property, including covenants of seisin, right to convey, freedom from encumbrances, quiet enjoyment, and warranty, when made with the grantee, run with the land and are enforceable by any assignee thereof, immediate or remote, by a suit in his own name; Provided, however, that the ultimate damage occasioned by a breach of the covenant on which suit is brought has not occurred prior to the assignment to such assignee."

The critical issue here is whether a lessee under a 25-year lease from the grantee is an "assignee" within the meaning of the statute. The defendant Boss contends that covenants such as this run only with the legal title to the land and relies upon the case of Wallace v. Pereles, 109 Wis. 316, 85 N. W. 371. In that case the court held that the owner of the equitable interest in the land, who lacked any possessory interest, could not convey such a possessory interest. The court therefore held that grantees from her could not enforce any real covenant against her grantor. The case is not applicable here.

The case of Brockmeyer v. Sanitary District of Chicago, 118 Ill. App. 49, is in point. In that case the plaintiff was a lessee and the defendant contended that plaintiff was not a party to the deed and could not sue with respect to a duty due under the deed. The court held that the plaintiff was an assignee of the land for the benefit of which the covenant was made and therefore a privy in estate and said: "The plaintiff, being

lessee of the land, is an assignee, within the meaning of the law."

Black's law dictionary defines an assignment as: "A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein."

The breach of the covenants involved in this case directly involved the possessory interests and title. The whole of the possessory interests were transferred by Second Island to the plaintiff for a period of 25 years. Under the lease agreement the lessor "demised and leased" the real estate, and the habendum clause covered the real estate and improvements "and the rights, privileges and appurtenances thereunto belonging or appertaining * * * for and during the term of 25 years * * *." There can be no doubt that plaintiff held the whole of the possessory title and interests in the Yancey Hotel property. We hold that a lessee of real estate under a written lease for a term of 25 years, notice of which is duly recorded, is an "assignee" within the meaning of section 76-208, R. R. S. 1943, and may enforce covenants of title involving possessory rights contained in a prior conveyance of the real estate to his lessor.

The defendant Boss Hotels Company in its contingent cross-appeal contends that its special appearance should have been sustained. It argues that it was not "doing business" in the state at the time this suit was filed. The cause of action here arose from "having an interest in, using or possessing real property in this state" and the covenants were made as to its property at a time when Boss was transacting business in this state. See § 25-536, R. S. Supp., 1972. The action of the District Court in overruling the special appearance was correct.

The judgment of the District Court is reversed and the cause remanded with directions to enter judgment in favor of plaintiff and against the defendant Boss

Hotels Company, a corporation, in the sum of $6,998.40.
REVERSED AND REMANDED WITH DIRECTIONS.

JACK W. HUBER, APPELLEE, V. CORNHUSKER PAVING CO., A CORPORATION, ET AL., APPELLANTS.

214 N. W. 2d 269
Filed January 11, 1974. No. 39095.

1. **Contracts: Highways: Signs.** It is the duty of a contractor, engaged in construction work on a public highway, to erect barricades or signs, or otherwise adequately warn the traveling public if the highway is dangerous to travel.
2. **Negligence: Highways: Signs.** It is elementary that the public may assume that those charged with the maintenance of highways have performed their duty.
3. **Negligence: Highways: Signs: Trial.** A failure to so warn the traveling public of a dangerous condition caused by the contractor on a highway is continuing negligence as distinguished from a condition, and if reasonable minds could conclude from the evidence that such negligence proximately caused an accident, then the issue should be submitted to a jury for its determination.
4. **Damages: Trial.** Where the recovery is not a mere matter of computation, it will not be interfered with unless so excessive or so grossly inadequate as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury, or unless it appears to have been based on an oversight, mistake, misconception, or misrepresentation, or on a consideration of elements not within the scope of the action.

Appeal from the District Court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Stephen A. Davis of Cassem, Tierney, Adams & Henatsch, for appellants.

Ronald K. Parsonage of Burbridge, Burbridge & Parsonage, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ, and ZEILINGER and BURKE, District Judges.

BURKE, District Judge.

This is an appeal from a jury verdict awarding plaintiff $20,000 in damages for personal injuries allegedly suffered in consequence of defendants' negligence.

The injuries compensated for were sustained when plaintiff drove his automobile into an excavation or cut made in the highway by the defendants for the purpose of installing a sewer.

The following facts are not in serious dispute.

The accident occurred on September 24, 1970, at approximately 5:30 in the evening just east of the intersection of 120th and Fort Streets in Douglas County. Fort Street is a two-lane highway running east and west and 120th Street intersects Fort Street and runs north and south. The speed limit on Fort Street is 65 miles per hour.

Approximately 1 week prior to the date of the accident the defendants made a cut across Fort Street at a location approximately 10 to 15 feet east of 120th Street. The cut across the pavement measured nearly 8 feet in its east-west dimension, and was 6 to 9 inches deep at the time of the accident.

There were no barricades, signs, or other warning devices on Fort Street within the mile to the west of the cut to warn the traveling public that the highway was dangerous to travel.

Immediately west of the intersection there were 6 sawhorse-type barricades in the ditch facing parallel with Fort Street approximately 10 feet south of the south edge of the Fort Street pavement. Immediately east of the intersection and in close proximity to the west edge of the cut, there were sawhorse-type barricades north and south of Fort Street. The plaintiff estimated the location of the sawhorses to be approximately 8 feet from the edges of the pavement.

The plaintiff was driving east on Fort Street at a speed of 50 miles per hour and was at a point approximately

300 feet west of the intersection when he noticed the sawhorse-type barricades positioned as described above. He testified that he first noticed the cut in the roadbed approximately 20 feet before reaching the intersection or at a distance of 55 to 60 feet. He applied his brakes but his automobile struck the east edge of the cut at a speed estimated at 30 to 35 miles per hour.

A witness who had driven the same road 3 days prior to plaintiff's accident in describing the cut and the pavement testified that: "It all kind of blended together, in together until you got on top of it."

The defendants do not find fault with any of the 42 instructions on the law given by the trial judge to the jury, but argue (1) that there was no evidence by which the jury could find that the defendants violated any duty owed to the plaintiff, and (2) that the plaintiff was guilty of contributory negligence sufficient to bar his recovery as a matter of law.

It is the duty of a contractor, engaged in construction work on a public highway, to erect barricades or signs, or otherwise adequately warn the traveling public if the highway is dangerous to travel. Bruno v. Gunnison Contractors, Inc., 176 Neb. 462, 126 N. W. 2d 477.

As we stated in Sharp v. Chicago, B. & Q. R. R. Co., 110 Neb. 34, 193 N. W. 150: "It is elementary that the public may assume that those who are charged with the maintenance of highways have performed their duty."

A failure to so warn the traveling public is continuing negligence as distinguished from a condition, and if reasonable minds could conclude from the evidence that such negligence proximately caused an accident, then the issue should be submitted to a jury for its determination. Johnson v. Metropolitan Utilities Dist., 176 Neb. 276, 125 N. W. 2d 708.

In Tutsch v. Omaha Structural Steel Works, 110 Neb. 585, 194 N. W. 731, we observed that: "A driver may expect to find obstructions at the side of the road, but can

hardly be called upon to anticipate an unguarded ditch across it."

In sum, under the facts of this case and under the prior decisions of this court, the issue of the primary negligence of the defendants and the issue of the contributory negligence of the plaintiff were properly submitted to the jury for its determination. See, Andelt v. County of Seward, 157 Neb. 527, 60 N. W. 2d 604; Thurow v. Schaeffer, 151 Neb. 651, 38 N. W. 2d 732.

Finally, the defendants argue that the verdict was exorbitant and appears to have been reached under the influence of passion and prejudice, and in disregard of the evidence and controlling rules of law.

In arriving at the amount of the award, prudent jurors could have believed the following testimony from lay and expert witnesses concerning the physical condition of the plaintiff:

That prior to the accident the plaintiff was a healthy male, age 56, and had been active athletically as a golfer and bowler; that he has not golfed or bowled since the date of the accident; that as a result of the accident he suffered soft tissue injuries to his neck and right shoulder which impaired the mobility of both and resulted in a frozen right shoulder; that several months after the accident the plaintiff was experiencing a loss of 60 degrees forward flexion and 70 degrees abduction on his right side when compared to the left; that during the 2-year period from the date of the accident to the date of trial the plaintiff suffered pain whenever movement of the arm reached the limitation of the restriction of the shoulder; that plaintiff was still experiencing difficulty and pain at the time of the trial; and that frozen shoulder patients "not only have pain, but they have a lot of pain because they use their arm and come up against the restrictions in the shoulder" and "sometimes these things take a long time to work out, and sometimes they never completely work out."

Where the recovery is not a mere matter of computation, it will not be interfered with unless so excessive or so grossly inadequate as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury, or unless it appears to have been based on an oversight, mistake, misconception, or misrepresentation, or on a consideration of elements not within the scope of the action. Yount v. Seager, 181 Neb. 665, 150 N. W. 2d 245.

The amount of the award, underpinned by expert medical evidence, resided chiefly within the jury's domain, an area into which we have but limited authority to intrude.

We find that the issue of damages was fairly and properly submitted to the jury and that there is not a soupcon of evidence to indicate that the jurors acted other than in accordance with their oath. The judgment of the District Court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARTYN CHARLES YOUNGSTROM, APPELLANT.
214 N. W. 2d 27

Filed January 11, 1974. No. 39109.

1. **Criminal Law: Indictments and Informations: Guilty Plea: Habitual Criminals: Trial.** Where an information charges former convictions which give rise to enhanced punishment under the habitual criminal statute, a plea of nolo contendere or guilty to the information confesses the prior convictions and no hearing for proof of the convictions is required under section 29-2221(2), R. S. Supp., 1972.
2. **Criminal Law: Habitual Criminals: Trial.** The fact that the previous offenses at the time of their commission and at the time of conviction thereof were felonies and have since been by statute reduced to misdemeanors will not preclude their use under the habitual criminal statute to enhance punishment.
3. **Criminal Law: Guilty Plea.** A finding of guilty will not be set aside for errors which are not prejudicial to the substantial rights of the defendant.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

T. Clement Gaughan and Paul M. Conley, 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.

CLINTON, J.

The defendant was charged in the District Court for Lancaster County with the felony offense of having possession of a forged instrument with intent to utter. The information further alleged that the defendant had been twice previously convicted of felony charges and had been sentenced thereon, and was therefore a habitual criminal. The defendant entered a plea of nolo contendere and a sentence of 10 to 12 years was imposed. He appeals. We affirm.

The defendant assigns as error and contends: (1) He was entitled to a separate hearing to determine whether he had been twice previously convicted and sentenced on felony charges. (2) The acts constituting the felonies of which he was convicted have since the convictions and previous to sentencing in this case been classified by the Legislature as misdemeanors and therefore the prior felony convictions should not be used to enhance punishment under the habitual criminal statute. (3) The trial court erred in not permitting him to withdraw his motion to vacate the sentence imposed on April 12, 1973, and to resentence.

We will treat the assignments in the order in which we have listed them.

The bill of exceptions discloses the defendant has at all times in these proceedings been represented by counsel. He first pled not guilty to a charge of possession of a forged $75 check with the intent to utter. Thereafter in

open court with the defendant and his counsel present, the State was granted leave to and did amend the information to allege in addition to the forgery charge: "... that on or about the 7th day of April, 1967, the said defendant, Martyn C. Youngstrom, was convicted of a crime, sentenced and committed to prison in the State of Nebraska for a term of not less than one year; that on or about the 18th day of November, 1969, the said defendant, Martyn C. Youngstrom, was convicted of a crime, sentenced and committed to prison in the State of Nebraska for a term of not less than one year; by which such convictions said defendant is deemed to be a habitual criminal." Thereafter, on the same day the amendment was allowed, the defendant withdrew his previous plea of not guilty. The record shows that previous to this withdrawal the defendant was advised as follows: ". . . do you understand in the event you enter a plea of guilty to this charge with the provision for the habitual criminal as included in the amended information that you will not be entitled to a trial by jury; you will not be entitled to any trial whatever; and the further disposition will be up to the Judge of this Court alone; and the penalty provided for possession of a forged instrument, under the habitual criminal act, would mean a sentence a minimum of ten to a maximum of sixty years? Do you understand that? DEFENDANT: Yes, sir."

It was then disclosed to the court that a plea bargain had been made, the substance of which was that the State would dismiss two other felony charges then pending against the defendant, one for burglary and one for forgery, if the defendant would plead guilty "to the charge of possession of a forged instrument, carrying, as it does in the amended information, the provision of a habitual criminal," and that the State would not make any recommendation to the court with regard to sentence.

The defendant acknowledged that the foregoing statement of the bargain was correct, but stated that he want-

ed "to plead just no contest." The State then indicated it had no objection to that plea.

The defendant then waived the 24-hour service of the amended information, stating: "I would like to have a copy, but waive the right of waiting."

He was then rearraigned on the amended information which was read in its entirety, including the allegation of the previous felony convictions. He then pled, "No contest, Your Honor." The court, before accepting the plea, explained that it was for most purposes the equivalent of a plea of guilty and gave a detailed explanation of the effects of such a plea and what rights were waived by it. The court specifically called to the defendant's attention that the information included the habitual criminal charge which was not included in the one to which he had earlier pled not guilty. There then followed an explanation that the plea waived trial and proof. The defendant stated that he understood. There then followed a further explanation of the defendant's rights and the effect of the plea and the elicitation of facts supporting voluntariness and a factual basis for the plea of guilty. This concluded with the following: "COURT: You still want your plea to stand; is that right, sir? DEFENDANT: Yes, Your Honor."

The defendant, to support his contention that despite his plea he was entitled to a hearing on and proof of the prior convictions, relies upon the following portion of section 29-2221, R. S. Supp., 1972: "If the accused is convicted of a felony and before sentence is imposed, a hearing shall be had before the court alone as to whether such person has been previously convicted of prior felonies. The court shall fix a time for the hearing and notice thereof shall be given to the accused at least three days prior thereto. At the hearing, if the court shall find from the evidence submitted that the accused has been convicted two or more times of felonies and sentences imposed therefor by the courts of this or any other state,

or by the United States, the court shall sentence such person so convicted as an habitual criminal."

An examination of the entire statute clearly shows that subsection (2) of section 29-2221, R. S. Supp., 1972, part of which has been quoted, is concerned with the situation where the accused is to be tried by a jury and is aimed toward preventing the verdict from being influenced by the prior convictions. It appears not to contemplate the situation where the defendant pleads guilty or nolo contendere and therefore has waived trial.

Suffice it to say that here the record discloses with great clarity that the defendant pled not only to the principal charge of possession of the forged instrument, but also that he intended to admit the prior convictions which give rise to the enhanced punishment.

Where the information charged the former convictions a plea of guilty confesses the prior convictions. The plea of nolo contendere is not any different in this respect. Brozosky v. State, 197 Wis. 446, 222 N. W. 311 (nolo contendere); People v. Hamlett, 408 Ill. 171, 96 N. E. 2d 547; Witte v. Dowd, 230 Ind. 485, 102 N. E. 2d 630; Wallace v. Lainson, 250 Iowa 854, 95 N. W. 2d 277; Hahn v. People, 126 Colo. 451, 251 P. 2d 316; Nash v. Commonwealth (Ky. App.), 272 S. W. 2d 464 (pleas of guilty). We do not in this case have a situation where the defendant admits the crime but at the same time denies the prior convictions which give rise to enhanced punishment.

Defendant's second assignment is not well taken. The fact that the previous offenses at the time of their commission and at the time of conviction thereof were felonies and have since been by statute reduced to misdemeanors will not preclude their use under the habitual criminal statute to enhance punishment. In re Harincar, 29 Cal. 2d 403, 176 P. 2d 58; People v. McConnell, 20 Cal. App. 2d 196, 66 P. 2d 720; State v. Ambrose, 212 La. 1062, 34 S. 2d 261; State v. Broussard, 213 La. 338, 34 S. 2d 883; People ex rel. Kruger v. Snyder, 261 App. Div. 352, 25 N.

Y. S. 2d 644; Emert v. Thorn, 249 App. Div. 301, 292 N. Y. S. 58; Salatte v. Bowers, 185 Misc. 858, 57 N. Y. S. 2d 571; State ex rel. Grandstaff v. Gore, 182 Tenn. 94, 184 S. W. 2d 366; Davis v. State, 148 Tex. Crim. 452, 188 S. W. 2d 177; People v. Kerschman, 283 App. Div. 811, 128 N. Y. S. 2d 411; Igo v. State (Okla. Crim.), 267 P. 2d 1082. We find no cases holding otherwise.

With reference to the third assignment, the record shows that subsequent to imposition of sentence on April 12, 1973, and after appeal to this court had been perfected, the defendant on July 19, 1973, filed a motion asking the court to vacate the sentence imposed on April 12, 1973, and resentence him on the forgery charge alone. The stated ground for this motion was the one with which we have dealt in connection with the first assignment. Later the defendant sought to withdraw his motion to vacate and resentence. The court refused leave to withdraw the motion, then purportedly set aside the sentence, held a hearing, received documentary evidence of the prior convictions, and then imposed the same sentence that it had on April 12, 1973. Defendant urges that we find all the proceedings after April 12, 1973, erroneous. Those proceedings were void as the authority of the District Court, after appeal to this court has been perfected, seems limited to granting a new trial on the basis of the newly discovered evidence. See, State v. Brewer, 190 Neb. 667, 212 N. W. 2d 90; Smith v. State, 167 Neb. 492, 93 N. W. 2d 499; Smith v. Goodman, 100 Neb. 284, 159 N. W. 418; and perhaps certain matters ancillary to appeal; Dudgeon v. Dudgeon, 142 Neb. 82, 5 N. W. 2d 133 (preliminary determination of sufficiency of supersedeas). In any event, in light of our determination of the first assignment, it follows that there was no prejudice to the defendant from the proceedings after April 12, 1973.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VINCENT GARZA, APPELLANT.

214 N. W. 2d 30

Filed January 11, 1974. No. 39127.

1. **Criminal Law: Attorneys at Law: Trial.** For relief on the ground of ineffective assistance of counsel, it must appear that assistance of trial counsel was so grossly inept as to shock the conscience of the court.
2. **Criminal Law: Venue: Trial.** Section 29-1301.01, R. R. S. 1943, permits the trial court to proceed either in the county where the offense is committed or in any county into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

William J. Riedmann, 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.

WHITE, C. J.

After a full evidentiary hearing, the District Court denied the defendant post conviction relief on the asserted grounds of incompetency of counsel and improper venue of the original trial. We affirm the judgment of the District Court.

The defendant was jury convicted and sentenced for the crime of forcible rape on a 17-year-old girl. The transcript of the record of the original trial is before us in this post conviction action. We have reviewed it. The evidence is ample to sustain the conviction. Briefly, the prosecutrix, accompanied by her boy friend's older brother, was on her way home after attending a party in her girl friend's residence. A short distance

from her home, the defendant with his brother Steve and Louis Godoy stopped in their car and persuaded the prosecutrix and the older brother to accompany them on a ride. They drove to a park. All except the defendant and the prosecutrix left the car. Encountering resistance to his advances, the defendant, by a series of threats and by a continuous course of brutal beatings and chokings, took the prosecutrix some distance from the car, and forced her to disrobe and have intercourse with him. A medical examination the next morning fully corroborated this direct evidence. It revealed extensive bruises in the area of the neck and throat and other portions of the body including the left leg and thigh, all of which were testified to by the prosecutrix in connection with the choking and the forcible conduct of the defendant. It also revealed injury in the genital area and a laceration of the prosecutrix' hymen.

The contention of the defendant is the failure of his trial counsel to call the defendant's brother, Steve Garza, and Louis Godoy as witnesses in his behalf. Godoy testified at the post conviction hearing. He told the defendant's counsel what he could testify to; that he was in the car at the time they had stopped; that he was in the vicinity when the rape was supposed to have taken place; that he had gotten out of the car to go to the bathroom; that the defendant and the prosecutrix were in the car alone; and when asked if he told the defendant's trial counsel that the rape did not happen, he answered that he told him that he did not know. The defendant's trial counsel, after this conversation with Godoy, informed him that he would be of no help. Even viewing this witness' testimony from hindsight, we fail to see any error, much less ineffective assistance of counsel, in the final judgment of the trial counsel in not using Godoy. It is apparent that the possible danger of Godoy's cross-examination corrobora-

ting the condition and other details of the prosecutrix' story, was a very real pitfall which in turn might have subjected the trial counsel to the accusation of ineptness.

As to the failure of the defendant's counsel to call Steve Garza, the defendant's brother, as a witness, counsel testified that he located the brother in Chicago and he refused to come back for the trial. Steve did testify at the post conviction hearing and stated that shortly after the date of the rape he and his family left for Illinois, but no one knew he was in Illinois; and by his own testimony he was unavailable and could not be discovered at the time of the trial. Moreover, there is no evidence in the record that he was possessed with any evidence or testimony that would be helpful to the defendant's case. He was in the same position as Godoy. There is no merit to these contentions.

The defendant now contends that his trial counsel was inadequate because he failed to object to certain remarks made by the prosecutor in his closing argument. There is no record of exactly what the remarks were. Even assuming that the defendant's own testimony in this respect is to be believed, there was no repetition or elaboration of the offending remarks that is persuasive of any prejudice. But more importantly, trial counsel testified that he did not object to the remarks because he did not want to emphasize them or highlight them at that point in the trial. It is a familiar truism of trial counsel strategy that an objection and a request for an admonition or an instruction from the court will only serve to emphasize and give importance to an otherwise harmless statement. We find no merit to this contention.

We have revewed the record. It reveals an alert and effective cross-examination of the State's witnesses by defense counsel. Discrepancies and inconsistencies in the prosecutrix' testimony, including variance with her preliminary testimony, were explored and revealed. Ob-

jections to hearsay, leading, and narrative evidence, many times successful, were alertly interposed by counsel. His cross-examination of the medical witness' very damaging testimony was searching and competent.

The record in this case reveals, even from hindsight, no incompetency of counsel, much less the standard that it was so inept as to shock the conscience of the court. See State v. Putnam, 182 Neb. 185, 153 N. W. 2d 456.

The contention of improper venue and that the trial court lacked jurisdiction to try the case is quickly disposed of. The trip on which the incident occurred originated in Douglas County and there is some testimony that the actual rape occurred in Sarpy County. Our statute, section 29-1301.01, R. R. S. 1943, permits the trial to proceed in the county where the offense is committed or in any county into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense. There is no merit to this contention.

The judgment of the District Court denying post conviction relief is correct and is affirmed.

AFFIRMED.

CLINTON, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. LARRY JOE GASTON, APPELLANT.

214 N. W. 2d 376

Filed January 18, 1974. No. 38910.

Criminal Law: Sentences: Appeal and Error. On direct appeal this court has the power to remand the cause for a lawful sentence where the one pronounced was erroneous or void as being beyond the power of the trial court to pronounce and where the accused himself invoked appellate jurisdiction for the correction of errors.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded with directions.

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.

WHITE, C. J.

This is a direct appeal from a judgment, sentence, and commitment to the Nebraska Penal and Correctional Complex for an indeterminate period of not less than 20 or more than 30 years.

The defendant was found guilty by a jury of forgery, and by the court of being an habitual criminal in a subsequent proceeding. § 29-2221, R. S. Supp., 1972. On November 13, 1972, he appeared for sentencing on these two convictions.

Instead of imposing *one* sentence on the forgery conviction for the mandatory minimum of 10 to 60 years required by the habitual criminal act (section 29-2221, R. S. Supp., 1972), the District Court imposed a separate sentence of 1 to 2 years on the forgery conviction and another and second sentence of 20 to 30 years on the conviction under the habitual criminal act. This was error. State v. Tyndall, 187 Neb. 48, 187 N. W. 2d 298; State v. Sheldon, 179 Neb. 377, 138 N. W. 2d 428.

On the same day, November 13, 1972, the court committed the defendant to the Nebraska Penal and Correctional Complex by entering a formal written journal entry of judgment and commitment, "that the defendant * * * be delivered * * * to the Nebraska Penal and Correctional Complex * * * for an indeterminate period of not less than Twenty (20) years and not more than

Thirty (30) years * * * on the charge of Forgery and being an habitual criminal * * *." This would have been a proper sentence but it does not conform to the two sentences actually imposed in open court and is no proper judgment. Preuit v. People, 5 Neb. 377, at 382.

The defendant now contends on direct appeal, citing numerous decisions in support, that the second and separate habitual criminal sentence is illegal and void, and that he only has to serve the 1-to-2 year indeterminate sentence for forgery.

The answer to this contention is that both sentences orally pronounced on the defendant are unauthorized, not according to law, and invalid. By its terms, the habitual criminal act provides for one single sentence on the principal charge and mandatorily requires that single sentence to be for a period of from 10 to 60 years. The sentence for only 1 to 2 years was improperly entered. § 29-2221, R. S. Supp., 1972; Preuit v. People, *supra;* Hickman v. Fenton, 120 Neb. 66, 231 N. W. 510; In re Fanton, 55 Neb. 703, 76 N. W. 447. On direct appeal this court has the power to remand a cause for a lawful sentence where the one pronounced was void as being beyond the power of the trial court to pronounce and where the accused himself invoked appellate jurisdiction for the correction of errors. Hickman v. Fenton, *supra;* Drawbridge v. State, 115 Neb. 535, 213 N. W. 839; Knothe v. State, 115 Neb. 119, 211 N. W. 619; In re Application of Cole, 103 Neb. 802, 174 N. W. 509, 848. The holdings of these cases apply "with equal force to a sentence for a shorter period than the minimum prescribed by statute." Hickman v. Fenton, *supra.*

Both original orally pronounced sentences were unauthorized by statute, illegal, and of no force and effect. The two convictions are valid and stand unchallenged. The defendant remains legally without sentence.

Our recent decision in State v. Brewer, 190 Neb. 667,

212 N. W. 2d 90, is not contrary to our present holding. In that case there was a valid sentence orally pronounced on the defendant on the principal charge and a subsequent attempt to convict and sentence the defendant on an habitual criminal charge. The case of State v. Solano, 181 Neb. 716, 150 N. W. 2d 585, insofar as it is in conflict with this opinion, is overruled.

The judgment of the District Court is reversed and the cause remanded with directions to resentence the defendant in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SPENCER, J., dissenting.

I am unable to see how we can distinguish this case from State v. Brewer, 190 Neb. 667, 212 N. W. 2d 90.

The bill of exceptions and the journal entry do not reflect the same facts. The bill of exceptions reflects that on Monday, November 13, 1972, after visiting with the defendant, the court said: "No, the Court doesn't see anything either in your record or your background, or in your attitude, that would justify anything else other than what the Court intends to sentence you.

"So it will be the judgment of the Court that for the crime of forgery you be sentenced in the Nebraska Penal Complex, in accordance with law, for a period of one to two years, and to pay a dollar fine.

"On the conviction for being an habitual criminal it is the judgment of the Court that you be sentenced in the Nebraska Penal Complex, pursuant to law, for a period of twenty to thirty years, and to pay the costs of this action."

The journal entry appearing in the transcript, so far as material herein, is as follows: "IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED by the Court, that the defendant Larry J. Gaston be taken hence to the Douglas County Jail and that thence within thirty (30) days and as early as practicable, he be delivered by the Sheriff of Douglas County to the NE-

BRASKA PENAL AND CORRECTIONAL COMPLEX, in Lancaster County, Nebraska, for imprisonment at hard labor, for an indeterminate period of not less than Twenty (20) years nor more than Thirty (30) years, from and after this 13th day of November A. D. 1972, on the charge of Forgery and being an habitual criminal, * * *."

We have therefore a journal entry filed after sentence was pronounced, which does not reflect the sentencing proceedings. Neither do they reflect in any way that defendant was present or was advised that the court had changed its mind and was now imposing only one sentence. We therefore are not dealing with an erroneous sentence. On this record the sentence as an habitual criminal was void.

In Gamron v. Jones (1947), 148 Neb. 645, 28 N. W. 2d 403, we said: "We see no reasonable basis for construing the judgment of the court to be other than one imposing two sentences—one for chicken stealing, and one as an habitual criminal. * * * The district court for Washington County was without authority to render a distinct separate judgment and sentence as was done for 10 years as an habitual criminal. That portion of the sentence is void."

In State v. Solano (1967), 181 Neb. 716, 150 N. W. 2d 585, this court stated: "In this case, the court found the defendant guilty of being an habitual criminal and separately sentenced him upon this count. This was error. * * * the sentence in this case for being an habitual criminal is void, but the principal sentence upon the charge of breaking and entering is valid. * * * Consequently, we hold that the sentence of the court for 10 years upon the habitual criminal charge is void but that the sentence for a period of 5 years for burglary is a valid sentence and should be affirmed."

In State v. Tyndall (1971), 187 Neb. 48, 187 N. W. 2d 298, we said: "Defendant's third assignment of error

must be sustained. The habitual criminal act, section 29-2221, R. S. Supp., 1969, does not create a new and separate offense for which a person may be separately sentenced * * *. We accordingly vacate the separate sentence in Count III, the habitual criminal charge."

There can be no question that a separate sentence as an habitual criminal is void. Likewise, our rule has always been that a sentence imposed on the main offense, if within the statutory limits, is valid. In this case, the court imposed two sentences: One much too lenient on the main offense; and then a 20 to 30 year sentence as an habitual criminal. The first sentence is valid (section 28-601, R. S. Supp., 1972), and in my judgment the second one is void. While the defendant deserved a more severe sentence, we cannot correct that situation without ignoring past precedent. In any event, if we deal with the question of whether the first sentence for the main offense was invalid, we must remember that the defendant is not questioning that sentence. It is not involved in the appeal. Assume that it was valid, or in the alternative, assume that its invalidity cannot be reached herein. How do we then handle the question of double jeopardy?

I am in total disagreement with the statement in the majority opinion that: "Our recent decision in State v. Brewer, 190 Neb. 667, 212 N. W. 2d 90, is not contrary to our present holding." It is premised upon the fact that the sentence pronounced on the forgery conviction herein was not a valid sentence. This is erroneous.

The sentence pronounced, while minimal, was within the limits of the sentence provided for the offense, so this case is in no different posture than those heretofore cited in this dissent.

BOSLAUGH, J., concurring in result.

I concur in only the result. The sentence for forgery was erroneous. The separate sentence for being an

habitual criminal was void. The entry on the journal was a nullity.

STATE OF NEBRASKA, BOARD OF EDUCATIONAL LANDS AND FUNDS, APPELLANT, V. FANNIE HABERMAN, APPELLEE.
214 N. W. 2d 266

Filed January 18, 1974. No. 38925.

Appeal from the District Court for Chase County: JACK H. HENDRIX, Judge. Affirmed.

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.

This is an action for a declaratory judgment to ascertain the relative rights of a tenant of school lands and the Board of Educational Lands and Funds in certain improvements placed on the land by the tenant. Judgment was entered for the defendant-tenant. We affirm.

Involved are buildings of various types, wells, fences, and land leveling. Several of the buildings, including a house and three metal grain bins, were on permanent-type concrete foundations. All the improvements were made prior to September 14, 1953, with the exception of one 4,300 bushel-capacity grain bin erected without plaintiff's approval or consent in 1964.

The law pertaining to pre-1953 improvements has vacillated in recent years. See, Banks v. State, 181 Neb. 106, 147 N. W. 2d 132; State v. Bardsley, 185 Neb. 629, 177 N. W. 2d 599; State v. Rosenberger, 187 Neb.

726, 193 N. W. 2d 769. The latter case discloses that a majority of the present membership of this court is of the opinion that tenants of school lands have a compensable interest in pre-1953 improvements, notwithstanding the unconstitutionality of the former statute. See Watkins v. Dodson, 159 Neb. 745, 68 N. W. 2d 508. No distinction is made between permanent and temporary-type structures. These cases appear to be determinative of rights in the pre-1953 improvements, exclusive of a tenant's personal property, and to vest a compensable interest in the tenant.

A somewhat different situation appears with reference to the grain bin erected after 1953. It is a fundamental rule of law that contracts, including leases, are to be construed according to laws in existence at the time the contracts are entered into. The lease here in question was entered into as of January 1, 1943, expired December 31, 1967, but was then extended from year to year. "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. * * *

"The rights of a lessee of school land are determined by the law as it was at the time the lease was made and the lessee may not be deprived of any substantial right resulting from the lease in his favor by subsequent legislation." Pfeifer v. Ableidinger, 166 Neb. 464, 89 N. W. 2d 568. See, also, Stoller v. State, 171 Neb. 93, 105 N. W. 2d 852.

Section 72-240.07, R. R. S. 1943 (Laws 1953, c. 255, § 2, p. 863), provided that improvements placed on school lands without written approval by the Board of Educational Lands and Funds would be "considered improvements of the land and the lessee shall not be entitled to reimbursement therefor." This statute was

in effect when the grain bin was erected on a permanent-type concrete foundation. Is it applicable?

Under the 1943 laws in effect at the time of the execution of the lease, no such permission was required or forfeiture provided for. Article I, section 16, Constitution of Nebraska, forbids and makes ineffective any "law impairing the obligation of contracts." A statute may not operate retroactively where it would impair the obligation of a contract or interfere with a vested right. See Travelers Ins. Co. v. Ohler, 119 Neb. 121, 227 N. W. 449. As seen in the Stoller and Pfeifer cases, *supra,* the rule serves to protect the vested rights of tenants of school lands. Since the Legislature cannot give away vested interests in school lands, it also serves to protect the trust property held by the State. See Lassen v. Arizona ex rel. Arizona Highway Dept., 385 U. S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515.

At the time the lease was executed, a tenant had the right to place any improvements he desired upon school lands without specific permission. Under our decisions in Banks and Rosenberger, *supra,* the tenant had a compensable interest in the improvements. The right thus acquired was a substantial property right which cannot be affected by the later 1953 statutory restriction. We therefore conclude that defendant had a compensable interest in the grain bin and the judgment of the District Court is affirmed.

AFFIRMED.

Adopted by the court before January 1, 1974.

McCOWN, J., concurring in result only.

The statutes dealing with "improvements" on school land leases over the years have had little or no regard for the technical definitions and distinctions of the common law in marking the dividing line between real estate and personal property. Neither have these statutes generally made distinctions between "improvements" which are severable from the land and those

which become an actual part of the land itself and could never be severed. Nevertheless, it is clear that these statutes did not and could not apply to personal property which was neither a part of nor affixed to the real estate.

Certain types or kinds of property may be either personal property or real property depending on the facts. A grain bin falls in this category. The District Court found that the grain bin here was personal property owned by the lessee. That factual finding will not be disturbed in this court where there is reasonable evidence to support it. The judgment of the District Court was correct in all respects, and should have been affirmed on the basis upon which it was made.

CLINTON, J., joins in this concurrence.

SPENCER, J., dissenting.

I respectfully dissent from the decision of the court in this case. As I said in my dissent in State v. Rosenberger (1972), 187 Neb. 726, 193 N. W. 2d 769, I cannot be a party to the rape of the school land trust. For the reasons I enunciated there, I believe that improvements made on school lands prior to September 14, 1953, without the specific consent of the Board of Educational Lands and Funds, became the property of the State. I question the power of the Legislature or of this court to force the Board of Educational Lands and Funds to grant rights to the detriment of the beneficiaries of the school land trust. See Lassen v. Arizona ex rel. Arizona Highway Dept. (1967), 385 U. S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515.

I believe the majority in Rosenberger were in grievous error in overruling State v. Bardsley (1970), 185 Neb. 629, 177 N. W. 2d 599, and readopting Banks v. State (1966), 181 Neb. 106, 147 N. W. 2d 132. In Bardsley the court had before it facts identical to those concerning the 4,300-bushel grain bin. Both cases involved 25-year leases of school land entered into in the early

1940s and expiring in the late 1960s. In both cases, the lessees placed buildings on the school land after September 14, 1953, without the express written permission of the Board of Educational Lands and Funds. Because I believe Bardsley states the proper rule, the lower court was in error in holding that the lessee is entitled to the proceeds of the sale of the grain bin. When the grain bin was placed on the land without the approval of the Board of Educational Lands and Funds, it became at that time the property of the state.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL WAYNE RHODES, SR., APPELLANT.
214 N. W. 2d 259

Filed January 18, 1974. No. 39002.

1. **Criminal Law: Insane Persons: Trial.** The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court.
2. **Criminal Law: Witnesses: Trial: Continuances.** Where a witness has refused to answer questions before trial, and during the trial his testimony is compelled under section 29-2011.01, R. S. Supp., 1972, the defendant may request a continuance to interview the witness.
3. ———: ———: ———: ———. Where a witness for the State, who has previously refused to answer questions, is compelled to testify under section 29-2011.01, R. S. Supp., 1972, and the defendant's objection and request for a continuance are denied, all the circumstances must be considered in determining whether there has been an abuse of discretion and the defendant was prevented from properly preparing for trial.
4. **Statutes: Constitutional Law.** Section 29-2011.01, R. S. Supp., 1972, held constitutional.
5. **Criminal Law: Evidence: Trial.** Testimony which is relevant and admissible on independent grounds is not inadmissible solely because it tends to show immoral or illegal conduct by the defendant.

Appeal from the District Court for Keith 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.

BOSLAUGH, J.

The defendant was convicted of second degree murder in the death of Fokke Snoeijer. The body of Snoeijer was discovered in a field south of Paxton in Keith County, Nebraska, on May 23, 1972. An autopsy disclosed his death had been caused by a gunshot wound approximately 2 inches behind and a little above his left ear. It appeared to be a "contact wound" in which the muzzle of the gun had been held against the skin. There was also an injury to the left side of the face. The back four upper teeth were broken and there was a fracture of the upper jaw.

Snoeijer was 21 years of age and a resident of Grand Rapids, Michigan. He and Daniel Doezema had been on a trip to the west coast. On May 15, 1972, they left California to return to Michigan by hitchhiking. After they had reached Evanston, Wyoming, they were picked up by the defendant.

The defendant is 23 years of age and a resident of Taylorville, Illinois. On May 15, 1972, he left California in his Chevrolet pickup truck to return to Illinois. In California he had become acquainted with Janet Painter and Stewart Holford. Painter and Holford were residents of Bellevue, Nebraska, and were riding to Nebraska with the defendant.

When the party left Big Springs, Nebraska, Painter, Holford, and the defendant were riding in the front of the truck. A third hitchhiker, identified in the record only as "Brian," was riding in the back of the truck with Snoeijer and Doezema.

Painter and Holford testified the defendant stopped

the truck on a county road someplace east of Big Springs and told Holford to drive away a short distance and then return. The defendant got out of the truck with a gun tucked in his waist. After rejoining Painter and Holford, the defendant said he had shot and killed Snoeijer. The evidence was sufficient for the jury to conclude that the defendant killed Snoeijer purposely and maliciously and was guilty of murder in the second degree.

The defendant contends the trial court erred in failing to appoint an "independent psychiatrist" to examine him; in permitting Painter and Holford to testify for the State; in failing to find section 29-2011.01, R. S. Supp., 1972, unconstitutional; and in permitting Crystal Brownwood to testify for the State.

On October 5, 1972, defendant's counsel filed a suggestion that the defendant was not mentally competent to stand trial. The trial court then ordered the defendant be examined at the North Platte Psychiatric Clinic. The defendant moved that an examination be made by a psychiatrist of his own choice. This motion was overruled and the examination ordered by the trial court was made.

The defendant contends the trial court should have ordered an examination be made by an "independent psychiatrist" at the expense of the State, and the failure to do so deprived him of due process and equal protection of the law. The defendant relies on Griffin v. Illinois, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891, and other cases holding that an indigent defendant may not be discriminated against because of his poverty.

The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. State v. Crenshaw, 189 Neb. 780, 205 N. W. 2d 517.

The examination of the defendant in this case was

made by Dr. Wisman, the Director of the North Platte Psychiatric Clinic. Dr. Wisman was fully qualified to make the examination. His testimony and the record generally support the finding of the trial court that the defendant was competent to stand trial. The fact that the North Platte Psychiatric Clinic is operated by the Department of Public Institutions and Dr. Wisman is employed by the State of Nebraska did not disqualify him in any way from making the examination of the defendant. See McGarty v. O'Brien, 188 F. 2d 151. The defendant's contention that he was entitled to a further examination by a psychiatrist of his own choice is without merit.

The names of Stewart Holford and Janet Painter were endorsed on the information as witnesses at the time it was filed on August 9, 1972. Both had been charged as accessories in the death of Snoeijer. The defendant took the depositions of Holford and Painter on September 30, 1972, but each witness refused to answer any questions. The questions were then certified to the District Court and a hearing was held on November 24, 1972. The trial court overruled the objections to most of the questions and ordered the witnesses to answer.

The case had been set for trial on December 5, 1972. On December 2, 1972, the State was given leave to endorse the names of additional witnesses on the information. At that time defendant's counsel stated specifically that a continuance was not requested and the defendant would take the deposition of Janet Painter on December 4, 1972.

The trial commenced on December 5, 1972. The defendant attempted to take the deposition of Painter on December 4, 1972, but the witness still refused to answer questions concerning the circumstances surrounding the death of Snoeijer.

Holford was called as a witness by the State on

December 7, 1972. He refused to testify on the ground his testimony might tend to incriminate him. The State then moved to compel his testimony under section 29-2011.01, R. S. Supp., 1972. The motion was granted; Holford was ordered to testify; and he was granted immunity as provided in the statute.

The defendant objected to the testimony of Holford on the ground that he had been unable to discover the testimony of Holford before trial because Holford had refused to answer questions when his deposition was taken. There was no request for a continuance. The objection was overruled and Holford was permitted to testify.

In determining whether the trial court abused its discretion in permitting Holford to testify, all the circumstances must be considered. See Carnivale v. State (Fla. App.), 271 So. 2d 793.

Holford had testified at the preliminary hearing and the critical part of his testimony concerned events that took place in the presence of only the defendant and Painter at about the time Snoeijer was killed. No effort was made to take the deposition of Holford after the hearing on certified questions on November 24, 1972, and the defendant did not request a continuance. The facts and circumstances indicate the defendant was not prevented from properly preparing for trial. We conclude there was no abuse of discretion in permitting Holford to testify for the State.

Janet Painter was the next witness called by the State. She also refused to testify. On the motion of the State, she was ordered to testify and granted immunity as provided in section 29-2011.01, R. S. Supp., 1972. The defendant objected to her testimony because she had refused to answer questions on two previous occasions and requested a continuance. The motion for a continuance and the objection to her testimony were overruled and she was allowed to testify.

The trial court relied primarily upon the fact that the defendant had refused the offer of a continuance at the time of the hearing on December 2, 1972, and had agreed that the deposition of Janet Painter would be taken on December 4, 1972, although it was known that she would refuse to answer any questions concerning the circumstances surrounding the death of Snoeijer.

The critical part of her testimony concerned the events that took place in the presence of the defendant and Holford, and her testimony was largely cumulative to that of Holford. There was no prejudice to any substantial right of the defendant in denying the continuance and permitting her to testify for the State.

The defendant further contends that section 29-2011.01, R. S. Supp., 1972, is unconstitutional because there is no way the defendant can discover the testimony of a witness who claims his constitutional right to refuse to answer questions until the county attorney has moved that the witness be compelled to testify. A similar contention was rejected in State v. McCown, 189 Neb. 495, 203 N. W. 2d 445.

Where a witness has refused to answer questions before trial, and during the trial his testimony is compelled under section 29-2011.01, R. S. Supp., 1972, the defendant's remedy is to request a continuance so that he may interview the witness. See Carnivale v. State, *supra*. The failure to grant a continuance after Janet Painter had been ordered to testify was not prejudicial to the defendant under the particular facts and circumstances in this case.

The constitutional right of a witness to refuse to answer questions, if applicable, is absolute unless the statutory procedure is followed. Since the effect of compelling the testimony will be a grant of immunity from prosecution, it is essential that the election to compel the testimony be that of the State. State v.

McCown, *supra*. In an appropriate case, however, the trial court in the exercise of its discretion might require the State to elect, in advance of trial, whether the testimony of a particular witness would be compelled so that the inconvenience and delay occasioned by a continuance after trial has begun could be avoided. The defendant's contention that section 29-2011.01, R. S. Supp., 1972, is unconstitutional is without merit.

Crystal Brownwood is 15 years of age and a resident of California. She became acquainted with the defendant when he was in California in May 1972. She was called as a rebuttal witness by the State and allowed to testify over objection as to statements and conduct by the defendant in her presence. The defendant argues her testimony should have been excluded because it tended to show immoral and illegal conduct of the defendant. Although somewhat marginal in nature, her testimony tended to corroborate the testimony of Holford and Painter and contradict that of the defendant. It was within the discretion of the trial court to allow her testimony to be received as rebuttal evidence. Testimony which is relevant and admissible on independent grounds is not inadmissible solely because it tends to show immoral or illegal conduct by the defendant. See State v. Kirby, 185 Neb. 240, 175 N. W. 2d 87.

Over objection, the State was allowed to introduce in rebuttal the testimony of a pharmacist concerning an experiment conducted out of the presence of the jury. The defendant had testified that Holford and Painter had dissolved Secobarbital in saliva and injected the solution into their bodies. The experiment and the testimony of the pharmacist tended to prove that it was impossible to do so. It was within the discretion of the trial court to allow this evidence to be introduced.

The judgment of the District Court is affirmed.

AFFIRMED.

SHIRLEY JEAN CASSELMAN, APPELLANT AND CROSS-APPELLEE, v. KYLE CASSELMAN, APPELLEE AND CROSS-APPELLANT.
214 N. W. 2d 278

Filed January 18, 1974. No. 39021.

Divorce: Alimony. Upon the dissolution of a marriage the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

George A. Sommer, for appellant.

James R. Hancock, for appellee.

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

BOSLAUGH, J.

This is a divorce proceeding in which the trial court found the marriage was irretrievably broken; determined custody of the minor children; made a division of the property; and awarded alimony and child support to the plaintiff. The plaintiff wife has appealed, claiming the property settlement and award of alimony were inadequate. The defendant husband has cross-appealed, claiming the award of alimony was excessive.

The parties were married on September 19, 1957. They have three minor children. There is no controversy concerning the custody of the children or the amount of child support awarded to the plaintiff.

The plaintiff was 36 years of age and in good health at the time of the trial in the District Court. She has been a beautician for 18 years and is qualified as a cosmetology instructor. She has operated beauty shops and a beauty school.

The defendant was 57 years of age at the time of the trial. He is partially paralyzed as a result of polio, but is able to get around by the use of crutches. He is licensed to practice law in Wyoming and has an office in Torrington, but his practice is limited to income tax work. His principal source of income is the property located in Scotts Bluff County, Nebraska.

The trial court assigned to the plaintiff all personal effects and household goods in her possession; the equipment located in the beauty shops in Scottsbluff and Torrington; a bank account in her name; a 1965 Corvette automobile; and a commercial building in Bayard, Nebraska, used as a beauty shop. All other property was assigned to the defendant. The defendant was ordered to pay alimony in gross at the rate of $500 per month for 121 months from April 1, 1973. The alimony payments do not terminate upon the death or remarriage of either party.

The principal controversy centers around the value of the property assigned to the defendant. This property consists largely of cattle, farm machinery, and real estate. The real estate consists of both city property and farm real estate. Most of the real estate came to the defendant through his parents. One farm, known as the Bryan farm, was purchased during the marriage. This purchase was financed by a purchase money mortgage and the mortgage of other property.

The plaintiff claims the property considered as a whole had a net value in excess of $530,000. The defendant claims the real estate and cattle had a value of $364,000. The defendant also claims indebtedness in excess of $230,000, part of which must be paid in the immediate future.

The evidence shows that much of the city real estate is in poor condition and needs renovation. The farm real estate appears to have speculative value for possi-

ble future residential or commercial development but is poor land for agricultural purposes.

Upon the dissolution of a marriage the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. § 42-365, R. S. Supp., 1972; Magruder v. Magruder, 190 Neb. 573, 209 N. W. 2d 585.

When all the circumstances in this case are considered, we believe the property settlement and award of alimony by the trial court were reasonable. The plaintiff is in good health and is capable of earning a good living. The alimony award will assist her through the period during which her youngest child will require the most care. On the other hand, the defendant is not in good health and is dependent upon the real estate to provide the income necessary to support the plaintiff, the children, and himself. It will require careful management to discharge his indebtedness and at the same time maintain the property so that it can provide the payments due the plaintiff. We conclude that the judgment of the District Court should be affirmed.

The plaintiff was awarded $2,500 for the services of her attorney in the District Court. We find this fee was adequate for his services in both courts. All costs are taxed to the defendant.

AFFIRMED.

Adopted by the court before January 1, 1974.

HILDA BOHLING, ADMINISTRATRIX OF THE ESTATE OF DONALD E. BOHLING, DECEASED, APPELLANT, V. FARM BUREAU INSURANCE COMPANY OF NEBRASKA, A CORPORATION, APPELLEE.
214 N. W. 2d 381

Filed January 18, 1974. No. 39053.

1. **Trial: Motions, Rules, and Orders: Evidence.** When, upon a jury trial, defendant, at the conclusion of plaintiff's evidence, moves for a dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to the plaintiff, and she is entitled to the benefit of all proper inferences that can reasonably be deduced therefrom.
2. **Trial: Evidence.** Circumstantial evidence is insufficient to warrant a recovery in a civil case unless the circumstances proved are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom. Conjecture, speculation, or choice of possibilities is not proof. There must be something more which would lead a reasoning mind to one conclusion rather than another.
3. ———: ———. In every jury case, at the conclusion of plaintiff's evidence, 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 plaintiff, upon whom the burden of proof is imposed.

Appeal from the District Court for Seward County: HOWARD V. KANOUFF, Judge. Affirmed.

Blevens, Bartu & Blevens, for appellant.

M. J. Bruckner and Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, for appellee.

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

STUART, District Judge.

This is an action to recover under an insurance policy which included coverage for the expenses of bodily injury and death resulting from an automobile accident. Defendant moved for a directed verdict and dismissal of plaintiff's petition after the plaintiff had adduced all

her evidence. This motion was sustained, the trial court dismissed plaintiff's petition, and the plaintiff appealed therefrom. The sole issue on this appeal is whether the evidence was sufficient to sustain a finding that the insured died as a result of an automobile accident.

The insured, Donald E. Bohling, was operating his pickup truck in a westerly direction on Interstate Highway No. 80 immediately prior to his death. An eyewitness observed his pickup proceeding west at a speed of 15 to 20 miles per hour. The pickup was partly in the north lane and partly on the asphalt shoulder of the highway with the decedent slumped over toward the passenger side. The pickup then crossed the two westbound lanes, the median, the two eastbound lanes, traveled off south of the highway, went through the fence bordering the highway, and finally came to rest straddling a shallow ditch 3 feet wide some 335 feet from the point it left the south westbound lane. The first person who arrived at the pickup thereafter heard the decedent give a final sigh or exhalation of breath. This person also observed that the ignition of the truck was turned off. The plaintiff testified that when she viewed the decedent at the mortuary he had a bruise on the forehead. She also produced evidence that the pickup had a cracked windshield on the driver's side.

There was no medical opinion as to the causation of death, nor any expert testimony as to the severity of the bruise on decedent's forehead. In addition, there was no evidence as to whether or not the pickup windshield was cracked at this time or at a prior time, and no evidence of any violent collision at the time of decedent's death.

When the defendant, at the conclusion of plaintiff's evidence, moves for a directed verdict in its favor or for dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to the plaintiff and she is

entitled to the benefit of all proper inferences that can reasonably be deduced therefrom. Popken v. Farmers Mutual Home Ins. Co., 180 Neb. 250, 142 N. W. 2d 309.

There was no showing of any causal connection between the decedent's pickup leaving the highway and the decedent's death other than circumstantial evidence. The pickup, when last seen on the highway, was being driven at a very slow speed. When traversing the median, the grade on the side of the highway, and the fence, it was moving across rather gentle slopes. With this evidence, it was just as possible that decedent was dying of natural causes and then drove off the highway as the possibility that he drove off the highway and the bump on his head caused his death. Plaintiff may establish her case by circumstantial evidence. However, in such case the circumstances proved by the evidence must be of such nature and so related to each other that the conclusion to be reached thereby is the only one that can fairly and reasonably be drawn therefrom. Popken v. Farmers Mutual Home Ins. Co., *supra;* Raff v. Farm Bureau Ins. Co., 181 Neb. 444, 149 N. W. 2d 52. As was stated in the latter case: "* * * the evidence must be sufficient to make the theory of causation reasonably probable and not merely possible. Conjecture, speculation, or choice of possibilities is not proof. There must be something more which will lead a reasoning mind to one conclusion rather than another."

In every jury trial, at the conclusion of the plaintiff's evidence, when properly raised by motion, there is a preliminary question for the court to decide, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed. In this case the motion for a directed verdict at the conclusion of the plaintiff's case raised the question as to the sufficiency of the evidence.

It was properly sustained by the trial judge and the judgment is affirmed.

AFFIRMED.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLEE, V. GARY DON HOLLIDAY ET AL., APPELLEES, IMPLEADED WITH JOHN CLAYTON SPENCER, A SINGLE MAN, ET AL., APPELLANTS.

214 N. W. 2d 273

Filed January 18, 1974. No. 39064.

1. **Mortgages: Acknowledgments: Notice: Records.** Where a real estate mortgage is acknowledged by some mortgagors, but not all, the mortgage is entitled to be recorded and upon recording is constructive notice of the interest of those persons who acknowledged the instrument.
2. **Mortgages: Acknowledgments: Homestead.** A mortgage upon real estate, other than the homestead, executed and delivered by the mortgagor is valid between the parties even though it was not lawfully acknowledged.
3. **Contracts: Estoppel.** As a general rule every person of mature age, able to read and write, who has an opportunity to read an instrument, and executes the same is presumed to know the contents of the instrument signed and is estopped from denying the contents thereof.
4. **Appeal and Error.** The findings of the trial court on conflicting evidence will not be disturbed on appeal unless clearly wrong.

Appeal from the District Court for Cherry County: ROBERT R. MORAN, Judge. Affirmed.

Padley & Dudden and David T. Schroeder, for appellants.

Quigley, Dill & Quigley, for appellee Prudential Ins. Co.

Murphy, Pedersen & Piccolo and Allan F. Black, for appellee Broken Bow Production Credit Assn.

Thomas L. Anderson, for appellees Holliday et al.

Heard before WHITE, C. J., BOSLAUGH, and MCCOWN, JJ., and TESAR and HAMILTON, District Judges.

HAMILTON, District Judge.

This action was brought to foreclose a real estate mortgage. The land involved is a ranch located principally in Cherry County and a small portion in Thomas County, Nebraska. The District Court entered a decree of foreclosure in favor of the Prudential Insurance Company of America on its first mortgage.

The controversy which is the subject of this appeal concerns the validity of the District Court's supplemental decree of foreclosure, finding that the mortgage of Broken Bow Production Credit Association of Broken Bow was second in line of priority and superior to the claim of appellants.

The ranch in question was owned by Betty Lou Holliday, Sally Leone Armstrong, formerly Sally Leone Spencer, and John Spencer, who took title to said real estate under the provisions of their father's will. Each party owned an undivided one-third interest. The ranch was operated by Betty Lou Holliday and her husband, Gary Don, under a lease and guarantee arrangement entered into in 1966 between the owners and not filed of record until September 28, 1971, subsequent to the filing of the foreclosure action by Prudential Insurance Company.

On or about the 31st day of March 1970, the defendants Gary Don Holliday and Betty Lou Holliday, husband and wife, and John Spencer, a single man, being the owners of an undivided two-thirds interest in the ranch, executed and delivered to Broken Bow Production Credit Association, a real estate mortgage. It is undisputed that the mortgage was signed and acknowledged by the Hollidays. It is undisputed that the mortgage was signed but not acknowledged by John Spencer.

The mortgage was filed of record in Cherry County, Nebraska, on the 1st day of April 1970, and on the 7th

day of April 1970, the mortgage was filed of record in Thomas County, Nebraska.

It is contended by the appellants that the mortgage was not properly acknowledged and void and therefore not properly recorded. Appellants contend that their lease and guarantee contract therefore takes priority as between the parties since the recordation of said mortgage was invalid, and the recording of a void instrument does not impart notice of its contents.

In 1 C. J. S., Acknowledgments, § 33, p. 813, it is said: "Where an instrument is executed by several parties, the acknowledgment by one is, in the absence of a contrary provision of the statute, sufficient as to its validity and recordability as to him." The real estate mortgage to Broken Bow Production Credit Association having been properly executed and acknowledged by the Hollidays, was entitled to be recorded. Where a real estate mortgage is acknowledged by some mortgagors, but not all, the mortgage is entitled to be recorded and upon recording is constructive notice of the interest of those persons who acknowledged the instrument, and the priorities that are attendant therewith. Bell v. Sage, 60 Cal. App. 149, 212 P. 404.

There is evidence in the record that Sally Leone Armstrong had actual and constructive knowledge that the Hollidays had executed the real estate mortgage, and as to the Hollidays' undivided one-third interest, the mortgage had priority and was superior to any claim of indebtedness from Hollidays to Sally Leone Armstrong arising out of the lease and guarantee contract.

Appellants complain that the mortgage was void as to John Spencer for lack of acknowledgment. They also claim that John Spencer did not read the mortgage, and was mislead as to the nature and effect of the note and mortgage obligation. In Mitzner v. Putnam, 186 Neb. 664, 185 N. W. 2d 665, it was held that a mortgage upon real estate, other than the homestead, executed

and delivered by the mortgagor is valid between the parties, even though it was not lawfully acknowledged. See, also, Holmes v. Hull, 50 Neb. 656, 70 N. W. 241; Prout v. Burke, 51 Neb. 24, 70 N. W. 512; Mazanec v. Lincoln Bonding & Ins. Co., 169 Neb. 629, 100 N. W. 2d 881.

The evidence shows that John Spencer signed the mortgage at Oakland, Iowa, in the presence of, and at the request of, the Hollidays. Claim is made that his signature was obtained upon the oral representation made to John Spencer by Hollidays, that his liability under the note and mortgage would cease upon certain conditions occurring in the future. The alleged conditions were not contained in the note or mortgage, and there is no evidence to show that the Hollidays were ever authorized to act as agents of the Association.

As a general rule every person of mature age, able to read and write, who has an opportunity to read an instrument, and executes the same is presumed to know the contents of instruments signed and is estopped from denying the contents thereof. Shanle v. Busch, 134 Neb. 903, 280 N. W. 174; 28 Am. Jur. 2d, Estoppel and Waiver, § 66, p. 691; 17 Am. Jur. 2d, Contracts, § 149, p. 498.

The trial court found there was no proof of fraud on the part of Broken Bow Production Credit Association with regard to the transactions, or signing of instruments, and that said Association had no knowledge, actual or constructive, of the lease and guarantee agreement executed between the owners of the ranch. Under such circumstances with conflicting evidence the findings of the trial court will not be disturbed on appeal, unless clearly wrong, since the court had the opportunity to observe the witnesses and judge their credibility. The mortgage was valid between the parties and effective against the two-thirds interest in the real estate of the Hollidays and John Spencer.

The judgment of the District Court was correct in all respects and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES BATCHELOR, APPELLANT.
214 N. W. 2d 276

Filed January 18, 1974. No. 39076.

Criminal Law: Evidence: Controlled Substances: Trial. When evidence is conflicting regarding a motion for the suppression of evidence, the decision upon the motion is for the court and will not be reversed on appeal in the absence of an abuse of discretion.

Appeal from the District Court for Sarpy County: BETTY PETERSON SHARP, Judge. Affirmed.

Richard H. Hoch and Richard J. Wegener of Swarr, May, Smith & Andersen, for appellant.

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

Heard before SPENCER, SMITH, NEWTON, and CLINTON, JJ., and MURPHY, District Judge.

PER CURIAM.

Defendant was convicted of the sale of lysergic acid diethylamide commonly referred to as LSD. Only one tablet was available for testing. Error is alleged in overruling a motion to suppress evidence of chemical tests to which the tablet was subjected made on the ground that a portion of the tablet should have been retained and made available for defendant's use. The defendant was placed on probation. We affirm the judgment.

The State called as a witness the chemist for the state laboratory who had analyzed the tablet. This witness testified that the tablet did contain LSD and described the several tests made to determine this. He stated that one tablet constituted a bare minimum required for a reliable analysis and that use of a smaller amount would render the result questionable. After the tests were completed, the LSD in the residue was

broken down, could not be preserved, and was unfit for further testing.

Of the two chemists called by the defendant, one stated half the tablet was sufficient for analysis and the other half could have been preserved, but admitted that better results could be obtained by using the entire tablet and that the volume of work handled in the state laboratory rendered it extremely difficult to take extra measures and retain residuals. He also conceded that the chemist called by the State was competent. Defendant's second chemist was in almost total disagreement with the State's witness on the subject of amounts required for analysis and the possibility of preserving and using residues for additional tests.

Obviously the evidence is conflicting. Under such circumstances it is for the District Court to determine whether or not the defendant was wrongfully or negligently deprived of a right to have the tablet analyzed. In this instance the court found that the defendant was not negligently or intentionally deprived of a right to analyze the tablet. This was not an abuse of discretion.

The rule adopted in State v. Brodrick, 190 Neb. 19, 205 N. W. 2d 660, is not applicable here. In that case a different substance was analyzed and it was apparent, indeed conceded, that the residue could have been preserved and further used for analytic purposes.

Defendant also argues suppression of the evidence because of a graph obtained in one of the tests but not preserved. Section 29-1912(1) (e), R. S. Supp., 1972, provides for discovery of: "The results and reports of physical or mental examinations, and the scientific tests, or experiments made in connection with the particular case, or copies thereof; . . . ." Section 29-1919(3), R. S. Supp., 1972, permits suppression of tests for failure to allow discovery.

No specific request for the graph was made in the discovery motion and it was stipulated that "results

of the laboratory tests, investigations, and experiments" were produced and copies given to defendant. No further request was made.

The assignments of error by defendant are not well taken, and the judgment is affirmed.

AFFIRMED.

Adopted by the court before January 1, 1974.

MURPHY, District Judge, concurs in the result.

SPENCER, J., concurring.

I agree with the result reached in the opinion. However, I call attention to section 29-1912(1) (e), R. S. Supp., 1972, which provides for discovery of: "The results and reports of physical or mental examinations, and the scientific tests, or experiments made in connection with the particular case, or copies thereof; * * *." Section 29-1919 (3), R. S. Supp., 1972, permits the suppression of tests for failure to allow discovery. In my judgment, the graph and other evidence of the results of scientific tests should be preserved. In drug cases where the substance seized may be used up in the test, the defendant should be permitted to check the work sheets. In the future, I would suppress such evidence if the work sheets are not preserved. Such suppression appears to be the only reasonable and effective sanction available.

SMITH, J., concurs with SPENCER, J.

JOHN D. MELIA, SPECIAL ADMINISTRATOR OF THE ESTATE OF PEARL LORRAINE NORGAARD, DECEASED, APPELLANT, V. CRAIG SVOBODA, APPELLEE.

214 N. W. 2d 476

Filed January 18, 1974. No. 39085.

1. **Trial: Evidence.** A motion for directed verdict must be treated as an admission of the truth of all competent 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.

2. **Trial: Appeal and Error: Verdicts.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.

Appeal from the District Court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

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

John J. Respeliers of Respeliers & DiMari, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

MCCOWN, J.

This is an action for wrongful death, the result of an automobile accident in an intersection. All issues were submitted to the jury which returned a verdict for the defendant.

The accident occurred on February 11, 1971, just before 9 a.m., at the intersection of Military Avenue and 90th Street in Douglas County, Nebraska. It was a bright sunny day but the road was wet from melting snow. The decedent, Mrs. Norgaard, was proceeding south on 90th Street and the defendant was proceeding west on Military Avenue. There was an automatic traffic signal at the intersection. The speed limit on Military Avenue at this point was 50 miles per hour. Essentially the only testimony as to what happened comes from the defendant. He testified that he was traveling at about the 50 mile per hour speed limit. He checked the traffic light when he was approximately 100 yards from the intersection and again just as he was going through the intersection. On both occasions the light was green for westbound traffic. He suddenly saw the car driven by Mrs. Norgaard directly in front of him in the intersection and about two car-lengths away. He tried to brake and

to turn to the right but the left front of the defendant's car collided with Mrs. Norgaard's car at a point just behind the left door. Her car came to rest about 75 feet south of the intersection on 90th Street. Mrs. Norgaard was thrown from her car and landed on a triangular median at the southwest corner of the intersection 66 feet from the point of impact and 75 feet from the point where her car came to rest after the collision. The defendant's car came to rest headed east at a point west of the intersection. Mrs. Norgaard died without regaining consciousness.

The plaintiff moved for a directed verdict on the issue of contributory negligence; moved to strike each of the allegations as to the contributory negligence of Mrs. Norgaard for failure of proof; and later moved for a directed verdict on the issue of defendant's negligence. The motions were all overruled. The defendant moved for a directed verdict both at the close of plaintiff's evidence and again when all the evidence had been presented. His motions were also overruled. The case was submitted to the jury on all issues and the jury's verdict was for the defendant.

The plaintiff's assignments of error boil down to the assertion that plaintiff was entitled to a directed verdict on the issue of defendant's negligence, as well as to a directed verdict on the issue of decedent's contributory negligence. The essential basis for the first claim is that the defendant did not see decedent's automobile until it was directly in front of him and therefore he must have been guilty of failure to keep a proper lookout as a matter of law. The basis for the contention on the contributory negligence issue is that there was no affirmative testimony to establish negligence on the part of the decedent. The latter contention disregards the fact that there is ample physical evidence from which the jury could have and obviously did infer the decedent's negligence.

The difficulty with all plaintiff's contentions is that they rest upon only the evidence or inferences most favorable to the plaintiff, while the opposite assumptions are required by law. The evidence is uncontradicted that the defendant was proceeding through the intersection with the green light and the corollary inference must follow that the decedent was proceeding against a red light. Any inferences to be drawn from the physical facts must also be resolved in the defendant's favor.

A motion for directed verdict must be treated as an admission of the truth of all competent 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. Hoffman v. Jorgensen Awnings, Inc., 178 Neb. 261, 132 N. W. 2d 867. A consideration of all the evidence viewed in the light most favorable to the defendant makes it apparent that in this case, at the very least, the issues were for the jury.

Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Fellows v. Buffalo County, 181 Neb. 269, 147 N. W. 2d 801. There was no prejudicial error here.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, v. VIRTUS D. SHEETS, APPELLANT.

214 N. W. 2d 379

Filed January 18, 1974. No. 39110.

Criminal Law: Sentences. Unless an abuse of discretion appears,

a sentence within statutory limits will not be disturbed on appeal.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

T. Clement Gaughan and Richard L. Goos, 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 was found guilty by a jury of shooting with intent to kill, wound, or maim. The court found him guilty of being an habitual criminal. He was sentenced to imprisonment for 16½ to 25 years. The issue on appeal is whether or not the sentence was excessive.

The presentence investigation report discloses a record of offenses committed by the defendant beginning in 1942 when he was 11 years old. He was committed to the Boys Training School in Kearney on more than one occasion. His military service in the early 1950's was marked by a sentence of 5 years in the United States Disciplinary Barracks followed by parole and dishonorable discharge. He was convicted and served sentences for felonies in 1957, 1958, and 1960. The crime for which he was convicted in this case was a violent one. His marital history is equally violent.

The statutory range of sentence here was from 10 to 60 years. The sentence was well within those limits. There was no abuse of discretion by the trial court. Unless an abuse of discretion appears, a sentence within statutory limits will not be disturbed on appeal. State v. Weidenfeller, 189 Neb. 505, 203 N. W. 2d 784.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SETH E. BLACKWELL, SR., APPELLANT.
214 N. W. 2d 264

Filed January 18, 1974. No. 39144.

Post Conviction: Constitutional Law. In the absence of a violation of a constitutional right, no relief may be had under the Post Conviction Act.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Charles E. Wright, 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.

SMITH, J.

Seth E. Blackwell moved the District Court for post conviction relief on two grounds. First, at the time of the jury trial that led to his conviction and sentence he was mentally incompetent to stand trial. Second, isolation and restraint imposed upon him during the jury trial violated Article I, sections 3 and 11, of the Nebraska Constitution, Bill of Rights, and the Sixth and Fourteenth Amendments to the Constitution of the United States. After an evidentiary hearing the court overruled the motion, and Blackwell appeals.

The District Court might properly find as follows. During the period of 1½ months immediately prior to the jury trial the behavior of Blackwell was extraordinary. He removed his handcuffs by his own strength,

barricaded his cell, destroyed "everything in the room," and assaulted his lawyer. He was gassed severely with tear gas.

At the jury trial and upon request of defense counsel, Blackwell was seated 5 feet away from the counsel table, 3 feet away from the second chair, and between two deputy sheriffs. The request was made because of the tendency in Blackwell for belligerence. Blackwell in conversation with counsel dissented mildly. Two outbursts by him disrupted the trial. He possessed the opportunity to communicate effectively with his counsel by notifying a deputy sheriff that he wished to speak with counsel. Such notice was conveyed on several occasions. Defense counsel at no time was denied the right to converse with Blackwell during the trial, and they conversed several times. In respect to the seating arrangement no cautionary instruction was given to the jury. The evidence was sufficient to sustain the findings under review in respect to the seating arrangement and the opportunity for effective client-counsel communication beneficial to Blackwell.

In the absence of a violation of a constitutional right, no relief may be had under the Post Conviction Act. State v. Whited, 187 Neb. 592, 193 N. W. 2d 268 (1971).

The order denying the post conviction motion was correct.

AFFIRMED.

Adopted by the Court before January 1, 1974.

McCOWN, J., dissenting.

Our original opinion in this case specifically held that the defendant was competent to stand trial. That opinion, as well as the current majority opinion, rests upon a failure to distinguish between two different legal tests of mental competency in a criminal case. One involves the responsibility of the defendant to be punished, which is determined under the legal test of responsibility. The other involves the mental com-

petence of the defendant to stand trial. The latter requires that the defendant be competent to make a rational defense and that necessarily includes the ability to assist in his own defense. Courts have uniformly adhered to the two standards. See State v. Klatt, 187 Neb. 274, 188 N. W. 2d 821.

The only expert witness who examined the defendant prior to trial made his examination on or before September 26, 1967. A letter bearing that date gave the doctor's opinion that: "Mr. Blackwell had a Ganser reaction and this syndrome is an acute halucinatory mania, a reaction due either to the confinement in jail or to his fear of his own future. It is further my opinion that he is mentally competent and that he is able to make a plea to the Court."

One week after that opinion was given, the defendant attacked his court-appointed counsel during a consultation and injured him, and one week after that the defendant tried to hang himself. The record does not show that these facts were given to any expert witness or to the court in 1967. Instead, they were brought out at this post conviction hearing. The trial began less than three weeks after the hanging attempt and the defendant's counsel was forced to request that the defendant be seated away from the counsel table. There were motions for mistrial on at least two occasions following disruptions by the defendant at the original trial.

A post-trial testing of competency was ordered by the court and once again there was a wholesale misunderstanding as to the tests or measures of mental competence to be applied. The clinical psychologist noted that the defendant "may develop transient psychotic episodes." Dr. Woytassek, who examined the defendant approximately one month after trial found the defendant "has known and does know the nature and quality of his actions and * * * right from wrong." In his testimony in this post conviction hearing, Dr.

Woytassek stated that he did not examine the defendant in 1967 to determine whether he had capacity to stand trial but instead he determined his mental capacity and his capacity to undergo sentence. He testified at the current hearing that he had serious doubts as to the defendant's capacity to relate to his attorney in any meaningful way so he would have been able to stand trial.

No expert witness who ever examined the defendant before or after trial felt that he was malingering and no expert who examined him before or after trial testified that he was competent to make a rational defense or to assist his counsel in his defense. It might be said the evidence is almost uncontradicted that the defendant not only was unable to assist in his own defense but actively disrupted and impeded any rational defense.

It is interesting to note that Dr. Modlin, a psychiatrist who testified at the post conviction hearing in this case testified as to the factors he would use in determining the issue of mental competency to stand trial. Most of the nine specific items he described have to do with the defendant's ability to assist in his defense. Dr. Modlin was never permitted to give his opinion as to whether, on the basis of hypothetical established facts, the defendant here was, in fact, competent to stand trial at the time of the original trial in 1967.

The evidence as it now appears is overwhelmingly persuasive that the defendant was not mentally competent to make a rational defense nor competent to assist his counsel in that defense and was therefore not mentally competent to stand trial in November 1967. "The tests of responsibility—capacity to know right from wrong, are not the tests which are applied in determining competency to plead or stand trial. The test of mental competency to plead or stand trial is whether the defendant has capacity to understand the

nature and object of the proceedings against him; to comprehend his own condition in reference to such proceedings *and to make a rational defense.*" (Emphasis ours.) State v. Klatt, 187 Neb. 274, 188 N. W. 2d 821.

The evidence is clear that the defendant is now mentally competent to stand trial but was not mentally competent to stand trial in 1967. The original judgment and sentence should be set aside and he should have the fair and impartial trial mandated by the Constitution.

CLINTON, J., concurring.

I concur in the result in this case on the basis of the rule that matters decided on the original appeal will not again be considered in a post conviction proceeding. State v. Weiland, 188 Neb. 626, 198 N. W. 2d 327.

The opinion in State v. Blackwell, 184 Neb. 121, at 124, 125, 165 N. W. 2d 730, shows that competency of the defendant to stand trial was considered and determined at that time.

HOSMER B. DOOLITTLE ET AL., APPELLANTS, V. COUNTY OF LINCOLN ET AL., APPELLEES, CITY OF NORTH PLATTE, LINCOLN COUNTY, NEBRASKA, INTERVENER-APPELLEE.
214 N. W. 2d 248

Filed January 18, 1974. No. 39147.

1. **Municipal Corporations: Annexation.** A municipal corporation has no power to extend or change its boundaries otherwise than as provided by constitutional enactment or as it is empowered by the Legislature by statute to do.
2. ———: ———. A city of the first class has no power to annex territory which is not "contiguous or adjacent." § 16-117, R. R. S. 1943.
3. ———: ———. Lands, lots, tracts, streets, or highways shall be deemed contiguous although a stream, embankment, strip, or parcel of land not more than two hundred feet wide lies between the same and the corporate limits. § 16-118, R. R. S. 1943.

4. **Municipal Corporations: Annexation: Words and Phrases.** The words contiguous and adjacent in section 16-117, R. R. S. 1943, are used synonymously.
5. **Municipal Corporations: Annexation: Statutes.** The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring it.
6. **Statutes.** An unambiguous statute is not open to construction.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Reversed and remanded.

Baskins & Baskins and Robert E. Roeder, for appellant.

Maupin, Dent, Kay, Satterfield, Girard & Scritsmier and W. R. Mullikin, for appellees.

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

CLINTON, J.

This is an action to enjoin the transfer of certain property from School District No. 127 to the School District of the City of North Platte. The foundation of the plaintiffs' action is the claimed invalidity of ordinances No. 1447 and No. 1461 of the City of North Platte which purported to annex to the city the tract of land described in the ordinances. The standing of the plaintiffs to contest the validity of the ordinances arises from the effect of the annexation upon school district boundaries under the provisions of sections 79-801, R. R. S. 1943, et seq., pursuant to which the annexed territory would be transferred from School District No. 127 and merged in the Class III district of the City of North Platte. The City of North Platte intervened in the action and is one of the appellees on this appeal. The District Court denied the relief requested, finding that the annexation was valid. We reverse and remand.

The precise question involved is whether the territory purportedly annexed is "contiguous or adjacent" within the meaning of sections 16-117 and 16-118, R. R. S. 1943. The parties argue conflicting interpretations of section

16-118, R. R. S. 1943, which reads as follows: "Lands, lots, tracts, streets, or highways shall be deemed contiguous although a stream, embankment, strip, or parcel of land not more than two hundred feet wide lies between the same and the corporate limits."

The evidence is stipulated and there is no conflict. The land involved was, at the time of the enactment of the ordinance, separated by the South Platte River from the existing south boundaries of the City of North Platte. It is agreed that that separation is 490 feet. The ordinance does not include in the annexation any part of the river nor the connecting highway over it.

The plaintiffs assert that the statute, section 16-118, R. R. S. 1943, is plain and unambiguous, and prohibits separation of the annexed tract from the existing boundaries by more than 200 feet. The defendants and intervener assert that the 200-foot limitation applies only to parcels of land and not to streams.

The following principles govern the disposition of this case. A municipal corporation has no power to extend or change its boundaries otherwise than provided by constitutional enactment or as it is empowered by the Legislature by statute to do. Village of Niobrara v. Tichy, 158 Neb. 517, 63 N. W. 2d 867; Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490. The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring it. Village of Niobrara v. Tichy, *supra;* Wagner v. City of Omaha, *supra.* The power of a municipality to annex territory is, under the specific provisions of section 16-117, R. R. S. 1943, limited to annexing contiguous or adjacent land. The terms contiguous and adjacent are used in the statutes synonymously and interchangeably. Village of Niobrara v. Tichy, *supra.* The term contiguous is defined by section 16-118, R. R. S. 1943. An unambiguous statute is not open to construction. Bachus v. Swanson, 179 Neb. 1, 136 N. W. 2d 189.

It appears clear to us that the terms stream, embankment, strip, and parcel of land are all modified by the phrase "not more than two hundred feet wide." The construction contended for by the defendants and intervener is a strained one and an analysis of their specific arguments demonstrates that strain.

They argue from statutory history and also seek to apply certain canons of statutory construction.

The statute in question was originally enacted in 1901. In 1963, the Legislature substituted in what is now section 16-117, R. R. S. 1943, the words "lots, tracts, streets, or highways" for the word "territory," and substituted the same words for "land" in what is now section 16-118, R. R. S. 1943. It at that time also repealed section 16-111, R. R. S. 1943, which contained the language "notwithstanding any stream, embankment, or strip or parcel of land not more than two hundred feet in width." In 1967, the Legislature enacted present section 16-118, R. R. S. 1943, which reinstated the language "although a stream, embankment, strip, or parcel of land not more than two hundred feet wide." The placing of a comma between the words "strip" and "or parcel" was the only pertinent change from the earlier version.

The defendants and intervener argue that the presence of the disjunctive in the earlier version clearly shows that the 200-foot limitation did not apply to streams but only to "parcel of land." They further argue that the subsequent dropping of the "or" was inadvertent and that their claimed meaning of the earlier version still applies. The difficulty with the argument is that the statute appears to have the same meaning with or without the "or" or the comma, and that under either version the limitation applies to all the antecedent words "stream," "embankment," "strip," and "parcel." The strained nature of the construction contended for is evident from the fact that it is claimed that the limitation applies only to "parcel." This leaves them in what

seems to us the untenable position to claiming that no matter how wide a "strip" is the city can annex across it, and that no matter how wide an "embankment" is the city can annex across it. We point out that a "strip" is a parcel but roughly described by shape, and that an "embankment" is necessarily a "parcel" of land but described by topography or perhaps use as in the case of a railroad embankment or dike. If we were to adopt the construction requested we would create ambiguities for we might then be called upon at some time to determine when a tract is a strip and not a parcel. This obviously would involve a contradiction.

Acceptance of the ordinary usage of language requires that we reject the construction contended for by the appellees. Rules of statutory construction which they wish to apply, such as the rule against "undesirable consequences," have no application where the statute is unambiguous. Whether consequences are undesirable is for the Legislature to determine and not this court.

The power of the City of North Platte is limited by the provisions of sections 16-117 and 16-118, R. R. S. 1943, and the annexation ordinances are void. The lower court should have granted the relief requested.

There is no contention made here that the merger in this case is one of those coming within the provisions of the proviso of section 79-801, R. R. S. 1943, which proviso requires the approval of the board of education of the Class III, IV, or V district whose territory is merged.

The judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HOSMER B. DOOLITTLE ET AL., APPELLANTS, V. CITY OF NORTH PLATTE, LINCOLN COUNTY, NEBRASKA, APPELLEE.
214 N. W. 2d 251

Filed January 18, 1974. No. 39148.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Reversed and remanded.

Baskins & Baskins and Robert E. Roeder, for appellants.

Maupin, Dent, Kay, Satterfield, Girard & Scritsmier and W. R. Mullikin, for appellee.

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

CLINTON, J.

The issue in this case is the identical one involved in Doolittle v. County of Lincoln, No. 39147, *ante* p. 159, 214 N. W. 2d 248. The same annexation ordinance and land are the subject of this action. The sole differences are the identity of the plaintiffs, the manner in which the interest and standing of the plaintiffs arise, and in this action only the City of North Platte is defendant. The outcome is governed by our opinion in Doolittle v. County of Lincoln, *supra*.

REVERSED AND REMANDED.

SCHOOL DISTRICT NO. 127, LINCOLN COUNTY, NEBRASKA, ET AL., APPELLANTS, V. ALICE B. SIMPSON, SUPERINTENDENT OF SCHOOLS, LINCOLN COUNTY, NEBRASKA, ET AL., APPELLEES, CITY OF NORTH PLATTE, LINCOLN COUNTY, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., INTERVENERS-APPELLEES.
214 N. W. 2d 251

Filed January 18, 1974. No. 39149.

Schools and School Districts: Injunction: Municipal Corporations: Annexation: Limitations of Actions. An action to enjoin a merger of a school district or a part thereof under the provi-

sions of sections 79-801 and 79-801.02, R. R. S. 1943, consequent upon an annexation of territory by a city of the first class under the provisions of sections 16-117 and 16-118, R. R. S. 1943, is barred by the statute of limitations provided in section 18-1717, R. R. S. 1943, unless it is brought within 1 year from the effective date of the annexation ordinance.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Baskins & Baskins and Robert E. Roeder, for appellants.

Maupin, Dent, Kay, Satterfield, Girard & Scritsmier and W. R. Mullikin, for appellees.

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

CLINTON, J.

This action was consolidated for trial in the lower court with Doolittle v. County of Lincoln, No. 39147, *ante* p. 159, 214 N. W. 2d 248; and Doolittle v. City of North Platte, No. 39148, *ante* p. 164, 214 N. W. 2d 251. All three cases were argued together on appeal in this court. A different annexation ordinance, No. 1318, is here involved and describes a different tract of land. The parties are substantially those involved in Doolittle v. County of Lincoln, *supra,* and the relief sought is the same as in that case. An additional issue, however, is involved, namely, whether the action is barred by the pertinent statute of limitations. The lower court found the action was barred. We affirm.

Ordinance No. 1318 was enacted on April 18, 1967, and it is conceded the petition in this case was filed more than 1 year after the effective date of the ordinance. The petition on its face is directed only against "a transfer" order made by the county superintendent supposedly merging School District No. 127 into the School District of the City of North Platte. Although we can readily see the utility of some administrative action recording the effectiveness of the merger, we do not believe that the merger depends upon such an

order. Section 79-801.02, R. R. S. 1943, provides: "Whenever an existing school district or a part thereof, is merged into a Class III school district under the provisions of section 79-801, such merger shall be effective on June 15 of the year following the first full school year after such merger." See, also, School Dist. of Bellevue v. Strawn, 185 Neb. 392, 176 N. W. 2d 42. In any event, as the pretrial order makes clear and as the briefs concede, the plaintiffs' entitlement to relief depends upon a successful attack upon the validity of the annexation ordinance. It appears clear to us that if an attack on the annexation ordinance is barred by a valid statute of limitations, then the decision of the lower court was correct.

We hold that this action is one "to contest such annexation," i. e., an annexation made prior to April 29, 1967, within the meaning of section 18-1717, R. R. S. 1943, which provides in part as follows: "Any party affected by any annexation of property made by any city or village prior to April 29, 1967, whose rights have not already been barred by any other applicable statute of limitations, shall be required to commence any action or proceeding of any kind or nature, whether legal or equitable, to contest such annexation or to contest any act done prior to April 29, 1967 pursuant to such annexation, within one year from April 29, 1967 or the same shall be forever barred." We believe the statute applies because the merger depends upon the annexation and the effect of section 79-801.02, R. R. S. 1943, and not upon an order of merger by the county superintendent. Our attention has not been directed to any statute which makes such a merger under section 79-801.02, R. R. S. 1943, dependent upon some action of the superintendent of schools of the county. The plaintiff cannot avoid the effect of the statute by elevating the merger order to a dignity which no statute gives it.

AFFIRMED.

JANE HALL KUETHE, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

214 N. W. 2d 380

Filed January 18, 1974. No. 39176.

1. **Workmen's Compensation: Trial: Evidence.** A finding of fact by the trial court, either the Workmen's Compensation Court en banc or the District Court on direct appeal from the order by one judge of the compensation court, against the party with the burden of proof will be set aside only if the evidence compels a finding for that party.
2. **Workmen's Compensation: Evidence: Employer and Employee.** In workmen's compensation cases related to recreational or social activities one test of compensability is whether the employer derives substantial, direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreational and social life.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Kutak, Rock, Cohen, Campbell, Garfinkle & Woodward, 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.

PER CURIAM.

The District Court, on direct appeal from an order by a single judge of the Workmen's Compensation Court, sustained an order adverse to the plaintiff. The issue was whether accidental death of plaintiff's decedent arose out of the course of employment. The plaintiff appeals.

Plaintiff sought benefits on account of the death of her husband, Fred S. Kuethe, who had been the state investment officer. The record is as follows.

Kuethe, a full time officer, possessed authority, sub-

ject to the aproval of the Governor, to retain financial advisors and private consultants on a contract basis or otherwise to render such professional service or advice as he may require in performance of his duties. § 72-1242, R. R. S. 1943. In performance of his duties he frequently traveled to Omaha. No specific restrictions were placed upon his travel, and a voucher for the trip during which he was killed was paid by the State.

Kuethe and a representative of Dean Witter and Company had regularly transacted a large volume of business for some period of time. On July 26, 1972, he traveled to Omaha at the invitation of Tom Uren, a broker in charge of institutional accounts at Witter. Kuethe and Uren met at the Omaha Country Club where they played 18 holes of golf. During the round business was discussed. Afterwards they spent 1½ hours in the locker room, but the main subject of conversation was business. It included the activity of a conglomerate in which Kuethe was especially interested. Although he had purchased its shares on prior occasions, on that day he did not indicate whether he intended to purchase additional shares.

They left the locker room and dined. Expenses were paid by Witter. At 9:30 p.m. Kuethe began the return trip to Lincoln in an automobile. Near Lincoln he was killed in an accident.

Subject to exceptions, the State is liable for workmen's compensation in the same manner and to the same extent as is a private individual. See § 48-199, R. S. Supp., 1972.

A finding of fact by the trial court, either the Workmen's Compensation Court en banc or the District Court on direct appeal from the order by one judge of the compensation court, against the party with the burden of proof will be set aside only if the evidence compels a finding for that party. McPhillips v. Knox Constr. Co., Inc., 190 Neb. 306, 208 N. W. 2d 261 (1973).

Cases related to recreational or social activities are often difficult. One of the tests of compensability is whether the employer derives substantial, direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreational and social life. 1 Larson, The Law of Workmen's Compensation, § 22.00, p. 5-62 (1972).

Applying our scope and standard of review to the record, we conclude that the judgment of the District Court was correct.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD J. L. IRWIN, APPELLANT.

214 N. W. 2d 595

Filed January 25, 1974. No. 38515.

1. **Criminal Law: Arrest.** The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of routine investigation, and any incriminating evidence which comes to that officer's attention during this period of detention may become a reasonable basis for effecting a valid arrest.
2. **Criminal Law: Arrest: Probable Cause.** Probable cause justifying an arrest without warrant exists if the facts and circumstances known to the arresting officer warrant a prudent man in believing the offense has been committed and that the defendant committed it.
3. ———: ———: ———. The existence of probable cause must be determined by a practical and not by any technical standard.
4. ———: ———: ———. A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a felony. § 29-404.02, R. S. Supp., 1972.
5. **Criminal Law: Right to Counsel.** In the context of this case where it is possible that the questioning officer took the defendant's remark that "maybe I should talk to an attorney" not as a request that the interrogation cease but as a passing remark, there was no denial of counsel under Miranda.

6. **Criminal Law: Confessions: Evidence.** Before admissions or confessions may be considered as evidence of guilt, the evidence pertaining to the making thereof must be such as will justify a finding by a jury beyond a reasonable doubt that they were freely, voluntarily, and intelligently made.
7. ———: ———: ———. If a defendant is in custody of law enforcement officers or otherwise deprived of his freedom in a material way by such officers at the time a confession or admissions are made, the evidence must be such as to permit the jury to find beyond a reasonable doubt that prior to making such admissions or confessions the Miranda warnings were given and that the defendant knowingly and intelligently affirmatively waived his rights.
8. **Criminal Law: Confessions: Evidence: Trial.** In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and in so doing we will look to the totality of the circumstances.
9. ———: ———: ———: ———. The determination by the trial court of the admissibility of a confession by a preponderance of the evidence is not inconsistent with the mandate of proof of guilt beyond a reasonable doubt.
10. **Criminal Law: Venue: Trial: Appeal and Error.** A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed unless a clear abuse of discretion is shown.
11. **Criminal Law: Trial.** When the defense invites a responsive rebuttal argument which might otherwise be prejudicial, it cannot complain.
12. **Criminal Law: Sentences: Sexual Sociopaths.** If the evidence warrants a finding by the trial court that a defendant is a sexual sociopath and would not be benefited by treatment he should be committed in accordance with the sexual sociopath act for an indefinite period in the Nebraska Penal and Correctional Complex.
13. ———: ———: ———. The sexual sociopath act, sections 29-2901 to 29-2910, R. S. Supp., 1972, is constitutional. We construe the act to provide that when a defendant who has been committed under the indefinite commitment provisions thereof is found to be no longer a sexual sociopath, any sentence which the court may impose for the original conviction may not exceed the maximum sentence for the sexual crime of which he was found guilty less any time the defendant has been committed under the provisions for indefinite commitment.

Appeal from the District Court for Adams County: NORRIS CHADDERDON, Judge. Affirmed.

Eugene C. Foote, II, and John A. Wolf, for appellant.

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

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

CLINTON, J.

On February 17, 1972, the defendant was found guilty by a jury of six charges of rape and one of robbery. The offenses each occurred on separate dates from April 21, 1969, to February 21, 1971, and all occurred in or near Hastings in Adams County, Nebraska. All the charges were tried together. On the last offense, the robbery (which was accompanied by an unsuccessful sexual assault), the defendant was sentenced to a term of 20 to 25 years. At that time proceedings under the sexual sociopath act, sections 29-2901 to 29-2910, R. S. Supp., 1972, were pending. The defendant appealed the sentence. The trial court declined to proceed with the proceedings under sections 29-2901 et seq., R. S. Supp., 1972, on the theory it had lost jurisdiction because of the appeal on the robbery count. We heard the appeal and without decision retained jurisdiction on the robbery charge but remanded the cause for sexual sociopath proceedings because we felt the appeal was premature since no sentence had been imposed or other final determination made on six of the counts of the information. Dodge v. People, 4 Neb. 220; Kennedy v. State, 170 Neb. 193, 101 N. W. 2d 853. On remand the hearings under the sexual sociopath act were held, at the conclusion of which, a jury having been waived by the defendant, the court found that the defendant was a sexual sociopath; that the defendant could not benefit from treatment; and that the defendant be committed

to the Nebraska Penal and Correctional Complex for an indefinite period pursuant to the provisions of section 29-2906, R. S. Supp., 1972. From this finding and judgment of the court, the defendant has now appealed and we have before us all seven charges. The first five errors claimed here on appeal are common to all the charges. The sixth and seventh relate only to defendant's commitment to an indefinite term under the sexual sociopath statute.

The errors assigned and argued here are that the trial court erred: (1) In denying the defendant's motion to suppress a confession and certain other evidence because all these were the fruit of an illegal arrest; (2) in denying suppression of the confession because the defendant was unlawfully deprived of counsel contrary to Miranda; (3) in permitting the confession to be received in evidence because it was obtained by promises expressed or implied and the exertion of improper influence; (4) in denying the defendant's motion for a change of venue; (5) in denying defendant's various motions for mistrial; (6) in its finding that the defendant was a sexual sociopath and could not benefit by further treatment; and (7) that sections 29-2901 to 29-2910, R. S. Supp., 1972, are unconstitutional. We affirm.

An outline of events preceding the defendant's arrest and immediately following the arrest up to the time of his arraignment in the county court as known by the investigating officers and as shown by the evidence adduced at the suppression hearing before the District Judge is necessary for the disposition of the first three assignments.

As already noted, the series of offenses occurred from April 21, 1969, to February 21, 1971. The defendant was apprehended on Friday, October 1, 1971. Bobbie D. Henry, a deputy sheriff of Adams County for 7½ years and a member of the Hastings police department for 7 years prior to that, had among his duties been

assigned to investigate the rapes. It was an investigation in which both the sheriff's office and police department participated. Gary W. Hansel, criminal investigator for the Nebraska State Patrol, was on call in connection with the investigation and had been participating for about a year prior to October 1, 1971.

The crimes had followed a pattern. Access was gained to the various homes by stealth or in some cases by breaking. Evidence indicated that in some instances there was prior window peeping. In each instance prior to a sexual assault a demand was made for money which the victims might have in their homes or on their person. After the money was obtained the sexual assault took place. On each occasion save one the perpetrator used a weapon (a gun, knife, or other sharp object), or physical violence, or both, to impose his will and accomplish his purpose. Save in the last case he wore a mask or otherwise kept his face from observation of the victim and up until October 1, 1971, no victim had seen the uncovered face of the perpetrator.

There had also occurred in or near Hastings, Nebraska, a number of burglaries shortly prior to October 1, 1971. Some of these had occurred in the neighborhood where Irwin was first observed on the night he was apprehended. There had also been reports of a prowler or prowlers in the neighborhood just a couple of nights before. The neighborhood was residential.

In connection with one of the rapes and robberies a description of an automobile used by the perpetrator had been obtained. This description fitted that of an automobile owned by the defendant and in which he was observed on October 1, 1971. The defendant and his car had previously been observed by Hansel near the scene of two burglaries which had taken place at an earlier time.

The defendant Irwin had prior to October 1, 1971, been considered a possible suspect by Henry and the

other law enforcement officials because they knew of his having had a record of sexual offenses in McCook where he had formerly lived and of his having been as a consequence committed to the State Hospital at Hastings for treatment.

Hugh Elliott, who had lived in Hastings for almost 60 years and had been an automobile dealer there all his adult life, lived at 124 University in the city of Hastings. During the months of August and September 1971 he observed on several nights a week and on almost every Friday night a small sports coupé which was parked near his residence. It would show up about dark and was usually gone by 10:30 or 11 o'clock p.m. At first it was parked in what had been an alley at a point which was unlighted because the street light was burned out. The light was replaced and thereafter the car was parked east of Elliott's residence in the shadow of a huge evergreen tree. Elliott had, however, until shortly before October 1, never observed the driver of the car. Some time in September Elliott observed that a group of ferns in his yard beneath a window of his home had been badly trampled. He suspected a prowler or a window peeper and a possible connection with the parked car. He knew of the rape incidents. He decided to investigate. One evening he parked his own car on the street about 75 feet from where the suspect's car was parked. He already knew the license number of the car was Nebraska 14-F820. On the evening in question after waiting about an hour a man walking at a brisk pace came from the north. When the man reached the area illuminated by street lights he ran very fast and got into the car and "peeled out."

Following this incident Elliott was at the courthouse and he told deputy Henry about the incident and the occurrences and was advised by Henry to call immediately the next time the car showed up. Within a few days the car showed up again about 8:30 p.m. This

was October 1, 1971. Elliott was just arriving home in his car from his place of business as the other car drove up. As Elliott passed the car to go into his own driveway the car was started and with lights off was driven a couple hundred feet across an intersection and stopped. After a brief interval the driver got out and took off up the street in the direction from which the witness had seen him come on the earlier occasion. Elliott then called the sheriff's office and reported the presence of the car.

The call was relayed to deputy Henry who picked up Hansel and went to a point where the car could be observed and there he parked. This was about 9:45 p.m. He already knew from the license plate number and his prior investigation that the car belonged to Irwin. Henry related to Hansel what he had been told by Elliott. After a wait a person came from the north, got into the car and pulled out. Henry and Hansel followed and after a few blocks pulled up behind Irwin's car, apparently with beacon flashing. Irwin stopped. It was raining hard at the time. Both officers got out of their car. Henry approached the Irwin car on the left side. Irwin rolled down the window. Henry showed his badge and asked Irwin if he would come down to the sheriff's office as he wanted to talk to him. In the meantime Hansel had gone around to the right side of the car and rapped on the window. Irwin reached over and unlocked the door. Hansel opened it and asked if he could ride to the sheriff's office with him. Irwin said he could and Hansel got in. On the way to the station Irwin asked Hansel what they wanted to talk to him about and Hansel told the defendant that he thought he knew what they wanted to talk about.

Both officers testified that when they stopped Irwin and asked him to come to the station to talk neither had any intention of arresting him and did not tell him or indicate to him that he was under arrest. Henry

testified specifically that if Irwin had refused to go to the station he could have gone his own way.

When they reached the sheriff's office Henry got out of his car and walked to the front of it. At that point Irwin was getting out of his car on the left side. Henry testified: "A. As he got out of the automobile, we would be facing south, he got out and turned like this (indicating), and I could see his right arm go down by his leg. At this time I heard something drop on the pavement. I could see his right leg trying to move something underneath the car. Q. What was this object? A. I asked him what it was, and he told me it was a knife. I can't remember if he picked it up and gave it to me, but I think he did. Q. You have described this knife? A. Well, I seen it when we got into the office in the light. It was a fluorescent orange knife with a switch blade and with a U-shaped blade on the other end with a full blade for cutting rip cords. They identified it to me as a paratrooper's knife."

Hansel testified that Irwin would not have been free to go after the knife was dropped and identified.

About a week or 10 days previous to October 1, 1971, Henry had investigated a burglary in the city which had taken place at that time. Among the items taken was a paratrooper's knife which fitted the description of the knife obtained from Irwin just after he got out of his car. While Hansel began to talk to Irwin in the sheriff's office, Henry called one of the victims of the burglary. He came to the office and identified the knife as the one taken in the burglary. Henry then by office intercom informed Hansel, who was talking to Irwin in an adjacent room, of the identification.

Before Henry left Hansel and Irwin to make the phone call Hansel had, in Henry's presence and using the "Miranda card," given the Miranda warnings to Irwin and Irwin had affirmatively waived his rights. The questions and the affirmative responses of waiver are

set forth verbatim in the record and meet the requirements of Miranda.

The interrogation continued for about 1½ hours. During this time the defendant gave explanations of his whereabouts while away from his car on October 1, 1971, and other evenings when he was parked near the Elliott residence. He explained he had spent a good deal of time on the island in Heartwell Park nearby. He declined to comment on the knife. When asked about the various rapes he made no flat, direct denials or admissions, but stated that if he thought going to jail would help him any, "he would tell me about it." During that interrogation Irwin talked considerably of his arrest in McCook and his treatment there. A considerable portion of the conversation was about his prior treatment by law officers. Near the very end of the interview Irwin remarked: "'Maybe I should talk to an attorney.'" Hansel then immediately got the telephone directory, opened it to the directory of attorneys in the yellow pages, and handed it to Irwin. Irwin looked at it and stated he did not know any attorneys. Hansel told him all of them were good. Hansel left the room but Irwin made no telephone call. There was no further significant conversation at that time. Irwin asked to call his wife and this he did.

Henry then took Irwin to a solitary cell and locked him in. Hansel saw Irwin in the sheriff's office on the next day, Saturday morning, but did not talk to him. On Saturday, search warrants were obtained and Irwin's house and garage were searched and articles believed to be the proceeds of burglaries were seized. After the search, on Saturday afternoon, Irwin was removed from his cell, the Miranda warnings were again given, and he apparently indicated his willingness to speak. There was at that time a brief interview in which Irwin was presented with the items found in the search and he then stated he would sort them out. The whole inter-

view lasted about 5 or 10 minutes. There was at that time apparently no conversation about the crimes which were involved in this appeal. Irwin's wife came to the sheriff's office that afternoon. Irwin wanted to see her but she declined to see him.

Hansel testified that on neither of the occasions when he interviewed the defendant were any threats, promises, or inducements made and that Irwin appeared normal and unemotional at all times. No one interrogated Irwin on Sunday or Monday morning.

On Monday afternoon about 2 o'clock Hansel removed Irwin from his solitary cell and took him to the sheriff's office. There he introduced Irwin to Lieutenant Parks, Supervisor of the Criminal Division of the Nebraska State Patrol for the eastern half of the State of Nebraska. Parks had come to Hastings from Lincoln at the request of the sheriff's office to interview Irwin. After the introduction by Hansel, Parks talked to Irwin about his background, "his past history." Irwin apparently gave a rather complete history, including the story of his previous commitment to the Regional Center. He then told Parks: ". . . he was guilty of the rapes that had occurred in Hastings the past two and a half years, and also the burglaries." Parks testified that he had not, prior to Irwin's admission of guilt, asked him any questions about the Hastings rapes nor given any warnings and that he had made no promises, threats, or inducements to get Irwin to tell him anything. Immediately after the admissions were made he then asked Irwin if he would talk to Hansel because he knew more of the details than did Parks. Irwin agreed. Hansel came in and Parks left.

At that time Hansel, using a tape recorder, administered the Miranda warnings and received affirmative waivers, and Irwin made a confession. The confession was in substantial detail, admitting all the offenses of which he was later found guilty. At some subsequent

time the defendant was interrogated by the county attorney before a court reporter. This interrogation was transcribed. The prosecution did not offer it, but the defense apparently knew of it and, on cross-examination of Hansel who apparently had at some subsequent time read it, had the witness read part of it into the record. This part, together with a portion of the questioning of the witness, was as follows: "Q. Question by Mr. Connolly: 'Now, what you have told me has been the truth? A. Yes. Q. And there have been no promises or threats or anything? A. No. I have the impression they will help me with my troubles.' Q. You had been with Mr. Irwin most of the time during his incarceration. Do you have any idea where he could have gotten an impression like that? A. No, sir. Q. He just must have made that up, as far as you know? A. I don't know where that came from. Q. You have no idea where he would get a thought like that? A. No, sir."

The defendant did not testify at either the suppression hearing or at trial.

The Arrest and Probable Cause

The trial judge determined that the officers had probable cause for the arrest and did not attempt to decide precisely when the arrest occurred; whether it was when the stopping took place or later after the knife incident. The trial court further found the confession was voluntary and admitted both the confession and the knife into evidence.

The defendant first contends the arrest was illegal because there was a lack of probable cause, and that since the confession and the discovery of the knife were the fruits of the arrest, both should have been suppressed. He cites Henry v. United States, 361 U. S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134; Wong Sun v. United States, 371 U. S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441; and other cases. The State takes the position that no arrest

took place until after the knife incident and that the stopping was authorized under Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889; and Adams v. Williams, 407 U. S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612; that when the defendant attempted to dispose of the knife and deputy Henry recognized it as fitting the description of the rather unusual knife taken in a burglary a couple of weeks earlier, this, taken together with other circumstances known to the officers, gave probable cause for arrest.

We believe the principles enunciated by the Supreme Court of the United States in Adams v. Williams, *supra,* and by our own court in State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129, support the position of the State and that the issue may be decided on that basis. We conclude further that probable cause for arrest did exist at the time of the stopping. We will discuss each ground of decision in turn. The discussions will overlap somewhat.

In Adams v. Williams, *supra,* the United States Supreme Court approved an investigative stop and an immediate frisk where a police officer, operating alone in a high crime area, was advised by an informant known to him that a certain individual seated in a car had a weapon in his belt and narcotics on his person or in the car. This, the court held, justified the investigative stop and the frisk which resulted in the seizure of the gun from the belt of the individual in question. This in turn justified the arrest even though in the State of Connecticut it was not unlawful to carry a weapon as described. An immediate search of the auto disclosed another weapon and drugs and this search was held to be valid.

Our court in State v. Carpenter, *supra,* pointed out that every temporary restraint of absolute freedom is not an arrest. In that case there had been a number of burglaries committed in the city of Blair a short

time before the arrest and one or more of these had been committed with the use of a pry bar. The defendant and his companion were cruising about the city of Blair about 3 o'clock a.m. The officers followed and the defendant and his companion seemed to be trying to avoid them. The officers continued to follow and the defendant stopped on the blinker signal by the officers. The defendant, who was driving, got out of the car and came back to the police car. One of the officers went forward to the defendant's car and asked the defendant's passenger to get out. He did. As he got out his feet struck some metallic object. This caused the officer to flash his light while the door was open and he observed what he recognized as a pry bar. A closer look, using the flashlight, disclosed additional pry bars sticking out of a bag. They were in plain sight. They were not removed. The officers then asked the defendant and his companion to go to the police station. There an identity check showed they were known burglars. They were then placed under arrest.

In the case at hand, we have present a good deal more than in either Williams or Carpenter. A whole series of rape-robberies had been committed in or near the city of Hastings over a period of less than 2 years. The modus operandi of the crimes indicated the probability of a common perpetrator, who had not, up until October 1, 1971, been apprehended. Prowler complaints and burglaries had continued even beyond the last robbery and unsuccessful sexual assault on February 21, 1971. The unusual conduct of the defendant which had been observed by Elliott had been reported to the sheriff's office. It occurred in the neighborhood where the very recent prowler complaints and some burglaries had taken place. Elliott's report was based on personal observation. The reliability of his report was verified by the officer's own observations on October 1, 1971. The description of the car known to have been used by the

perpetrator of one of the rape-robberies matched that of the car belonging to the defendant. The officers also knew of the defendant's past record of sexual assaults.

If, on October 1, 1971, after Elliott's report was verified by the officers had they not determined they would stop and interrogate him they would have been remiss in their duties. It was not unreasonable especially considering the condition of the weather to ask him to come to the sheriff's office for questioning. This he agreed to do even before Hansel asked to ride with him. We believe there was no arrest up to that point and not thereafter until the discovery of the knife. From that time on it seems clear the officers would have restricted his freedom had he sought to leave.

The facts and holdings in the opinion of the Eighth Circuit in United States v. Harflinger, 436 F. 2d 928, are applicable. There the court said: "The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of a routine investigation, and any incriminating evidence which comes to that officer's attention during this period of detention may become a reasonable basis for effecting a valid arrest." The facts in that case are in principle close to what we have here—suspicious activity and an investigative stop which resulted in the discovery of undoubted probable cause. See, also, State v. Brewer, 190 Neb. 667, 212 N. W. 2d 90.

In any event, it became clear beyond cavil that when, in addition to the circumstances which we have already discussed, Irwin attempted to dispose of the knife and Henry recognized it as fitting the unique description of the knife taken in the burglary that probable cause for arrest did exist. The knife was not discovered as a result of any search. It was discovered as a result of Irwin's voluntary attempt at concealment, which in

itself is indicative of guilty knowledge of some type.

At the time Irwin was stopped, probable cause for his arrest existed and the arrest would have been authorized by our statutes. § 29-404.02, R. S. Supp., 1972.

In Henry v. United States, *supra,* the Supreme Court of the United States said probable cause justifying an arrest without warrant exists if the facts and circumstances known to the arresting officer warrants a prudent man in believing an offense has been committed and that the defendant committed it. In this case numerous offenses had been committed and probable cause did exist for believing the defendant had committed the rapes and at least one robbery. The facts and circumstances in this case which warrant the conclusion are much stronger than in Henry v. United States, *supra,* where the Supreme Court of the United States held probable cause did not exist. In State v. Carpenter, *supra,* our court said: "The existence of probable cause must be determined by a practical and not by any technical standard." The facts here are considerably stronger than in Draper v. United States, 358 U. S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327, which is frequently cited in the opinions of the Supreme Court of the United States and upon which we relied in State v. Rice, 188 Neb. 728, 199 N. W. 2d 480.

Was Defendant Unlawfully Deprived of Counsel?

The position of the defendant in this respect is founded upon the contention that his statement made near the end of the interrogation which began on Friday night, to wit, "Maybe I should talk to an attorney," constituted a request for counsel under Miranda and that any interrogation thereafter was unlawful. We have already fully set forth the circumstances. The salient facts in the case of Frazier v. Cupp, 394 U. S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 684, are almost identical with those here, and the holding of the Supreme Court of the United States in that case governs here and requires a deter-

mination adverse to the defendant's position. In State v. Moore, 189 Neb. 354, 202 N. W. 2d 740, we summarized the pertinent holding in Frazier as follows: "There the court held that there was no denial of the right to counsel by the police on interrogation of a suspect, so as to render a confession inadmissible in a State prosecution, notwithstanding the suspect showed signs of reluctance during questioning and stated: '"I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now."' The officer replied: '"You can't be in any more trouble than you are in now."' The court said it was possible that the questioning officer took the defendant's remark not as a request that the interrogation cease but merely as a passing comment. The defendant did not pursue the matter but continued answering questions."

Voluntariness of the Confession

The defendant asserts that the record shows the confession was obtained by direct or implied promises, or by the exertion of improper influence. He cites Brady v. United States, 397 U. S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747, as follows: "To be admissible, a confession must be 'free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.'"

In connection with this position the defendant relies upon an inference to be drawn from the statement made to the county attorney and to which we have earlier alluded. That statement was: "I have the impression they will help me with my trouble." He seems to imply that this establishes there was some promise of psychiatric help given in order to induce the confession and this taken with the fact the defendant was kept in a solitary cell establishes involuntariness.

That question has been twice determined adversely to the defendant and it seems clear to us that such

determination is supported by the evidence. The trial court in a separate hearing as required by Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A. L. R. 3d 1205, specifically found the confession to be voluntary and admissible. The evidence before the trial court was substantially that which we have previously recited. At the trial where all the evidence of the circumstances surrounding the confession which we have set forth was received, the question of voluntariness was submitted to the jury under NJI Nos. 14.52 and 14.52A. These instructions required that before the jury could consider the confession and admissions as evidence of guilt it had to find beyond a reasonable doubt the confessions were voluntary and the Miranda waivers were knowingly and intelligently given.

We must look at the totality of the circumstances to determine whether the trial court's finding was wrong. United States v. Watson, 469 F. 2d 362.

Immediately before the defendant made the statement on which he now relies and as a part of the same answer in which the statement appeared, he had categorically answered "No" to the question: "And there have been no promises or threats or anything?" It is to be noted further that the statement was made in an interrogation by the county attorney subsequent to the confession itself. That confession is set forth in the evidence verbatim and shows no promises or threats were made or inducements offered to obtain the confession. The interrogators Hansel and Parks unequivocally deny making any promises or threats or inducements. The Miranda warnings were thrice given and waivers made before the detailed confession was given. There was no conflict in the evidence. The defendant at the initial questioning on Friday evening indicated his desire to talk when he said: "If I thought going to jail would do me any good, I would tell you all about it." It was obvious he was weighing in his own mind

the possible benefit to himself of incarceration. At the very end of the confession on Monday he stated as with relief: "I'm just glad it's over."

The Jackson v. Denno hearing afforded to the defendant "a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." Jackson v. Denno, *supra,* 376-377; Lego v. Twomey, 404 U. S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618. The jury was properly instructed on the necessity of finding beyond a reasonable doubt the confession was voluntary. State v. McDonald, 187 Neb. 752, 194 N. W. 2d 183. We conclude as did the trial court that the prosecution had sustained its burden of proving the confession was voluntary and given after a knowing and intelligent waiver by the defendant of his Miranda rights.

The defendant contends the trial court in its determination of voluntariness did not apply the proper standard of proof because it did not base its finding upon proof beyond a reasonable doubt. He cites Parker v. State, 164 Neb. 614, 83 N. W. 2d 347; and State v. McDonald, *supra.* Neither case is applicable as both refer only to the burden before the jury. Under the holding of the United States Supreme Court in Lego v. Twomey, *supra,* determination by the trial court of the admissibility of a confession by a preponderance of the evidence is not inconsistent with the mandate of proof of guilt beyond a reasonable doubt.

Motion for Change of Venue

The defendant contends that because of extensive pretrial publicity surrounding the crimes with which he was charged, the defendant could not get a fair trial in Adams County and that therefore the court erred in denying his motion for a change of venue. In support of this motion the defendant offered a number of affidavits of residents of Hastings in which they expressed the opinion that the defendant could not get a fair trial in

Adams County. There were also received a number of newspaper clippings and copies of radio and television news reports.

The news accounts of the crimes were not of a sensational nature and were rather restrained. Certain articles did indicate that as the events continued to occur there was rather widespread and deep fear and suspicion. Newspaper accounts concerning Irwin's arrest and arraignment were restrained, but some of these newspaper accounts did indicate that with the defendant's arrest and coming trial the law enforcement officials were of the opinion the matter had been solved. Accounts of the preliminary hearing and the suppression hearing did not report the evidence presented as the trial court had taken appropriate precautions in an effort to protect the rights of the defendant.

The defendant relies upon Sheppard v. Maxwell, 384 U. S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600. The prejudicial publicity and demands of the press for conviction in that notorious case where the very jury which was hearing the case was clearly exposed to the inordinate pressures of the news media bear not the remotest resemblance to the case here.

The voir dire examination of the jury is set forth in full in the record. This discloses that a substantial number of the panel had formed opinions. Those who had opinions were excused for cause. Those who equivocated were eliminated by peremptory challenge.

A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed unless a clear abuse of discretion is shown. State v. Klatt, 187 Neb. 274, 188 N. W. 2d 821. We do not believe the record shows a clear abuse of discretion in this case.

Denial of Motions for Mistrial

In the course of the direct examination of one of the rape victims who could not identify the defendant, the

prosecutor asked: "Did the defendant try to do anything else?" Objection was promptly made and a motion to strike was made. The court said: "I will overrule it at the present time. I think probably there should be no reference to the defendant unless he is identified." The prosecutor then withdrew the question and restated it omitting reference to the defendant. A bit later the defense counsel moved to strike the testimony of the witness and moved for a mistrial. Both motions were overruled subject to renewal if there was no later evidence tying the defendant to the crime. The later tie-in was the confession itself. This later connection obviated any prejudice that arose from the premature reference to the defendant by the prosecutor.

In the course of the direct testimony of Lieutenant Parks relative to his interrogation of the defendant on the Monday following the defendant's arrest, the following question was asked: "What background information, if any, did you take?" The witness, after giving certain information, then stated: "I also took some information about the crime he had committed in McCook, Nebraska, prior to this." Defense counsel objected and moved for a mistrial. The county attorney moved to strike the offending statement. The defense then objected to the motion to strike. The trial judge overruled the objection to the testimony, the motion to strike, and the objection to the motion to strike. Thereafter the prosecuting attorney admonished the witness as follows: "Lieutenant Parks, if you can, please don't refer to any previous trouble." The witness then stated: "Harold told me he had been—" at which point he was interrupted by objection by defense counsel. The court then said: "Just a minute, he hasn't answered the question," and overruled the objection. The witness then continued to speak and stated: "Harold told me he had spent three months in the Regional Center at Hastings, having been sent down there from McCook,

Nebraska, and he was released from the Regional Center after spending three months there."

The so-called background material was clearly irrelevant and immaterial and the rulings of the court on objections to the testimony were erroneous. The quoted information could only be designed to influence the verdict and the persistence of the witness in pursuing his course seemed designed to that end.

In a close case the erroneous rulings of the court would call for a reversal and a new trial. Here, however, we find that under the evidence before the jury, particularly the confessions, we do not believe that the erroneously admitted evidence contributed to the verdict of guilty. We hold that under the circumstances the errors were harmless beyond a reasonable doubt.

In the course of final argument defense counsel urged upon the jury that the confession was the result of promises expressed or implied made by Hansel, and in the argument referred to the statement of the defendant to the county attorney to which we earlier referred.

In apparent response thereto the county attorney in his rebuttal stated: "I submit to you what Mr. Foote has done is, he has tried the Police Department, the Sheriff's Office; he made innuendoes that promises and inducements and things of that nature were given. I submit to you the only testimony you may take into account is what came off that witness stand. I have heard no testimony from anybody on the defense that says there were any promises or inducements made."

The defendant argues that because he was the only witness who could possibly have testified for the defense relative to the matter of inducements or promises, the last-quoted sentence constituted a comment on the failure of the defendant to testify on his own behalf.

The Supreme Court of the United States has stated the applicable rule as follows: ". . . the Fifth Amendment, in its direct application to the Federal Government,

and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Griffin v. California, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106, reh. den. 381 U. S. 957, 85 S. Ct. 1797, 14 L. Ed. 2d 730. The defendant relies upon our holding in Bruntz v. State, 137 Neb. 565, 290 N. W. 420, where a conviction was set aside because the prosecutor said to the jury: " 'The defendant does not get on the stand to tell you about this case.' " In that case the court referred to Hardesty v. State, 95 Neb. 839, 146 N. W. 1007, where we held the comments did not constitute prejudicial error and said: "It is not our purpose, however, to encourage violations of the statute, nor have we the right to speculate in any case on whether prejudice has resulted from the comment. The only possible aim of such a remark is to thwart the statute. If we treat violations indulgently, we shall soon—in the words of Pope—'first endure, then pity, then embrace.' We will apply the rule recognized in Hardesty v. State, supra, where the evidence of guilt is so conclusive that all will agree that no other factor could possibly have influenced the result, and not otherwise."

As we have earlier pointed out, the statement of the defendant which was put into evidence by the defense expressly negatived inducements or promises made by the police to induce the confession. The defense counsel's argument was made in disregard of this express disavowal and was founded on an inference drawn from the "impression" that the defendant had "that they wanted to help him." The argument of the prosecutor in rebuttal may, we think, be said to have been invited by the defense' argument. It does not appear that the prosecutor's statement, taken in context, is a reference to the defendant's failure to take the stand. It can be interpreted simply to be a relevant rebuttal directed to

the fact that the defendant's own statement introduced by the defense expressly negatives promise or inducement. The prosecutor's argument in this case is not at all like the statement condemned in Bruntz v. State, *supra.*

The rationale of the Supreme Court of California, in a situation similar in principle to what we have here, is applicable. There defense counsel argued that the prosecutor's failure to attack the defendant's background while the defendant was on the witness stand in connection with the admissibility of a confession was significant. The prosecutor pointed out that since the defendant had taken the stand only in reference to the voluntariness of a confession he (the prosecutor) could not ask questions on other matters. The court held that the defense invited the responsive argument and could not complain. People v. Hill, 66 Cal. 2d 536, 58 Cal. Rptr. 340, 426 P. 2d 908, cert. den. 389 U. S. 993, 88 S. Ct. 492, 19 L. Ed. 2d 487, cert. den. 390 U. S. 911, 88 S. Ct. 838, 19 L. Ed. 2d 884; 24 A. L. R. 3d 1120. That principle is applicable here.

The Determinations Under the Sexual Sociopath Statute

The hearing to determine whether the defendant was a sexual sociopath and whether he could benefit by treatment was held before the same judge who presided at the trial on the criminal charge. The statute, section 29-2903, R. S. Supp., 1972, provides that the final determination of whether or not the convicted person is a sexual sociopath is to be made by a jury, unless the jury is waived, and the determination of whether or not he will be helped by further treatment is to be made by the judge who presides. In this case a jury was waived and it was incumbent upon the judge to make both findings.

The material evidence on the issues was presented by three psychiatrists and one psychologist. One of these witnesses, a psychiatrist, was called by the State and

the other three by the defendant. The three psychiatrists were of the opinion that the defendant was a sexual sociopath. The psychologist did not express an opinion on this point.

On the issue of whether the defendant would be benefited by treatment the evidence is mildly conflicting. The psychiatrist called by the State testified that the defendant would not be helped by further treatment. The witness founded his opinion primarily upon the defendant's past history, his lack of a sense of responsibility for his acts, and his lack of remorse. One of the defendant's psychiatrists testified that the defendant was more likely than not to be benefited by psychiatric treatment, but that he did fall into a class of individuals "least likely to benefit." A second witness called by the defendant said the question was very difficult for him to answer based on experience because he had never treated any sexual sociopaths, but he felt that any individual ought to have a therapeutic trial, but that the defendant in the light of his long history is not the best candidate for therapy. The defendant's third witness, the psychologist, believed that it would be doubtful and improbable that Irwin would be helped at the Lincoln Regional Center. The primary reason for this opinion was Irwin's particular personality difficulties. He did not seem "to have the internal pain and distress over his condition that would provide the type of motivation desirable."

The findings of the trial court were clearly justified by the evidence.

The Constitutionality of the Sexual Sociopath Act

The claim of the defendant that the sexual sociopath act (hereinafter referred to as the Act), sections 29-2901 to 29-2910, R. S. Supp., 1972, is unconstitutional is lacking in specificity, except the inferential claim made in argument that the commitment constitutes cruel and unusual punishment. Defense counsel cite no authority.

We have nonetheless examined the matter closely and have given somewhat broader scope to the assignment than its language literally requires.

We have first examined the assignment of error and the Act in the light of Baxstrom v. Herold, 383 U. S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620; Specht v. Patterson, 386 U. S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326; and Humphrey v. Cady, 405 U. S. 504, 92 S. Ct. 1048, 31 L. Ed. 2d 394, in which cases the Supreme Court of the United States examined the constitutionality of the New York Corrections Law, the Colorado Sex Offender's Act, and the Wisconsin Sex Crimes Act, respectively. The Act of Nebraska was not adopted until after the decisions in the first two cited cases and seems to have been drawn with reference to the standards and criteria of those decisions.

The New York Corrections Law provided for the civil commitment of a person at the conclusion of a penal sentence if it was determined that the person was mentally ill and required treatment. In that case an equal protection attack was made on the statute because although other New York statutes gave the person civilly committed the right to a de novo review by a jury trial, the Corrections Law did not. The court found the statute deficient on equal protection grounds and declared it unconstitutional. It found the act deficient also in that the determination of whether to commit the defendant to a hospital maintained by the Department of Corrections or to a civil hospital was administratively determined. The Nebraska Act is not subject to these deficiencies. Here the defendant was entitled to a jury trial, if he wanted it, to determine whether he was a sexual sociopath. Thus he was afforded maximum protection even if we were to equate commitment as a sexual sociopath with that of commitment of a person mentally ill, which of course we do not. Under our Act the determination whether to commit to the Regional Cen-

ter or to the Penal and Correctional Complex is determined after all constitutional due process safeguards and is not made administratively as in the New York Corrections Law.

In Specht v. Patterson, *supra,* the Colorado Law was held deficient in respect to due process. The commitment under the Sex Offender's Act was an alternative, just as is in the case of the Nebraska Act, and was made after psychiatric examination and report to the court. There was no provision for a hearing. The court in Specht said: "Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." As we have pointed out in the introduction of this opinion, our Act provides all these constitutional safeguards.

In Humphrey v. Cady, *supra,* the court concerned itself with both due process and equal protection considerations. That case involved a "renewal" commitment under the Wisconsin Sex Crimes Act. The initial commitment was for treatment for a period equal to the maximum for the conviction of the crime. At the end of the period the state could petition for a 5-year renewal of the commitment if treatment was still needed. If after notice and hearing the defendant was found to be still dangerous to the public, renewal could be allowed. In respect to the equal protection issue, the court said: ". . . it is proper to inquire what justification exists for depriving persons committed under the Sex Crimes Act of the jury determination afforded to persons committed under the Mental Health Act." The Supreme Court recognized that the initial commitment triggered by a criminal conviction might not require a jury trial in order to satisfy equal protection requirements, but doubted that this would be true on the renewal commitment. It remanded the case to the Wisconsin court for a consider-

ation of that issue, saying: "An alternative justification for the discrimination might be sought in some special characteristic of sex offenders, which may render a jury determination uniquely inappropriate or unnecessary. It appears, however, that the Mental Health Act and the Sex Crimes Act are not mutually exclusive; that 'aberrations' warranting commitment under the latter might also amount to 'mental illness' warranting commitment under the former. The equal protection claim would seem to be especially persuasive if it develops on remand that petitioner was deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other."

As we have already noted there is no discrimination under our statute between persons committed under the Act and persons committed under statutes pertaining to the mentally ill. Under the Act greater protection is afforded rather than less because the defendant under the Act is entitled to a jury trial on the issue of whether or not he is a sexual sociopath. We consequently see nothing in Humphrey v. Cady, *supra,* which requires us to hold our statute unconstitutional.

We now turn to the cruel and unusual punishment claim as set forth in the brief of the defendant from which we quote: "The evidence at the hearing wherein Appellant was adjudged to be a sexual sociopath was conflicting in regard to whether Appellant could benefit by further treatment at the Lincoln Regional Center, or whether Appellant should be committed to the State Penal and Correctional Complex, wherein treatment could be administered under more closely controlled conditions. . . . While this court held (State v. Madary, 178 Neb. 383, 133 N. W. 2d 583) that sexual psycopath statutes, etc. are generally not criminal statutes, it would appear that incarceration in a penal and correctional complex, wherein one is separated from other inmates

and not afforded the full resources of a psychiatric institution, would be punishment of a criminal nature.... Appellant is serving a potential life sentence under a statute, the inherent purpose of which is rehabilitative and curative treatment. Commitment to the Nebraska Penal and Correctional Complex for an indefinite time is an indeterminable sentence and not applicable under R. R. S., § 29-2620 (1943) and has been held not to apply as punishment for the crime of rape; Haswell v. State, 167 Neb. 169, 92 N. W. 2d 161 (1958) .... Appellant is left in a state of limbo not knowing when, if ever, he may be released, sentenced by the Trial Court, or rehabilitated."

We consider the above contentions in the light of Specht v. Patterson, *supra;* Jackson v. Indiana, 406 U. S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435; and Davy v. Sullivan, 354 F. Supp. 1320.

In Davy v. Sullivan, *supra,* the court considered the constitutionality of the Alabama sexual psychopath law and pointed out: "Commitment is apparently not in lieu of sentence for a triggering conviction, and is not limited in duration to the maximum permissible sentence for the triggering conviction." The statute was held unconstitutional.

The Nebraska Act provides, as we have noted, that if the defendant is determined to be a sexual sociopath and further determined that he cannot be benefited by treatment, he shall be committed to the Nebraska Penal and Correctional Complex for an indefinite period. § 29-2903 (3), R. S. Supp., 1972. The question of whether he remains a sexual sociopath is subject to review at yearly intervals either on motion of the defendant or on the court's own motion. § 29-2906 (2), R. S. Supp., 1972. This review under the provisions of the Act is subject to the same due process safeguards which pertain to the initial commitment. §§ 29-2906 (2) and 29-2902 (2) to (7), R. S. Supp., 1972. The Act therefore is not subject to the criticisms made by the court in Jackson v. Indiana,

supra, and Davy v. Sullivan, *supra,* in these respects. Continuing commitment under the Act depends upon a finding that the defendant is still a sexual sociopath, i. e., "disposed to repeated commission of sexual offenses which are likely to cause substantial injury to the health of others." § 29-2901 and 29-2906 (2), R. S. Supp., 1972.

The Act provides that if the defendant on one of these reviews is determined no longer to be a sexual sociopath the court may "sentence the defendant on the original sex offense or release the defendant on probation." § 29-2906 (3), R. S. Supp., 1972. This provision may, depending upon the construction placed thereon, run afoul of what we believe are valid criteria stated in Davy v. Sullivan, *supra;* Specht v. Patterson, *supra;* and implicit in Jackson v. Indiana, *supra,* upon which latter two cases the court in Davy v. Sullivan, *supra,* relied. The Act would apparently permit an indefinite commitment of a sexual sociopath and then upon recovery the imposition of the maximum sentence for the offense which triggered the commitment. This possibility is characterized in the cited case as subjecting the defendant to two criminal penalties for a single offense. We believe that the indefinite commitment authorized serves two functions. The first, the protection of society and the second, punishment. The commitment and the sentence must be reasonably related to those ends. We hold that when and if the defendant is found to be no longer a sexual sociopath any sentence which the court may impose for the original conviction may not exceed the maximum sentences for rape less any time the defendant has been committed under the present order for indefinite commitment. Stated in another way, we hold that under the Act a defendant may not be confined for a period longer than the longer of the following: (1) The period during which he remains a sexual sociopath, or (2) the maximum term or terms authorized for the crime of which he was convicted and which triggered the initial

indefinite commitment. As so construed the Act is constitutional.

AFFIRMED.

SMITH, J., not participating.

COMMUNITY CREDIT CO., A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. JOE GILLHAM, DOING BUSINESS AS GILLHAM'S AUTO SALES, APPELLANT AND CROSS-APPELLEE.

214 N. W. 2d 384

Filed January 25, 1974. No. 39018.

1. **Security Interest: Time: Records: States.** When property subject to security interest perfected in another state is removed to Nebraska, secured party has 4 months to locate property and perfect his security interest in Nebraska, and if he fails to file in Nebraska within 4 months, protection of the security interest ceases and his interest is thereafter subject to be defeated like any other unperfected security interest.

2. ———: ———: ———: ———. Where property subject to security interest perfected in another state is removed to Nebraska, subsequent purchaser during 4-month period of statutory protection which secured party had to perfect its interest in Nebraska is not retroactively given superior title, although secured party fails to perfect its interest in Nebraska.

3. **Security Interest: Time: Motor Vehicles: Sales: States.** The holder of a security interest in an automobile which was perfected pursuant to the laws of a nontitle state, who had no knowledge of its removal to this state, has priority over a Nebraska purchaser without knowledge of the security interest who purchases the automobile with a clear Nebraska title within 4 months of its arrival in Nebraska.

4. **Appeal and Error: New Trial: Affidavits.** This court will not review testimony in the form of affidavits used in the trial court on the motion for a new trial unless such affidavits have been included in and presented by a bill of exceptions.

5. **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 entitle a party to relief on that ground.

6. **Replevin: Damages: Time.** Property which cannot be returned in a replevin action is to be valued as of the time of trial.

Appeal from the District Court for Howard County: LLOYD W. KELLY, JR., Judge. Affirmed.

Robert E. Paulick, for appellant.

Orval W. Von Seggern of Cunningham, Blackburn & Von Seggern, for appellee.

Heard before WHITE, C. J., McCOWN, and NEWTON, JJ., and LYNCH and WARREN, District Judges.

WARREN, District Judge.

This is a replevin action by plaintiff Community Credit Co., a Minnesota corporation, for the return of a 1971 Hornet automobile, or the value thereof, from the defendant Joe Gillham, doing business as Gillham's Auto Sales, of St. Paul, Nebraska. After two special findings by the jury, the court entered judgment for plaintiff for $1,700. Defendant has appealed and plaintiff has cross-appealed.

The evidence establishes that on April 15, 1971, Jean C. Grapentin, then residing in Hennepin County, Minnesota, purchased a new 1971 Hornet automobile from plaintiff's assignor under a conditional sales contract which was signed by her husband Stanley C. Grapentin as guarantor. Pursuant to that transaction plaintiff filed a financing statement on April 19, 1971, in the office of the register of deeds of Hennepin County, Minnesota. Before a recent enactment which became effective October 1, 1972, Minnesota was a nontitle state, and hence Mrs. Grapentin obtained only a registration card from the Minnesota Motor Vehicle Division. The Minnesota registration card did not provide a space for listing of liens and encumbrances. The payments on the conditional sales contract became 30 days past due in October

1971. In the first part of October 1971, Stanley C. Grapentin brought the automobile to Grand Island, Nebraska, where he stayed temporarily while frequenting used car lots with a view to trading off his wife's automobile for a different car. With his estranged wife in California, Stanley C. Grapentin, identifying himself as Jean C. Grapentin, endorsed the Minnesota registration card before a Grand Island notary public, then signed his wife's name to a Nebraska application for a certificate of title in the office of the county clerk of Hall County, and on November 12, 1971, obtained a "clear" Nebraska certificate of title in the name of Jean C. Grapentin showing no liens or encumbrances. He then again signed his wife's name to the assignment portion of the Nebraska title, before a St. Paul, Nebraska, notary public, and on November 15, 1971, sold the automobile to the defendant for a stated consideration of $2,285 which consisted of $900 cash and an older automobile. Plaintiff first learned that the automobile might be in Nebraska in late November or early December 1971, and inquired of the defendant as to the whereabouts of the automobile. Defendant had sold the Hornet automobile on December 3, 1971, to a man in Denver, Colorado, whom he could not name at the time of trial, for "$1900.00 and something," and defendant testified that he had made no record of the sale. The testimony of Stanley C. Grapentin was offered by deposition taken at the Nebraska Penal and Correctional Complex 2 weeks before the trial.

The question presented by this fact situation is whether defendant purchased the 1971 Hornet automobile subject to plaintiff's security interest.

The trial court submitted two issues to the jury: (1) Whether or not Stanley C. Grapentin had the automobile in Nebraska for more than 4 months; and (2) the value of the automobile on January 17, 1972. The jury returned special findings that Grapentin had the automobile

in Nebraska less than 4 months and fixed the value at $1,700 on the date the petition in replevin was filed. By submitting only these two issues, the trial court in effect found that plaintiff was entitled to recover if the jury found that the automobile had not been in Nebraska for at least 4 months prior to its sale to defendant.

The broad problem of maintaining security interests in highly mobile, heavily financed and readily saleable vehicles has caused most states to enact "Certificate of Title" laws requiring that all liens and encumbrances (security interests) be noted on the face of the title certificate. In 1971, Minnesota had no such title law, while Nebraska did. The Uniform Commercial Code has attempted to provide certainty in this field of commerce by the provisions of section 9-103, U. C. C.

Section 9-103, U. C. C., has been entirely rewritten effective September 2, 1973, to provide specific rules for goods covered by a certificate of title issued under a statute of this state or of another jurisdiction. See § 9-103(2), U. C. C., as amended, Laws 1973, L. B. 363, § 1. The references which follow are necessarily to section 9-103, U. C. C., as it existed before the 1973 amendment.

Section 9-103(3), U. C. C., provides: "If personal property * * * is already subject to a security interest when it is brought into this state, the validity of the security interest in this state is to be determined by the law (including the conflict of law rules) of the jurisdiction where the property was when the security interest attached. * * * If the security interest was already perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this state, the security interest continues perfected in this state for four months, and also thereafter if within the four month period it is perfected in this state."

Defendant argues that the perfection of plaintiff's security interest is governed by the laws of the state which

issued the certificate of title (Nebraska) and cites subsection (4) of section 9-103, U. C. C., which provides: "Notwithstanding subsections (2) and (3), if personal property is covered by a certificate of title issued under a statute of this state or any other jurisdiction which requires indication on a certificate of title of any security interest in the property as a condition of perfection, then the perfection is governed by the law of the jurisdiction which issued the certificate."

Defendant contends that since the Nebraska certificate of title act requires noting of the security interest on the title, the plaintiff cannot assert a valid security interest in the automobile as against the defendant holding a clear Nebraska certificate of title. Here, there was a substantial question as to whether or not the defendant was a bona fide purchaser without notice of plaintiff's security interest, but our decision will be based on the premise that defendant had no prior notice when he purchased the automobile.

By official Comment 7 to section 9-103, U. C. C., the editorial board of the Uniform Commercial Code attempts to clarify the application of the above-quoted subsections (3) and (4), by stating: "Collateral other than accounts, contract rights, general intangibles and mobile equipment may be brought into this state subject to a security interest which has attached and may have been perfected under the laws of another jurisdiction. If the property is covered by a certificate of title, subsection (4) applies. In other cases, under subsection (3) this article applies from the time the collateral comes into this state, except that (1) the validity of the security interest is determined by the law of the jurisdiction where it attached * * * and (2) if the security interest was perfected in the jurisdiction where the collateral was kept before being brought here, it continues perfected in this state for four months after the collateral is brought in, although the filing requirements of this

article have not been complied with here. * * * Subsection (3) proceeds on the theory that not only the secured party whose collateral has been removed but also creditors of and purchasers from the debtor in this state should be considered. The four month period is long enough for a secured party to discover in most cases that the collateral has been removed and to file in this state; thereafter, if he has not done so, his interest, although originally perfected in the state where it attached, is subject to defeat here by those persons who take priority over an unperfected security interest."

The comment makes it clear that subsection (4) does not apply to an automobile which was sold under a conditional sales contract in a state which does not require indication on a certificate of title of any security interest in the property as a condition of perfection, and which was subsequently brought into a state which had such a requirement. Here, the automobile was brought from a nontitle state (Minnesota) to a title state (Nebraska), and pursuant to section 9-103(3), U. C. C., the question of whether or not plaintiff had a perfected security interest in the automobile when it was brought to Nebraska in October 1971, is governed by Minnesota law.

A recent annotation at 42 A. L. R. 3d 1168, deals extensively with the problem of priorities between a vendor's lien and a subsequent title or security interest obtained in another state to which the vehicle was removed. The annotation states at page 1189: "Where an automobile has been transferred to the forum state from a nontitle state, courts in jurisdictions adopting U. C. C. § 9-193 generally have resolved questions as to priorities between the vendor's lien and subsequent titles or security interests obtained following removal of the vehicle to the forum state by reference to the rules stated in § 9-103(3)."

Section 9-103(3), U.C.C., has been construed to require

enforcement of the foreign vendor's lien under similar fact situations involving automobiles brought from non-title to title states in the leading cases of First National Bank v. Stamper, 93 N.J. Super. 150, 225 A. 2d 162 (1966), and Churchill Motors, Inc. v. A. C. Lohman, Inc., 16 App. Div. 2d 560, 229 N. Y. S. 2d 570 (1962). Uniformity of decisions construing the Uniform Commercial Code is as desirable as the adoption of the Uniform Commercial Code itself. Two states in which the Uniform Commercial Code does not apply to motor vehicle titles have reached the same result in similar fact situations under the rule of comity. First National Bank v. Chuck Lowen, Inc., 128 Colo. 104, 261 P. 2d 158 (1953); Doenges-Glass, Inc. v. General Motors Acceptance Corp., 28 Colo. App. 283, 472 P. 2d 761 (1970); General Motors Acceptance Corp. v. Birkett L. Williams Co., 17 Ohio Misc. 219, 46 Ohio Op. 2d 311, 243 N. E. 2d 882 (1969). Louisiana, which has not adopted the Uniform Commercial Code, followed the same general principal in General Motors Acceptance Corp. v. Nuss, 195 La. 210, 196 So. 323 (1940).

Prior to the adoption of the Uniform Commercial Code in Nebraska, this court held that under the doctrine of comity the Oklahoma assignee of the original vendor under an installment sale contract should prevail over a Nebraska bona fide purchaser at an execution sale who obtained a "clear" Nebraska certificate of title. Universal C. I. T. Credit Corp. v. Vogt, 165 Neb. 611, 86 N. W. 2d 771 (1957). Therefore, the adoption of the Uniform Commercial Code in Nebraska has merely modified former substantive case law in limiting the period of time during which a foreign vendor or lienholder would have absolute priority over a Nebraska purchaser to a period of 4 months, unless further affirmative action is taken in Nebraska under the Uniform Commercial Code to perfect the security interest.

"The four-month period provided in subsection 3, above, is an absolute period of protection of the vendor's se-

curity interest, designed to give him adequate time to make an investigation and locate the property. If the vendor fails to file within the four-month period, the protection of his security interest ceases upon the expiration thereof, and his unperfected security interest is thereafter subject to be defeated in the same way in which any unperfected security interest may be defeated under the Code. A subsequent purchaser for value, without notice of the unprotected security interest, would take a superior title. * * * But, a prior purchaser who had purchased during the four-month period of statutory protection is not retroactively given a superior title." First National Bank v. Stamper, *supra.*

We hold that under the provisions of section 9-103, U. C. C., the holder of a security interest in an automobile which was perfected pursuant to the laws of a non-title state, who had no knowledge of its removal to this state, has priority over a Nebraska purchaser without knowledge of the security interest who purchases the automobile with a clear Nebraska title within 4 months of its arrival in Nebraska.

Minnesota Law in 1971 provided generally for filing of a financing statement on motor vehicles in the office of the register of deeds in the county of the debtor's residence. § 336.9-102, 336.9-302, and 336.9-401, Minnesota Statutes, 1971.

The question of fact for determination here was whether defendant purchased the automobile within 4 months from the time it was brought here. While the only evidence introduced on that question established that the automobile was brought to Nebraska in the first part of October 1971, and was sold to defendant on November 15, 1971, the court, out of an abundance of caution, submitted that special issue to the jury, which returned a finding "that Stanley C. Grapentin had the 1971 Hornet Station Wagon automobile less than four months in the State of Nebraska."

The defendant having disposed of the automobile prior to the filing of the replevin action, the plaintiff was entitled to recover its value. The jury fixed that value in its second finding at $1,700.

On March 8, 1973, 41 days after the final judgment was entered for plaintiff, and after perfecting his appeal to this court, the defendant filed in the District Court a second motion for new trial, on the grounds that the deposition of Stanley C. Grapentin had been allowed in the jury room and was used by one of the jurors during jury deliberations. Four affidavits of jurors were filed prior to the hearing on the second motion for new trial, which was overruled on May 11, 1973. The affidavits were neither offered nor received in evidence at the hearing on the motion, and the same do not appear in the bill of exceptions.

This court has stated as recently as Metschke v. Department of Motor Vehicles, 186 Neb.197, 181 N. W. 2d 843 (1970), the long standing rule that: "* * * affidavits in support of a motion for new trial must be offered in evidence and preserved in and made a part of a bill of exceptions to be considered by this court. 'This court will not review testimony in the form of affidavits used in the trial court on the hearing of a motion for a new trial unless such affidavits have been included in and presented by a bill of exceptions.' "

In addition, the record contains no allegation or showing by defendant which would bring him within the two exceptions exempting one from the mandatory 10-day limit for filing a motion for new trial prescribed by section 25-1143, R. R. S. 1943. The jury returned its verdict on November 30, 1972; the court entered its judgment thereon on January 26, 1973; and defendant had until February 5, 1973, in which to file his first motion for new trial. There is nothing whatever in the record to show defendant was unavoidably prevented during the intervening 67 days from interviewing the

jurors and ascertaining the facts regarding the presence and use of the deposition in the jury room. " '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.' " Vacek v. Marburger, 188 Neb. 180, 195 N. W. 2d 515 (1972). Counsel is not free to arbitrarily delay the questioning of jurors until convenient, in the face of the 10-day limit for filing of a motion for new trial, and the burden is upon him to show he was unavoidably prevented from ascertaining the facts within the time limited, when he does so delay. The overruling of the second motion for new trial was correct and defendant's second assignment of error is without merit.

Plaintiff has cross-appealed on the ground that the jury was improperly instructed to fix the value of the automobile as of the date of filing of the petition on January 17, 1972, rather than on the date of the wrongful taking on November 15, 1971. Plaintiff cites Hickman-Williams Agency v. Haney, 152 Neb. 219, 40 N. W. 2d 813 (1950), as holding that if property is not returned the measure of damages is the value of the property as proved, together with interest thereon from the date of unlawful taking. Plaintiff confuses the date from which interest shall commence to run with the date the chattel is to be valued.

This court has construed section 25-10,104, R. R. S. 1943, in holding: "The 'value thereof' is instead of a return of the property when a return cannot be had, and should be the equivalent of the property itself as it was at the time of trial * * *." Wallace v. Cox, 100 Neb. 607, 160 N. W. 992 (1916). The trial took place on November 29 and 30, 1972, and the trial court was in error in instructing the jury to value the automobile as of the date of filing

of the replevin action; however, plaintiff can hardly assert that the error was prejudicial when it resulted in having the automobile valued more than 10 months prior to the trial and hence as a newer automobile by that length of time. Section 25-853, R. R. S. 1943, is applicable to plaintiff's cross-appeal and requires the court to disregard errors and defects not affecting the substantial rights of the adverse party. We hold the error not prejudicial to the plaintiff and deny its cross-appeal.

We affirm the judgment of the trial court.

AFFIRMED.

KATHERINE M. QUINCY, APPELLANT, V. J & S OF NEBRASKA, INC., APPELLEE.

214 N. W. 2d 498

Filed January 25, 1974. No. 39094.

1. **Workmen's Compensation: Appeal and Error: Evidence.** 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.

2. ———: ———: ———. 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.

3. **Workmen's Compensation: Trial: Evidence.** Where an award in a workmen's compensation case is supported by reasonable competent evidence and the medical testimony is uncontradicted that future medical examinations, treatment, and medicines will be necessary, the employer shall be liable for reasonable medical and hospital services and medicines as and when needed, subject to the approval of the Workmen's Compensation Court.

Appeal from the District Court for Buffalo County: S. S. SIDNER, Judge. Affirmed as modified.

Mitchell & Beatty, Larry R. Demerath, and Timothy D. Whitty, for appellant.

Tye, Worlock, Tye, Jacobsen & Orr and Kenneth C. Fritzler, II, for appellee.

Heard before WHITE, C. J., McCOWN and NEWTON, JJ., and LYNCH and WARREN, District Judges.

LYNCH, District Judge.

This case was originally tried before one of the judges of the Nebraska Workmen's Compensation Court, who awarded the plaintiff total disability, medical, hospital, certain travel costs, and future medical expenses. The defendant waived rehearing and appealed to the District Court for Buffalo County, which court found that the plaintiff was temporarily totally disabled from August 9, 1969, to August 25, 1972, and thereafter suffered 50 percent permanent disability to the body as a whole. Some expenses were allowed but nothing for future medical services and medication.

The plaintiff was 47 years old at the time of the trial in District Court. She had completed sophomore year of high school, had no special vocational training, had worked since high school in restaurants and kitchens in many capacities, and had owned and operated a small cafe for about one year during 1966 and 1967. On August 8, 1969, while working as a salad lady for the Holiday Inn in Kearney, Nebraska, the plaintiff slipped and fell in a walk-in cooler and suffered a severe low back strain.

The plaintiff testified in substance that her prior employment as a salad lady and banquet waitress required her to be on her feet all day, to bend and stoop, and to lift heavy containers; that she had not worked since the accident but at home she had tried to do dishes, dust, mop, and sweep, all of which bothered her; and that she could not do the work she formerly did at the Holiday Inn. Plaintiff had not applied for employment nor had she attempted to work on a full or part-time basis since the accident.

Dr. Kenneth W. Ellis, an orthopedic surgeon who examined and treated the plaintiff from September 22, 1969, until January 1973, and who attempted a fusion which resulted in an incomplete union of the lumbar vertebrae, rated plaintiff's permanent partial disability on August 20, 1970, as 20 percent, later as 40 percent, and at trial estimated her permanent partial disability to be 50 percent of the body as a whole. This surgeon testified that the degree of disability had become more severe but that her symptoms had stabilized by August 1972, and he did not anticipate continued deterioration without intervening factors. He also stated that in his opinion the plaintiff would be unable to do the work she described last doing but could return to at least part-time work at the Holiday Inn for 3 or 4 hours at a stretch if it required no lifting.

Another orthopedic sugreon estimated plaintiff's permanent disability as 25 to 30 percent to her body as a whole and agreed that her condition had stabilized and she should be given a trial at her previous employment for 4 hours a day. The record includes medical reports from several other doctors, but they contain nothing additionally significant.

An employment counselor for the Department of Labor stated that from the testimony he had heard during the trial he considered plaintiff unemployable as a waitress or cook.

The manager of food operations at the Holiday Inn testified that it was not necessary for a salad lady or banquet waitress to do any great amount of lifting, and that her employer hires about 20 part-time restaurant employees.

Counsel for both parties cited several Nebraska cases and argued competently that the factual situation and the medical testimony bring this case within or without their respective interpretations of the term "total disability" for workmen's compensation purposes; how-

ever, it is our opinion that this case is subject to the rule 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." Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285. From a consideration of the entire record, we conclude that the findings of fact and the award of 50 percent permanent disability by the District Court are supported by reasonable competent evidence and therefore should not be considered de novo in this court. If the medical experts are in error relative to their estimates of disability or opinions that the plaintiff's condition has stabilized, an application to modify the award may be submitted pursuant to workmen's compensation statutes. Pavel v. Hughes Brothers, Inc., 167 Neb. 727, 94 N. W. 2d 492.

Concerning future medical expenses, the opinion testimony of Dr. Ellis, the attending orthopedic surgeon, that the plaintiff will require some degree of medical attention, examinations, and medications in the future as a result of the accident and back injury is unquestioned. As a matter of fact, it is the only evidence in the record pertaining to this possible need, and the District Court decree is silent on the subject. "Section 48-120, R. R. S. 1943, provides: 'The employer shall be liable for reasonable medical and hospital services and medicines as and when needed, * * * subject to the approval of the compensation court, * * *.'" Shotwell v. Industrial Builders, Inc., 187 Neb. 320, 190 N. W. 2d 624. Therefore, in this particular the award of the District Court should be modified.

AFFIRMED AS MODIFIED.

FEDERATED MUTUAL INSURANCE COMPANY, A CORPORATION, APPELLANT, V. GOOD SAMARITAN HOSPITAL, KEARNEY, NEBRASKA, A CORPORATION, APPELLEE.

214 N. W. 2d 493

Filed January 31, 1974. No. 39012.

Payment: Parties: Mistake: Restitution. A creditor who has innocently received payment of a debt from a third party is under no duty to make restitution to the third party if it is later discovered that the third party had no responsibility to make the payment and payment was made solely because of the third party's mistake.

Appeal from the District Court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Tye, Worlock, Tye, Jacobsen & Orr and Kenneth C. Fritzler, for appellant.

William T. Oakes and Robert F. Craig of Kennedy, Holland, DeLacy and Svoboda, for appellee.

Heard before WHITE, C. J., MCCOWN, and NEWTON, JJ., and LYNCH and WARREN, District Judges.

WARREN, District Judge.

This is a suit by Federated Mutual Insurance Company against the Good Samaritan Hospital, Kearney, Nebraska, to recover an $1,959.17 overpayment on group hospital insurance policies paid directly by plaintiff to the defendant hospital pursuant to assignments by plaintiff's insured. The parties stipulated to the facts and each moved for summary judgment. The trial court found generally for the defendant hospital and dismissed plaintiff's petition. Plaintiff has appealed. We affirm.

The parties stipulated to all the facts. The defendant hospital performed hospital and medical services for plaintiff's insured, Gary Bemis, between October 7, 1968, and April 13, 1969, of the reasonable value of $13,915.20. Plaintiff's insured assigned his policy benefits to defendant and the total of those policy benefits was $12,047.30.

Due to its own mistake, plaintiff paid defendant directly by three drafts a total of $19,822.78, which was $7,775.48 more than plaintiff's total liability to its insured under its group health and accident and major medical insurance policies. The last payment to defendant was made by draft dated July 9, 1969. In the latter part of 1969, plaintiff requested that the defendant hospital refund the $7,775.48 overpayment. In response, defendant did on January 19, 1970, remit the sum of $5,816.31 to plaintiff, but retained the net policy overpayment of $1,959.17 already applied to the balance of the Gary Bemis hospital bill.

The stipulation of facts establishes several points which narrow the scope of the question involved, namely: (1) The overpayment by plaintiff was made solely due to plaintiff's own mistake and lack of care; (2) the defendant hospital made no misrepresentation to induce the overpayment; (3) defendant acted in good faith without prior knowledge of the mistake in receiving the overpayment; and (4) there is no evidence that defendant, in reliance upon the mistaken payment, changed its position to its detriment.

Plaintiff contends that under the general principle that a person wrongly deprived of his property is entitled to restitution, it is well settled that an insurer is entitled to restitution of payments made under a mistake, and cites as the general rule: "An insurer who made a payment under a mistake of fact may, as a rule, recover such payment, even if its mistake was due to its lack of care, unless the payee has so changed his position that it would be unjust to require a refund." Annotation, 167 A. L. R. 472 (1947). "A person who has entered into a contract binding upon him and has paid money to the other party thereto under an erroneous belief induced by a mistake of fact that the terms of the contract required such payment, is entitled to restitution from the other, except where the mistake is only

as to the time of payment." Restatement, Restitution, § 18, p. 82 (1937).

We have no quarrel with those broad principles. The controlling factor here, however, is that in cases involving payments on insurance policies we must distinguish between mistaken payments made to the insured from whom the insurer seeks to recover, and those payments made by the insurer to an innocent third party creditor of the insured.

An earlier A. L. R. note covers the specific point. "It is also settled that where money is paid to another under a mistake of fact, that is, on the mistaken supposition of the existence of a specific fact which would entitle the other to the money, and would not have been paid had it been known to payor that the fact was otherwise, it may be recovered. The ground on which this rule rests is that money paid through misapprehension of facts, in equity and good conscience, belongs to the person who paid it. 21 R. C. L. p. 164. * * * But according to numerous cases this rule as to recovery of payments made under a mistake of fact does not apply where, as a result of a mistake or fraud between the original parties, money is paid by one of them on account of the other to a third party (directly or through the intervention of the other), who receives the same in good faith without knowledge of the mistake or fraud, in payment of a claim by him against the latter. In such case, by the overwhelming weight of authority, no recovery may be had against such third party." Annotation, 114 A. L. R. 384 (1938).

"The principle that a person who innocently has acquired the title (here, money) to something for which he has paid value is under no duty to restore it to one who would be entitled to reclaim it if the one receiving it had not been innocent or had not obtained the title or had not paid value therefor, is of wide application, being a limitation upon the principle that a person who

has been wrongly deprived of his things is entitled to restitution. This limitation involves no moral issue, since it merely creates convenient rules for determining which of two innocent persons should bear a loss which must be borne by someone." First State Bank of Oregon v. Peoples Nat. Bank of Washington, 254 Ore. 309, 459 P. 2d 984 (1969).

In Vermont Mutual Fire Ins. Co. v. Van Dyke, 105 Vt. 257, 165 A. 906 (1933), the plaintiff sought to recover for payments made to a mortgagee of the insured for a fire loss. After payment had been made it was discovered that in his claim the insured had made deliberate false statements as to the encumbrances on the property as well as to other insurance coverage. Of the insurance company's claim against the mortgagee, the court stated: "It does not follow, however, that this suit can be maintained. The rule by which a recovery could be had from Paradis (the insured) is, ordinarily, limited to payments inter partes and has no application to third persons to whom a debtor has paid what he supposed he owed his creditor. The rule is thus stated by Prof. Williston: 'When A, under a mistaken belief in his liability to B, on direction of the latter, pays C a claim which C has against B, A cannot recover the payment from C. If the payment was voluntarily and intentionally paid by A to C to satisfy the latter's claim against B, and C had a genuine claim against B, it seems clear that no recovery should be allowed. C is a purchaser of the money for value and in good faith.' 3 Williston, Contracts, § 1574. * * * In such cases, when the money is received by C, his rights are just what they would be if he had received it from B, * * *."

The American Law Institute states the specific rule applicable here: "A creditor of another or one having a lien on another's property who has received from a third person any benefit in discharge of the debt or lien,

is under no duty to make restitution therefor, although the discharge was given by mistake of the transferor as to his interests or duties, if the transferee made no misrepresentation and did not have notice of the transferor's mistake." Restatement, Restitution, § 14(1), p. 55 (1937).

Here, the payment to the defendant hospital was made solely due to plaintiff's own mistake. Defendant made no misrepresentations. Plaintiff knew its own policy provisions. Defendant, having the insured's valid assignment and no notice or knowledge of the mistake, was entirely justified in receiving the payment. When the mistake was discovered, defendant retained only the amount due it from the insured for services it performed. It was therefore not unjustly enriched. We regard the status of the defendant creditor exactly as though plaintiff had made the overpayment to its insured, and the insured had then paid his debt directly to defendant. Defendant here was not required to show a change of position in reliance and to its detriment, because it was in the position of a bona fide purchaser for value.

The widespread use of assignments of policy benefits to hospitals by patients is well known and is recognized by the health insurance industry. To subject a hospital to possible refund liability if the insurer later discovers a mistaken overpayment, lasting until all such claims were barred by the statutes of limitation, would be to place an undue burden of contingent liability on such institutions. Hospitals would be safe only by requiring insurers to pay benefits directly to the insured patient, and then by accepting payment directly from the patient. By this ruling, we place the burden for determining the limits of policy liability squarely upon the only party (as between the insurer and the assignee hospital) in a position to know the policy provisions and its liability under that contract of insurance. Someone must suffer

the loss, and as between plaintiff insurer and defendant hospital, the party making the mistake should bear that loss.

A creditor who has innocently received payment of a debt from a third party is under no duty to make restitution to the third party if it is later discovered that the third party had no responsibility to make the payment and payment was made solely because of the third party's mistake.

Plaintiff, for reasons not shown by the record, did not join its insured as a party defendant in attempting recovery of its overpayment, and we are therefore not called upon to rule as to the right of an insurer to recover from its insured for overpayments mistakenly made to insured's third party creditor.

For the reasons stated, the judgment of the trial court is affirmed.

AFFIRMED.

MELBA ANN O'SHEA, APPELLEE AND CROSS-APPELLANT, V. JOHN F. O'SHEA AND JOHN F. O'SHEA, TRUSTEE, APPELLANTS AND CROSS-APPELLEES.

MELBA ANN O'SHEA, EXECUTRIX OF THE ESTATE OF FRANK P. O'SHEA, DECEASED, APPELLEE AND CROSS-APPELLANT, V. JOHN F. O'SHEA AND JOHN F. O'SHEA, TRUSTEE, APPELLANTS AND CROSS-APPELLEES.

214 N. W. 2d 486

Filed January 31, 1974. No. 39038.

1. **Pretrial: Pleadings: Trial.** The purpose of a pretrial conference is to simplify the issues; amend the pleadings, when necessary; and avoid unnecessary proof of facts at the trial.
2. **Pretrial: Trial.** An order of a pretrial conference when duly entered by the trial court controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.
3. ———: ———. Permission to amend a pretrial order at the trial or before final submission to the court should ordinarily not

be granted when such amendment will result in a delay of the trial, except when relevant matters have arisen after the pretrial conference, or when matters existing at the time of that hearing were not discovered until afterwards and the attorney was not negligent in failing to obtain the information earlier.

4. **Trusts: Payments: Accounting: Spendthrifts.** The trustee of a spendthrift trust is not entitled to a charge on a beneficiary's interest in the trust estate for overpayments made to said beneficiary in accordance with the provisions of the trust. The trustee's rights under these circumstances are no greater than those of any other unsecured creditor of the beneficiary.

Appeal from the District Court for Scotts Bluff County: ROBERT R. MORAN, Judge. Affirmed as modified.

W. H. Kirwin and Robert M. Harris, for appellants.

Wright & Simmons, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and NEWTON, JJ., and RONIN, District Judge.

RONIN, District Judge.

Two separate cases involved in this appeal were consolidated for purpose of trial in the District Court for Scotts Bluff County, Nebraska. The plaintiff, Melba Ann O'Shea, hereinafter designated as Melba, brings one of the actions in her capacity as executrix of the estate of Frank P. O'Shea, her deceased husband, against John F. O'Shea individually and in his capacity as trustee of a spendthrift trust in which his brother, Frank, was the beneficiary.

In the other action Melba seeks an accounting as a judgment creditor against the same defendants for the support payments for herself and minor children under an order of the District Court for Scotts Bluff County, Nebraska. Frank P. O'Shea will be referred to as Frank and his brother John F. O'Shea as John.

The factual background of both these actions involves an accounting of a trust for a period of nearly 25 years. On May 14, 1945, Matilde O'Shea, the then widowed

mother of John and Frank, conveyed by deed certain real property in trust to John for the benefit of Frank. This was a spendthrift trust with the only asset being the real property described in the trust deed, together with the rental income from a garage building situated thereon. The conditions of the trust imposed on John the duty to manage the property, collect the rents, pay the taxes, insurance, and necessary repairs, and to pay the net income derived from said property to Frank "for twenty (20) years from the 25th day of October, 1944. After such period, the said trustee is directed to convey said trust property to Frank P. O'Shea if he be then living or to his heirs at law if he be not living." The terms of the trust denied Frank the right to convey or encumber the property or its income.

John accepted his rights and duties as trustee and agreed to execute the trust without any charge for his services. The record discloses no change in his trust activities or records during the life of Frank, who died on October 5, 1970, which was nearly 6 years after the expiration of the 20-year period of the trust provided for in the trust deed. John never made an accounting prior to the commencement of this action, nor has he conveyed the property in accordance with the provisions of the trust deed. John continued to collect the rents up to October 5, 1970, and commingled these trust funds with his personal account. He failed to pay the real estate taxes for the last half of the year 1960 to and including the year 1969, which with accrued interest calculated to October 5, 1970, amounted to $15,262.86. The income from the trust was sufficient to have paid the taxes.

John, as trustee, distributed funds to Frank and his creditors for which he seeks credit. Melba, as executrix of Frank's estate, seeks an accounting from John personally and in his capacity as trustee for the real estate taxes not paid.

Melba in her personal action against John, individually and as trustee, seeks an accounting of the trustee in compliance with a court order to pay to the extent of the net income of the trust for the support and maintenance of the wife and minor children of Frank. The District Court for Scotts Bluff County, Nebraska, in a separate support action, ordered in 1961, that John as trustee pay from the net income of the trust the sum of $150 a month until November 1, 1964, and thereafter the sum of $250 per month for the support of Melba and the minor children of Melba and Frank. John complied with this court order through 1965. Although there was net income from which additional payments could have been made, John only partially complied with the support order after 1965. Melba seeks an accounting and recovery as a judgment creditor against John for the sum due her under the support order.

The time of the termination of this spendthrift trust is largely decisive of the issues in both cases. The trial court recognized this and expressly found in its written report of pretrial conference of January 21, 1972, for both cases, that: "The trust continued to October 5, 1970, when Frank P. O'Shea died, * * *. The period to be accounted for is from May 8, 1946 to October 5, 1970. * * * Any party may except to this Report in writing within 10 days from date."

No exceptions were made by John to this report nor does he allege in his answers filed in both cases that the trust terminated at any time prior to Frank's death. The cases were tried on May 3, 1972, on the issues fixed in the pretrial report and were taken under advisement by the court. On July 3, 1972, 2 months after trial, John moved for the first time to correct the pretrial order by alleging that the trust terminated at the end of the 20-year period provided in the trust deed, which was October 25, 1964. The trial court in its judgment order of January 24, 1973, overruled John's motion to change

the time of the termination of the trust, and made its computations of accounting for the period established in its trial order. John assigns as error the finding of the trial court that the trust continued beyond its term of "twenty years from the 25th day of October, 1944, to October 5, 1970."

The importance of pretrial procedure is recognized by a rule of this court, Revised Rules of the Supreme Court, 1971, p. 42, authorizing District Courts to hold pretrial conferences to consider: "(1) The simplification of issues; * * * (6) Such other matters as may aid in the disposition of the action." This rule further provides that "such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." See, also, Rule 16 of Federal Rules of Civil Procedure.

In Long v. Magnolia Petroleum Co., 166 Neb. 410, 89 N. W. 2d 245, the court quoted from its rule on pretrial procedure and held that the participants in the pretrial conference: "* * * must adhere to the spirit of that procedure and are held to have waived questions not there presented." See, also, Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc., 179 Neb. 858, 140 N. W. 2d 813.

In Tober v. Hampton, 178 Neb. 858, at 864, 136 N. W. 2d 194, our court cited with approval the pretrial rule discussed at length in 3 Moore's Federal Practice (2d Ed.), p. 1118: "Where there has been a pre-trial conference, there are not likely to be requests for permission to amend at the trial; and permission to amend at the trial should ordinarily not be granted when such amendment will result in a delay of the trial, except when relevant matters have arisen after the pre-trial conference, or when matters existing at the time of that hearing were not discovered until afterwards and the attorney was not negligent in failing to obtain the information earlier. Since the pre-trial order controls the

future course of the action, however, failure to amend the pleadings to reflect the issues stated in the order should be immaterial."

We hold that it was not an abuse of discretion for the trial court to refuse to amend its pretrial order 60 days after the trial. It was not incumbent on Melba to prove that which was admitted in the pretrial report and to which John made no timely exception. Under the facts in this case, the finding of the trial court that the trust terminated on the death of Frank on October 5, 1970, is correct.

The trustee of a spendthrift trust is not entitled to a charge on a beneficiary's interest in the trust estate for unauthorized overpayments made to the beneficiary. The trustee's rights under the facts in this case are no greater than those of any other unsecured creditor of the beneficiary. Such trustee has no charge on the trust property or privilege of set-off with respect to his claim against the beneficiary or his estate. Restatement, Trusts 2d, § 250, p. 630.

The trial court was correct in finding that the express terms of the trust provided that the trustee was to collect the rents and pay the taxes thereon; that there were sufficient rents received by John to pay all the taxes which became a lien prior to Frank's death on October 5, 1970; and that John failed to comply with the obligations of the trust in failing to pay the taxes for the last half of the year 1960 and thereafter through all the year 1969.

We affirm the judgment entered by the trial court in ordering the defendant trustee to convey the trust property free and clear of such taxes, interest, and charges to Frank's heirs.

We do not believe any useful purpose will be served by detailing the evidence on the issue of accounting. We approve of the computations of the trial court of the sums advanced by John to Frank and to Frank's

creditors that were in excess of the distributable income of the trust. The trial court properly entered judgment for John as a general creditor for the sum of $6,484.15 against Frank's estate. We further agree in the trial court's finding and order that John shall assign to Melba, as executrix of Frank's estate, the claim for unpaid rental by Celli Cycle Center in the sum of $750.

The 1961 support order of the District Court for Scotts Bluff County, Nebraska, provided that the payments to be made by John would be out of the net income of the trust which the trial court correctly computed on a yearly basis. The evidence discloses John made the required payments through the year 1965. The trial court correctly computed that beginning with the year 1966 and continuing through the year 1969 Melba received less than the amount to which she was entitled in the total amount of $4,358.59. John's claims of overpayment on the support payments for the years 1964 and 1970 are without merit. However his claim of overpayment for the year 1965 in the sum of $1,513.17 should be allowed. The net income of the trust in 1965 amounted to $1,486.83. John paid the sum of $3,000 on the support order resulting in the overpayment of $1,513.17. Generally a trustee is entitled to reimbursement for overpayments to a beneficiary made by him. 90 C. J. S., Trusts, § 345, p. 608. After crediting John with the amount of the 1965 overpayment, Melba is entitled to judgment against John in the sum of $2,845.42 in her support action instead of the amount allowed by the trial court.

We approve the finding of the trial court that there was no additional undistributed net income to which Melba was entitled in her support action on December 31, 1965. There is no merit to her cross-appeal and it is dismissed.

We affirm the judgment of the trial court in all respects except that Melba's judgment in her support

action shall be reduced from $4,358.59 to $2,845.42.

Judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

ELSIE M. OVIATT, APPELLANT, V. THE ARCHBISHOP BERGAN MERCY HOSPITAL, A CORPORATION, APPELLEE.

214 N. W. 2d 490

Filed January 31, 1974. No. 39072.

1. **Statutes: Actions: Time: Trial.** Amendments to statutes which are procedural in nature generally are applicable to pending cases which have not been tried.
2. **Hospitals: Records: Discovery: Physicians and Surgeons.** Proceedings of the medical staff committee of a hospital are privileged in the absence of a showing of good cause arising from extraordinary circumstances.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

John J. Higgins, Jr., and J. Patrick Green of Eisenstatt, Higgins, Kinnamon & Okun, for appellant.

Emil F. Sodoro, David A. Johnson, and Ronald H. Stave, for appellee.

Heard before WHITE, C. J., BOSLAUGH, McCOWN, and CLINTON, JJ., and COLWELL, District Judge.

BOSLAUGH, J.

The plaintiff was admitted to the defendant hospital for a hysterectomy which was performed on March 1, 1965. The operation was performed by Dr. Walter J. Holden with Dr. Clarence M. Hartmann, her personal physician, assisting. Following the operation the plaintiff had difficulty with her right foot and it was discovered that the sciatic nerve had been damaged. The plaintiff believes the nerve was damaged when Dr. Holden tied the hypogastric artery in an effort to con-

trol the massive hemorrhage that had been encountered.

This action was brought against the hospital to recover damages for the injury to the nerve and the resulting disability sustained by the plaintiff.

The third amended and substituted petition upon which the case was tried alleged in substance that the hospital was negligent in failing to revoke the staff privileges of Dr. Hartmann and in permitting him to assist Dr. Holden in performing surgery upon the plaintiff. The plaintiff's theory of the case was that Dr. Hartmann was not competent to assist in surgery.

By discovery procedures the plaintiff had obtained copies of the personnel records of the hospital pertaining to the restriction or suspension of Dr. Hartmann's staff privileges in the defendant hospital in 1964 and 1965. Only one suspension had occurred prior to March 1, 1965. Before trial, the defendant filed a motion in limine to prevent the plaintiff from using or referring to any proceedings, minutes, records, or reports of the medical staff committee of the defendant because the documents were privileged under section 71-2048, R. R. S. 1943. The motion was sustained on March 26, 1973, and the case proceeded to trial on that date. The trial court dismissed the action at the close of plaintiff's evidence. The plaintiff has appealed and her assignments of error relate to the ruling on the motion.

Section 71-2048, R. R. S. 1943, is a part of a 1971 act relating to medical staff committees and utilization review committees, and requires all licensed hospitals to establish such committees. It further provides the proceedings, minutes, records, and reports of such committees, together with all communications originating in such committees, shall be privileged and not subject to discovery unless the privilege is waived by the patient and a court of record orders their disclosure after a hearing at which "good cause arising from extraordinary circumstances" is shown. § 71-2048, R. R. S. 1943.

There is much discussion in the briefs as to whether a rule of privilege should be considered to be substantive or procedural in nature. It is a general rule that a litigant has no vested right in a rule of evidence, and amendments to statutes which are procedural in nature are applicable to pending cases which have not been tried. See, State v. Heldenbrand, 62 Neb. 136, 87 N. W. 25; Happy Hour, Inc. v. Nebraska Liquor Control Commission, 186 Neb. 533, 184 N. W. 2d 630; Haiar v. Kessler, 188 Neb. 312, 196 N. W. 2d 380.

The basis for the privilege extended to medical staff committees and utilization review committees is the public interest in the improvement of the care and treatment of hospital patients. The Joint Commission on Accreditation of Hospitals requires there be constant analysis and review of the clinical work done in a hospital. The importance of communication of information to the committees and full and open discussion in the committees during the review of clinical work can be easily seen.

In Bredice v. Doctors Hospital, Inc., 50 F. R. D. 249, U. S. Dist. Ct., D. C., in a decision not based upon a statute, the minutes and reports of any board or committee concerning the death of a patient were held to be privileged from discovery. There the court said: "Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a sine qua non of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit. * * * The pur-

pose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. They are not a part of the current patient care but are in the nature of a retrospective review of the effectiveness of certain medical procedures." See, also, Carter v. Metropolitan Dade County (Fla. App.), 253 So. 2d 920; Gillman v. United States, 53 F. R. D. 316, U. S. Dist. Ct., S. D. N. Y.

We conclude the proceedings and records of the medical staff committee of the defendant hospital were privileged and the defendant's motion was properly sustained.

The trial court's rulings on some of the evidence offered by the plaintiff may have been more restrictive than could be sustained by the privilege accorded to the proceedings of a medical staff committee. However, there was no prejudice in any of these rulings. Before the defendant could be found to be negligent in failing to revoke the staff privileges of Dr. Hartmann, it was necessary for the plaintiff to prove facts known to the defendant before March 1, 1965, that required a revocation of Dr. Hartmann's hospital privileges. It was further necessary for the plaintiff to prove the proximate cause of her injury was something that Dr. Hartmann did or failed to do while assisting in the operation. There was a failure of proof on both of these elements.

The judgment of the District Court is affirmed.

AFFIRMED.

THOMAS W. ELSON ET AL., APPELLANTS, V. MARY D. HARBERT, COUNTY SUPERINTENDENT OF FRONTIER COUNTY, NEBRASKA, ET AL., APPELLEES.

214 N. W. 2d 391

Filed January 31, 1974. No. 39083.

Schools and School Districts. Land in a nonaccredited Class I school district, which is also included within the boundaries of an accredited Class VI school district, may be transferred to an accredited Class III school district under subsection (1) of section 79-403, R. R. S. 1943, as amended in 1971, if all other applicable requirements of the statute are satisfied.

Appeal from the District Court for Frontier County: JACK H. HENDRIX, Judge. Affirmed.

Wagoner & Wagoner, for appellants.

Beatty, Morgan & Vyhnalek, for appellees.

Sampson & Amatys, for amicus curiae.

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

BOSLAUGH, J.

Robert L. Ruppert and Velma J. Ruppert own 160 acres of land located in School Districts Nos. 101 and 120 of Frontier County, Nebraska. They are contract purchasers of an additional 720 acres in these districts. On February 1, 1972, they filed a petition to transfer all this land to School District No. 46 in Frontier County. The required notice was given and the transfer was approved after a hearing on the petition on February 15, 1972.

District No. 120 (Medicine Valley) is a Class VI accredited district. District No. 101 is a Class I nonaccredited district which is included within the boundaries of District No. 120. District No. 46 (Maywood) is a Class III accredited district.

The plaintiffs are residents and taxpayers in Districts

Nos. 101 and 120. From the order of the board approving the transfer, the plaintiffs appealed to the District Court. They now appeal from the judgment of the District Court affirming the order of the board.

Section 79-403, R. R. S. 1943, is divided into two subsections. Subsection (1) authorizes a transfer from a Class I district to an adjoining district if tuition has been paid for two or more consecutive years to the adjoining district and the board deems it just and proper and for the best interest of the petitioners to do so. Subsection (2) authorizes a transfer from a nonaccredited Class I district which is also part of a Class VI district to an accredited Class III district.

The record shows proof of all applicable requirements of the statute for a transfer of the petitioners' land under either subsection as amended. Although the petition did not allege acceptance by the receiving district as required by subsection (2), this requirement was supplied by proof. See Bader v. Hodwalker, 187 Neb. 138, 187 N. W. 2d 645. Both subsections authorize a transfer upon the petition of a contract vendee in possession.

The plaintiffs' principal contention is that land cannot be transferred from an accredited Class VI district under subsection (1). Prior to the 1971 amendment to section 79-403, R. R. S. 1943, land could not be transferred from an accredited Class VI district. Clark v. Sweet, 187 Neb. 232, 188 N. W. 2d 889. The 1971 amendment eliminated the language in subsection (1) which prevented transfers from accredited Class VI districts. We believe the trial court reached the proper conclusion and that land may be transferred from accredited Class VI districts under subsection (1) of the statute as amended in 1971.

The judgment of the District Court is affirmed.

AFFIRMED.

SMITH, J., not participating.

MID-STATES EQUIPMENT COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. ROBERT A. EVANS, APPELLANT.
214 N. W. 2d 496

Filed January 31, 1974. No. 39097.

1. **Evidence: Verdicts.** In testing the sufficiency of the evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.
2. **Fraud.** A person is justified in relying upon a representation made to him in all cases where the representation is a positive statement of material fact, and where an investigation would be required to discover the truth.
3. **Fraud: Instructions.** An instruction stating that one element of fraud is that the false representations were made knowing them to be false or without knowledge of their truth or falsity as a positive statement of fact is a correct statement of the law.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Gross, Welch, Vinardi, Kauffman & Day, for appellant.

Abrahams, Kaslow & Cassman, for appellee.

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

NEWTON, J.

This is an action for fraud resulting from defendant's sale of a grain elevator construction business to plaintiff. Verdict and judgment were for plaintiff in the District Court. The judgment is affirmed.

Defendant negotiated the sale of all stock in the R. A. Evans Contracting Company to plaintiff for the sum of $48,963 of which amount $28,000 has not been paid. A written sale agreement was entered into on April 18, 1969, to which was attached a financial statement which it was agreed "accurately reflects the true financial condition of the company" as of December 31, 1968, "prepared in conformity with generally accepted accounting

principles." Defendant admits the financial statement was represented to reflect the company's correct financial condition. There is evidence, on the basis of which the jury may well have found that defendant knowingly and deliberately misrepresented the company's financial condition with the intent to deceive plaintiff and induce it to act on it, that plaintiff was deceived, relied on the misrepresentation, and sustained damage as a result. "In testing the sufficiency of the evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Dahl v. Robinson, 188 Neb. 547, 198 N. W. 2d 207. Defendant's contention that the evidence is not sufficient to sustain a finding of fraud and consequent damage cannot be sustained.

Defendant urges error was committed in the rejection of proffered instructions to the effect that plaintiff could not recover if a person of ordinary prudence would have discovered the falsity of the representation and not relied on it and that plaintiff had a duty to investigate and inquire into the facts. We cannot agree. "A person is justified in relying upon a representation made to him in all cases where the transaction is a positive statement of fact, and where an investigation would be required to discover the truth." Linch v. Carlson, 156 Neb. 308, 56 N. W. 2d 101. See, also, Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131.

Defendant asserts error in an instruction which permitted a finding of fraud if "the representations were submitted by the defendant without knowledge of the truth or falsity of the same as a positive statement of fact." No authorities are cited. In regard to this element of fraud we have heretofore approved the criterion criticized. See, Campbell v. C & C Motor Co., 146 Neb.

721, 21 N. W. 2d 427; Swanson Petroleum Corp v. Cumberland, 184 Neb. 323, 167 N. W. 2d 391.

Defendant also asserts error in the instruction of the court to the effect that if the jury found in favor of plaintiff then defendant could not recover on his counterclaim. The instruction is, under the circumstances, a logical one. The jury found plaintiff had sustained damage due to fraud. Were defendant to recover on his counterclaim for the balance of the purchase price, it would simply result in an increase in plaintiff's damage in a like sum.

No error is assigned in regard to the instruction on the measure of damage. It appearing that the record is free from error, we affirm the judgment of the District Court.

AFFIRMED.

SMITH, J., not participating.

SPENCER, J., concurring.

Appellant in this action contends that intent is an element of fraud in Nebraska. He relies upon Transportation Equipment Rentals, Inc. v. Mauk (1969), 184 Neb. 309, 167 N. W. 2d 183, the first syllabus point of which reads: "The essential elements required to sustain an action for fraud are, generally speaking, that a representation was made as a statement of fact, which was untrue and unknown to be untrue by the party making it, or else recklessly made; *that it was made with intent to deceive and for the purpose of inducing the other party to act upon it;* and that he did in fact rely on it and was induced thereby to act to his injury or damage." (Italics supplied.)

The statement "that it was made with intent to deceive and for the purpose of inducing the other party to act upon it" crept into that case by inadvertence and had no bearing on the result reached. Our law is otherwise. See, Swanson Petroleum Corp. v. Cumberland (1969), 184 Neb. 323, 167 N. W. 2d 391; Allied Building

Credits, Inc. v. Damicus (1958), 167 Neb. 390, 93 N. W. 2d 210; Campbell v. C & C Motor Co. (1946), 146 Neb. 721, 21 N. W. 2d 427.

JEAN L. DUFFY, APPELLANT AND CROSS-APPELLEE, V. PHYSICIANS MUTUAL INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

214 N. W. 2d 471

Filed January 31, 1974. No. 39122.

1. **Trial: Evidence.** The exercise by a trial court of its discretion in ruling on admission or rejection of evidence will not be disturbed on appeal unless the trial court clearly or plainly abused its discretion.
2. **Civil Rights: Evidence: Trial: Employer and Employee.** To sustain a charge of discrimination where there is no charge of a universal discriminatory practice or system, complainant, in the record, must establish that the employer intentionally engaged in acts that discriminated against complainant in violation of the statutory prohibitions.
3. **Civil Rights: Evidence: Trial.** The burden of proof is on complainant to prove a discriminatory pay differential by reason of her sex.
4. **Trial: Appeal and Error: Evidence.** Where evidence supporting the District Court findings of fact is substantial, the findings will not be disturbed on appeal.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Dana B. Badgerow and Steven G. Seglin, for appellant.

McGrath, North, Dwyer, O'Leary & Martin, for appellee.

Heard before WHITE, C. J., BOSLAUGH, and MCCOWN, JJ., and TESAR and HAMILTON, District Judges.

HAMILTON, District Judge.

This is an appeal from a District Court determination

denying relief on appellant's complaint of discrimination based upon sex, lodged against the Physician's Mutual Insurance Company. The complaint was originally filed with the Nebraska Equal Opportunity Commission pursuant to the provisions of the Nebraska Fair Employment Practice Act. §§ 48-1101 to 48-1125, R. R. S. 1943. The appellee has cross-appealed alleging jurisdictional defects in the factual sufficiency of the complaint and failure to timely file the complaint, both alleged defects having failed to comply with section 48-1118 (1) and (2), R. R. S. 1943.

On June 10, 1970, Jean Duffy filed a charge with the Nebraska Equal Opportunity Commission alleging sex discrimination practiced by Physicians Mutual Insurance Company.

A 4-day hearing was held before an Equal Opportunity Commission hearing examiner. The hearing examiner, among other things, found that "discrimination has taken place not upon the deliberate intent of the respondent company." The examiner thereupon recommended the Commission consider an award to Jean Duffy.

Both parties filed petitions for review with the Nebraska Equal Opportunity Commission and, after argument, the Commission accepted the hearing examiner's findings of discrimination, but modified the examiner's recommended award.

An appeal was taken by Physicians Mutual Insurance Company to the District Court for Douglas County, where the matter was tried on the record, pursuant to section 48-1120, R. R. S. 1943; a decree was entered vacating the Equal Opportunity Commission's order, and entering judgment in favor of Physicians Mutual Insurance Company.

The evidence presented by Jean Duffy to the hearing examiner to support her claim of sex discrimination was principally that she had performed equal work for less

pay than male employees. The evidence showed that Jean Duffy was classified as an Auditor I, under a claims audit department classification that distinguished its auditors as Auditor I and Auditor II. The stated reason for classifications by the Physicians Mutual Insurance Company was that those persons in Auditor II classification processed the more complex claims, and supervised and trained Auditor I personnel, who worked on the less complex claims, under an arrangement that teamed an Auditor I with an Auditor II. There existed a pay differential between classifications that varied, but approximated nearly $200 per month. During the course of employment Jean Duffy was assigned as an Auditor I to work with a male, classified as an Auditor II, under the team concept. It was under this arrangement that Jean Duffy allegedly performed identical work as her male counterpart for less salary.

The transcript before the District Court consisted of evidence from 24 witnesses and 61 exhibits. Without detailing all the evidence, the record generally shows that appellant prior to her assignment on a team aided other auditors, classified as Auditor II, when their work fell behind and when vacations or illness required her assistance. The record further shows that appellant performed 65 to 70 percent of the claim work assigned to her team, and that she ultimately took it upon herself, without company approval, to split the work of her team on a fifty-fifty basis. The record further indicates that a former Auditor II employee of Physicians Mutual, named Leota Kelley, testified by way of deposition, over objection, that the work performed by Miss Duffy and herself was identical.

The great share of the evidence of appellee was directed in response to the conclusions of equality drawn from the foregoing evidence. Appellee, by evidence, demonstrated that an Auditor II would have a lesser vol-

ume of work because complex claims required a greater amount of time to process, that an Auditor I, processing simple, routine perfunctory claims would have a greater volume of work, since this type claim constituted the majority of claims received. The Auditor I would process some complex claims but only under the supervision and assistance of the Auditor II assigned to the team.

In contradiction to Miss Duffy's conclusion that she was doing equal work for less pay under the fifty-fifty division of work assigned to her team, the Senior Auditor for appellee's department, testified that 65 to 75 per cent of all claims assigned to a team were simple or routine claims which were clerical in nature; and that the balance were considered as complex claims. He further testified that under the split arrangement, Miss Duffy handled a complex situation in a routine manner, which was improper, or took the problem to a Senior Auditor, rather than the Auditor II on the team, who was being paid to supervise and train the Auditor I.

Appellant relies heavily on the testimony of Leota Kelley to substantiate her complaint. The District Court found that the testimony of Mrs. Kelley was so lacking in foundation and irrelevant as to entitle it to no weight whatsoever. The evidence disclosed that Mrs. Kelley had terminated her employment some 8 months prior to Miss Duffy's termination; that she was in a different section; didn't observe her work; did at no time work in close conjunction with Miss Duffy; and that her familiarity with Miss Duffy's work was stated as "Oh, I am sure through the years that I have seen her work."

In referring to evidence before the Equal Opportunity Commission, section 48-1119, R. R. S. 1943, provides: "Such proceedings shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the State of Nebraska * * *." The testimony of Leota Kelley, admitted over proper objection, lacked foundation and was properly within the dis-

cretionary power of the District Court on review to disregard entirely. The exercise by a trial court of its discretion in ruling on admission or rejection of evidence will not be disturbed on appeal unless the trial court clearly or plainly abused its discretion.

The appellant asserts that the District Court erred, by imposing upon the appellant the burden of establishing her employer's discriminatory motive, and asserts that such a finding is immaterial to the granting of relief to appellant.

Section 48-1119 (3), R. R. S. 1943, recites: "If the commission shall determine that the respondent has intentionally engaged in or is intentionally engaging in any unlawful employment practice, it shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist * * *." The District Court in its findings stated: "It would appear that a pre-requisite to the granting of relief is, under the statute, a finding of such intent, at least in the language of the statute."

The language of section 48-1119 (3), R. R. S. 1943, is similar to the language employed in Title VII of the Civil Rights Act of 1964, 42 U. S. C. A., § 2000e-5(g), and the legislative history indicates that our statute was designed to conform to the congressional act.

In interpreting the question of intentionally engaged, the United States Supreme Court in Griggs v. Duke Power Co., 401 U. S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158, reversed the lower court's findings requiring a finding of a discriminatory purpose on the part of the employer in using as a condition of employment a requirement that all employees have a high school education or pass a standardized intelligence test. The court said: "We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups

and are unrelated to measuring job capability." The court further stated: "But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."

The question of intent has arisen in numerous decisions in the federal courts involving discriminatory practices with regard to protected classes of employees, and the decisions have uniformly followed the reasoning of Griggs v. Duke Power Co., *supra*, that the consequences of employment practices control, rather than specific intent. This applies in those situations where the practice, procedure, system, or policy automatically creates a discriminatory result, without regard to job capabilities of the individual or class affected.

Where, however, the complaint is made that a company has discriminated by reason of any of the prohibited practices and the evidence fails to disclose a practice that automatically creates the discriminatory result, intent becomes a necessary element for complainant to prove, pursuant to section 48-1119 (3), R. R. S. 1943. To rule otherwise would completely ignore the clear statutory language and intent of the Legislature.

The evidence in the present record does not relate that there existed a practice or system that discriminated against women with regard to equal pay, nor does the appellant seriously urge such a contention, the thrust of appellant's charge is that the appellee discriminated against her on an individual basis, rather than women in general, and more specifically, that her talents and capabilities measured up to those of male employees in higher wage brackets. To sustain a charge of discrimination where there is no charge of a universal discriminatory practice or system, complainant in the record must establish that the employer intentionally engaged in acts that discriminated against complainant in violation of the statutory prohibitions.

The appellant's principal assignment of error concerns

the District Court exceeding its authority to review the order and decision of the Nebraska Equal Opportunity Commission. It is suggested that the District Court should affirm the Commission's orders and decisions where there is some competent evidence to sustain its findings, even though the evidence be weak, doubtful, or conflicting. It is further urged that the District Court should construe every controverted fact in favor of the prevailing party before the commission.

The appeal to the District Court from an order of the Equal Opportunity Commission is governed by section 48-1120 (3), R. R. S. 1943, and specifically provides the manner and scope of the appeal: "The commission's orders shall not be vacated, modified, or set aside unless: . . . (b) The findings of the commission in support of such order are unreasonable or arbitrary or are not supported by a preponderance of the evidence."

In the absence of a specific statute setting out the method and scope of appeal, the Administrative Procedure Act, sections 84-901 to 84-919, R. R. S. 1943, would apply, and the review in the District Court would be governed by the substantial evidence test urged by appellant, however, in the present case the statute specifically provides the manner and scope of appeal. The District Court was therefore required to determine whether the Commission's findings were unreasonable or arbitrary and whether the findings were supported by the preponderance of the evidence.

The District Court judgment that the finding of the Commission was clearly arbitrary, and without any foundation in the evidence, was within the statutory guidelines on review. The statute fixed the scope of appeal and the District Court was required to review the entire record, weigh the evidence, and apply the statutory guidelines with relation thereto.

The evidence recited heretofore, and the record in its entirety, indicate that the great weight of the evidence

preponderates in favor of appellee, that the wage differential of appellant and male employees was based upon lack of skill, effort, and responsibility of appellant, and not upon any discriminatory considerations regarding her sex.

The record contains abundant evidence indicating Jean Duffy's inability to get along and work harmoniously with her fellow employees. Testimony showed that frictional situations existed with fellow employees; and that she lacked the supervisory skills or ability that were necessary to make the complex decisions required of an Auditor II.

The record further indicates that the salary of Jean Duffy on June 10, 1970, in comparison to those salaries of male auditors in the Auditor I classification, exceeded four of seven, and was within $10 of two of the other three.

The employment record of Jean Duffy indicates that since terminating her employment with Mutual of Omaha, in 1957, she has worked for nine separate insurance companies; and one former employer testified she was the only employee he had fired in a 15 to 20 year period.

The burden of proof is on complainant to prove a discriminatory pay differential by reason of her sex.

In reviewing the District Court's findings on review of an Equal Opportunity Commission order, the rule that this court will not disturb the District Court's findings, unless clearly wrong and unsupported by the evidence does not apply with the same force, since the District Court had no advantage in reviewing the written record from the commission hearing, but, whereas here, the evidence supporting the District Court's findings of fact is substantial, the findings will not be disturbed.

It is unnecessary to decide the issues raised by appellee's cross-appeal since the case has been decided on its merits.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

LYLE DILSAVER, APPELLANT, V. GLEN POLLARD, APPELLEE.
214 N. W. 2d 478

Filed January 31, 1974. No. 39125.

1. **Elections: Domicile: Time: Absentees.** If a qualified voter who will be absent from the county of his domicile on the day of an election fails to make application either in writing or in person at least "three clear days" before the election as required by section 32-803, R. S. Supp., 1972, he is not entitled to receive an absentee ballot, and if one is issued to him in violation of the statute a vote cast thereon is illegal and void.
2. **Elections: Time: Words and Phrases.** The period of "three clear days" is determined by excluding both the day of the election and the day of the request.
3. **Elections: Domicile: Constitutional Law.** The question of determining a voter's residence or domicile under the provisions of Article VI, section 1, of the Constitution of the State of Nebraska, is a judicial one and should be determined in accordance with principles which determined the meaning of residence or domicile at the time the Constitution was adopted. Section 32-475, R. R. S. 1943, does not establish absolute criteria for determining residence or domicile.
4. **Elections: Trial.** In an election contest the burden of proving the facts which may make a vote illegal is upon the party so contending. He also has the burden of proving how the alleged illegal vote affected the election and so must show how it was cast.
5. **Elections: Trial: Appeal and Error.** In an election contest appealed to this court the cause is heard de novo.
6. **Records: Appeal and Error: Evidence.** The inclusion of evidence in a bill of exceptions is the only vehicle for bringing evidence before this court on appeal. Evidence not included in the bill of exceptions may not be considered.

Appeal from the District Court for Loup County: DONALD H. WEAVER, Judge. Reversed and remanded.

Robert D. Stowell and Herman Ginsburg, for appellant.

Joseph W. Divis, for appellee.

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

CLINTON, J.

This is an appeal from the judgment of the District Court for Loup County, Nebraska, in an election contest involving the office of county commissioner from Madison Square Precinct, Loup County. The District Court determined the issues in favor of the contestee. Contestant appeals. Hereafter we will usually refer to the appellant Dilsaver as the contestant and the appellee Pollard as the contestee.

At the election in question held on November 7, 1972, the canvassing board determined that each candidate received 71 votes. The result was then determined by lot and the contestee declared elected.

The contestant's petition alleged that the absentee ballot of one Dorothy Pollard was illegally cast. The contestee in his answer alleged that the Pollard ballot was a legal and proper ballot, but further alleged that the vote of one Frank M. Dilsaver should not have been counted because he was not a qualified voter at the time of the election and that the illegal vote had been cast for the contestant.

The specific findings of the District Court, insofar as relevant to this appeal, were that the Dorothy Pollard ballot was valid and that it had been cast for the contestee, and that the Frank M. Dilsaver ballot was invalid and that it had been cast for the contestant. The court therefore found that Lyle Dilsaver, the contestant, had received 70 votes and the contestee, Glen Pollard, had received 71, and that the latter had been elected. It is evident that if the contestant is to prevail on this appeal he can do so only if both determinations by the trial court were wrong. Other issues were involved

in the court below, but on this appeal only the above two are saved and argued.

Dorothy Pollard was a college student who was to be absent from the county on election day, Tuesday, November 7, 1972. On Saturday, November 4, 1972, at about 4 p.m., the county clerk, pursuant to an oral request of Dorothy which she had made some time earlier in the week, opened the office and furnished her with a ballot which she then cast. It is the contestant's position that the vote was illegal because it was cast contrary to section 32-803, R. S. Supp., 1972, which provides: "Any qualified voter of this state who will be absent from the county where such voter resides on the day of any election, and who does not appear in person, at least three clear days before the election, before the county clerk, as issuing officer, to obtain a ballot and vote it before leaving home may, not more than ninety days nor less than three clear days before such election, apply in writing to the county clerk of the county of such voter's residence, as issuing officer, and request that such officer forward an absent voter's ballot to such voter by mail. . . ."

This statute clearly appears to mean that if a voter is going to be absent from the county on the day of an election he should proceed in one of two ways: (1) He may apply in writing to the county clerk not more than 90 nor less than 3 clear days before the election and request that a ballot be furnished to him by mail, or (2) he may appear in person before the county clerk at least 3 clear days before the election to obtain a ballot and "vote it before leaving home."

The contestee, on the other hand, points to the provision of section 32-812, R. S. Supp., 1972, which provides: "All ballots of absent, sick, or disabled voters, in order to be counted, must be voted not later than midnight of the day preceding election day." He argues that this latter statute lays down the essential require-

ment, and that since the ballot was voted within the time required by section 32-812, R. S. Supp., 1972, the failure to comply with the 3 clear days provision does not affect the fairness of the election and should not be held to disqualify the vote. There is no inconsistency whatever between the requirements of section 32-803, R. S. Supp., 1972, and section 32-812, R. S. Supp., 1972, and both can be applied without conflict. The first deals with the means of obtaining the ballot and the second with the time within which it must be voted.

It is conceded that the term "three clear days" has a well, long-established meaning and is determined in this case by excluding both the day of the election and the day the ballot is requested. Rex v. Justices of Herefordshire, 3 Barn. & Ald. 581; In re Gregg's Estate, 213 Pa. 260, 62 A. 856; State v. Marvin, 12 Iowa 499; 7 Words & Phrases, Clear Days, p. 630. The county clerk was apparently aware of the manner in which "clear days" are determined, but acted in accordance with the provisions of section 32-803, R. R. S. 1943, Reissue of 1968, and was unaware that the "two clear days" requirement of that statute had been changed by the 1969 amendment.

If the violation of the "three clear days" requirement were to be held not to invalidate the Pollard ballot, then we must necessarily ask ourselves what other effect the provision is to have, if any at all. It might be suggested that it is for the benefit of the official charged with issuing the ballot and that its purpose is to require the absent voter to make his request early enough so that last minute congestion will be avoided and the issuing official will have time to meet the requests, but that if conditions permit and he chooses to do so he may issue the ballot even though less than the required time period remains before the election. This argument has a certain surface appeal until we examine the alternatives and the undesirable results which could

flow from such an interpretation. If it is discretionary with the issuing officer as to whether the time requirement is met, then whether a certain absent voter may cast his ballot or not is necessarily left to the unfettered discretion of the election official. This in turn could result in lack of uniform application of discretion as between the voters of different counties depending upon the differing attitude of the officials. It could in turn be an invitation to those interested in the outcome of an election to attempt influence of the alleged discretion of the issuing officer. All this adds up to an invitation to corrupt the election process. The alternative interpretation would be to say that the "three clear days" provision is meaningless. This would constitute a judicial amendment of the statute and this we will not do.

We determine that the Dorothy Pollard ballot was an illegal ballot and should not be counted. The fact that the Dorothy Pollard ballot was cast for the contestee is not challenged. This conclusion was reached because the evidence showed that only seven absent or disabled voters' ballots were cast in the precinct and that of these the contestant received one and the contestee six. One of these absentee voters, whose qualifications are not challenged, waived her privilege against disclosing her vote and testified that her ballot had been cast for the contestant. It therefore followed that the Dorothy Pollard ballot must have been cast for the contestee.

We now turn to the question of the vote of Frank M. Dilsaver. There is no significant dispute in the competent evidence insofar as it pertains to the qualifications of Frank M. Dilsaver. He was called as a witness by the contestee. He testified that his home is on a farm in Madison Square Precinct in Loup County; he considers that his place of residence and he has never had any thought or intention of changing his residence

to any other place; he is a registered voter in Loup County; the farm is owned by him but leased to his son, but he maintains a residence thereon and has lived there since 1923; he is a former county commissioner of Loup County and had served 6 years in that office; and he works for his son on the farm on occasion. In 1967 he married his second wife; she owns a farm in Custer County; since his remarriage he spends part of his time in Custer County and the rest of it on his Loup County farm; and the residence on his farm he maintains the year around, keeping it heated and keeping provisions and clothing there. Neither side of this controversy pursued the matter of determining how he divided his time between the two places. There was no competent direct evidence to contradict the witness' expressed intention that his Loup County farm was his residence.

The trial court in its determinations seemed to place great weight upon the fact that the voter's wife resided in Custer County on a farm owned by her and that a return of the subpoena issued to Dilsaver to testify in the District Court had been endorsed "unable to locate" in Loup County. In connection with this residential determination the court in a memorandum opinion cited section 32-475(6), R. R. S. 1943, and held that that particular provision of the statute was under the facts determinative of the matter.

It has long been held by this court that section 32-475, R. R. S. 1943, does not establish absolute criteria for determining voting residence or domicile. Berry v. Wilcox, 44 Neb. 82, 62 N. W. 249; White v. Slama, 89 Neb. 65, 130 N. W. 978. In the second cited case the court said: "Whether an individual asserting the right to vote has established a residence within the meaning of section 1, art. VII of the constitution, is a judicial question," citing Berry v. Wilcox, *supra.* In Berry v. Wilcox, *supra,* the court pointed out: "The

question is, what did the word 'reside' mean when the constitution was adopted, not what the legislature may say it shall mean." This court pointed out in that case that the statutory rules are to be considered insofar as they are declaratory of prior law. It then cited the time honored definition of residence or domicile as: " 'that place . . . in which his habitation is fixed, without any present intention of removing therefrom.' " A majority of the subsections of section 32-475, R. R. S. 1943, deal with the intention of the voter. A person may have two residences, but only one of them is his domicile. In re Estate of Meyers, 137 Neb. 60, 288 N. W. 35. To effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. In re Estate of Meyers, *supra.* One spouse may have a domicile separate from the other. Wray v. Wray, 149 Neb. 376, 31 N. W. 2d 228; Fletcher v. Fletcher, 182 Neb. 549, 156 N. W. 2d 1; Schalk v. Schalk, 168 Neb. 229, 95 N. W. 2d 545.

In this case the contestee, as a possible defense to the loss of the Pollard or other votes, pleaded that Frank M. Dilsaver was not a qualified voter and that his vote had been cast for the contestant. The appellee was in this respect a contestant himself. He had the burden of proving (1) that Frank M. Dilsaver was not a qualified voter, and (2) that the alleged illegal vote had been cast for Dilsaver. White v. Slama, *supra;* Mosiman v. Weber, 107 Neb. 737, 187 N. W. 109; Mehrens v. Election Canvassing Board, 134 Neb. 151, 278 N. W. 252; Arends v. Whitten, 172 Neb. 297, 109 N. W. 2d 363; State ex rel. Brogan v. Boehner, 174 Neb. 689, 119 N. W. 2d 147; Plouzek v. Saline County Reorganization Committee, 181 Neb. 440, 149 N. W. 2d 919; 29 C. J. S., Elections, § 274, p. 739.

On appeal to this court in an election contest the cause is tried de novo. This rule appears to conform

to the uniform practice in this state under various election contest statutes, although this court has not always expressly stated in the opinion that it was hearing the case de novo. Griffith v. Bonawitz, 73 Neb. 622, 103 N. W. 327; Swan v. Bowker, 135 Neb. 405, 281 N. W. 891; Richmond v. Breithaupt, 110 Neb. 859, 195 N. W. 463. In considering the evidence de novo we conclude that the contestee has not carried his burden of proving that Frank M. Dilsaver was not a qualified voter in Loup County. The finding of the trial court in this respect was, we believe, clearly wrong. In so finding we disregard the previously mentioned recital in the return of the subpoena. Even if we concede arguendo that such evidence was competent and sufficient it cannot be considered for it is not included in the bill of exceptions in this case. The bill of exceptions is the only vehicle for bringing evidence before this court on appeal. If an item is not offered in evidence and preserved in the bill of exceptions it may not be considered here. Everts v. School Dist. No. 16, 175 Neb. 310, 121 N. W. 2d 487.

Had we determined that the Dilsaver ballot was illegal it would still have been the burden of the contestee to show how that vote was cast. The trial court made its determination in this respect based solely on the father and son kinship of the contestant and Frank M. Dilsaver. It is true that how a person voted may be proved by circumstantial evidence. White v. Slama, *supra*. However, we have been cited no case supporting the proposition that kinship alone without more is a sufficient circumstance upon which to found a conclusion as to the person for whom a vote was cast. We have grave doubts as to the validity of such conclusion, but the determination that we here make, that Frank M. Dilsaver was a qualified voter, makes it unnecessary to determine that question.

We find that the contestant was the duly elected

commissioner from Madison Square Precinct in Loup County. The judgment below is reversed and the cause remanded for further order of the trial court in accordance with the provisions of section 32-1001.22, R. R. S. 1943, and this opinion.

REVERSED AND REMANDED.

SMITH, J., not participating.

FIRST NATIONAL BANK OF OMAHA, A CORPORATION AND SUCCESSOR-TRUSTEE, APPELLEE, V. OMAHA NATIONAL BANK, APPELLANT, IMPLEADED WITH FRANKLIN P. ROGERS ET AL., APPELLANTS, IMPLEADED WITH SENSATION MOWER, INC., ET AL., APPELLEES.

214 N. W. 2d 483

Filed January 31, 1974. No. 39159.

1. **Landlord and Tenant: Contracts: Time.** In the absence of agreement, rent is not due until the expiration of the term.
2. ———: ———: ———. Rent, as such, is not payable until it falls due under the terms of a lease, and no suit can be brought for future rent in the absence of a clause permitting acceleration.
3. **Declaratory Judgments: Time: Trial.** The District Court has power to retain jurisdiction and grant further relief where it has entered a declaratory judgment declaring the rights of the parties under a contract.

Appeal from the District Court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed in part, and in part vacated and remanded with directions for modification.

Monen, Seidler, McGill & Festersen, for appellant Omaha Nat. Bank.

John W. Delehant, for appellants Rogers.

Lyman L. Larson of Kennedy, Holland, DeLacy & Svoboda, for appellee First Nat. Bank of Omaha.

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

McCOWN, J.

This is an appeal from a judgment granting further relief based upon an original declaratory judgment which had determined the rights, duties, and liabilities of the parties under a lease. The issue on appeal is whether the judgment for future unmatured installments of rent, taxes, and insurance to become due under the lease was proper.

On January 30, 1973, the District Court granted a declaratory judgment on behalf of the plaintiff, First National Bank of Omaha, against the defendant and third party plaintiff, the Omaha National Bank, declaring the Omaha National Bank to be liable, as lessee, to perform all the covenants, terms, and conditions of a certain lease of real property located in Omaha, Douglas County, Nebraska. The judgment included amounts which had accrued under the lease up to the date of hearing. The judgment also found that under an assumption agreement between Franklin P. Rogers and Wilma C. Rogers, third party defendants, and the Omaha National Bank, as third party plaintiff, the Rogerses were jointly and severally liable to the Omaha National Bank for an amount corresponding exactly to the judgment entered against the Omaha National Bank in favor of the First National Bank of Omaha. Franklin and Wilma Rogers, as third party plaintiffs, were also given judgment against W. Howard Phelps and Rosemary Phelps, as third party defendants, who were also held jointly and severally responsible for the same liabilities and in the same amounts.

After the judgments were final, the parties filed later applications for further relief with respect to rental installments, insurance premiums, and taxes which had accrued since the original declaratory judgment. On April 10, 1973, the District Court, after hearing, entered judgments in the successive actions for insurance, taxes, and rental installments then matured. The judgment ordered that the unmatured installments of rent, taxes,

and insurance were to be paid as they fell due and that the original declaratory judgment was to be complied with. There is no dispute as to these portions of the judgments. In addition, however, it was provided that the court would retain jurisdiction; and that the judgment "shall mature and become effective as to each unmatured installment of rent, taxes and insurance on the day after said installment or payments are due and execution may then issue at the instance of the Plaintiff to satisfy the same." The judgment also provided that if, due to subsequent circumstances, the rights of the parties were changed or affected, application for appropriate relief might be made by either party.

It should be noted that the lease term was 50 years, beginning November 1, 1951. The lease called for a monthly rental of $833.34 and also required the lessee to pay taxes and insurance and to keep the building in repair. There was no acceleration clause in the lease.

The appellants' sole assignment of error is that the District Court was without jurisdiction to enter a judgment for future unmatured installments of rent, taxes, and insurance.

In general, rent does not accrue as a debt until the tenant has enjoyed the use of the land for the period for which it is payable. Consequently, in the absence of some agreement or understanding between the parties to the contrary, rent is not due until the expiration of the term. This is true whether the rent is reserved in gross or on annual, quarterly, or monthly payments. If the tenant is deprived of the use and enjoyment of the property by unavoidable accident or similar contingency before the end of the term, his liability for rent extends only to that time. Bishop Cafeteria Co. v. Ford, 177 Neb. 600, 129 N. W. 2d 581.

Rent, as such, is not payable until it falls due under the terms of a lease, and no suit can be brought for

future rent in the absence of a clause permitting acceleration. Here there is no abandonment, nor has the lessor retaken possession and there is no acceleration clause. The granting of judgment for unmatured installments of rent, taxes, and insurance was improper. That conclusion is reinforced in this case by the fact that any judgment for sums to become due in the future must, of necessity, be uncertain and indefinite in amount. The amounts of future taxes and insurance are obviously subject to variation, and therefore the specific amount cannot be determined in advance. Any judgment for future rent is likewise uncertain in that destruction of the building might terminate the liability for rent. The entry of such judgments for indefinite and variable amounts to mature and become payable in the future also shifts the basic burden of proof from the lessor to the lessee.

The District Court clearly has power to retain jurisdiction and grant further relief where it has entered a declaratory judgment declaring the right of the parties under a contract. § 25-21,149, R. R. S. 1943; Richardson v. Waterite Co., 169 Neb. 263, 99 N. W. 2d 265. Such future relief contemplates necessary supervision of such contracts and the entry of supplemental judgments and orders from time to time.

That portion of the judgment here which pertains to matured installments of rent, taxes, and insurance and provides for the retention of jurisdiction by the District Court should be affirmed. That part of the judgment which provides for the entry of judgment and the issuance of execution as to any unmatured installments of rent, taxes, and insurance should be vacated. The judgment should be modified to provide that upon application and showing to the court from time to time, after due notice to all parties, judgment or judgments as to any installments of rent, taxes, or insurance then matured may be entered. As so modified, the judgment of the

District Court is affirmed. Costs are assessed to plaintiff appellee, First National Bank of Omaha.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED WITH DIRECTIONS FOR MODIFICATION.

SMITH, J., not participating.

THERESA R. (JENSEN) SCHULZE, APPELLEE AND CROSS-APPELLANT, V. ROBERT A. JENSEN ET AL., APPELLANTS AND CROSS-APPELLEES.

214 N. W. 2d 591

Filed February 7, 1974. No. 38908.

1. **Accord and Satisfaction.** The principal questions in determining whether a discharge by accord and satisfaction has taken place are: (1) Did the parties in fact agree that the performance rendered should operate as a final discharge and satisfaction; and (2) does that performance constitute a sufficient consideration for a return promise or for a discharge?
2. **Accord and Satisfaction: Payment.** The question of whether a payment rendered by the obligor, and later asserted to be in satisfaction, was so tendered to the claimant that he knew or should have known that it was tendered as full satisfaction is a question of fact.
3. **Accord and Satisfaction: Husband and Wife: Parent and Child: Appeal and Error.** This court will scrutinize an alleged accord and satisfaction between a husband and wife with reference to child support very carefully, and the evidence must be such that the court is satisfied by the clear weight of the evidence that an accord and satisfaction was intended and accepted.
4. **Fraudulent Conveyancces.** Section 36-401, R. R. S. 1943, provides that conveyances or assignments of property made to defraud creditors are void.
5. **Fraudulent Conveyances: Creditor's Suits: Trial.** Where there is a conveyance between close relatives without adequate consideration, the burden is upon the parties to the transaction to establish that it was done in good faith.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Albert Lustgarten and Bennett G. Hornstein, for appellants.

Thomas R. Wolff, for appellee.

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

WHITE, C. J.

This action, a creditor's bill, was brought by Mrs. Theresa R. (Jensen) Schulze against her former husband, Robert A. Jensen, and his present wife, Vivian Jensen. The trial court found generally for the plaintiff; both plaintiff and defendants appeal certain issues. We affirm the judgment of the District Court.

In 1965, the plaintiff was divorced from Robert Jensen. As part of the divorce decree, Jensen was to pay $260 per month in lump sum child support. In the years that followed, several things occurred. One, Robert Jensen made a payment of $1,640 to the plaintiff. Two, Robert Jensen was injured in an automobile accident and received an insurance payment of $60,000; these funds were used for expanding and remodeling his residence, for personal property, and other personal uses. Three, the children received $8,652.40 from Social Security as a result of their father's incapacitating auto accident. Four, the children received cash payments or gifts directly from their father. Five, Robert Jensen remarried and placed his car and other personal property in his new wife's name.

After Robert Jensen fell behind in his child support payments, his former wife attempted to execute judgment but was unsuccessful. She then brought this action, a creditor's bill, to get the back child support or the property held in his wife's name reconveyed or retransferred to Robert Jensen. The defendants pleaded accord and satisfaction as an affirmative defense; they alleged the $1,640 payment to the plaintiff was a discharge of the child support obligation.

The major issue in this case is whether there was an accord and satisfaction between the parties as to back child support. The defendants contend that the payment of $1,640 to the plaintiff operated as an accord and satisfaction and thus extinguished any remaining debt or judgment lien. A classic definition of accord and satisfaction is found in Crilly v. Ruyle, 87 Neb. 367, 127 N. W. 251 (1910): "An accord and satisfaction is predicated upon an agreement between the parties based upon a consideration and fully executed on the part of the defendant, whereby the plaintiff's cause of action is satisfied or discharged." The principal questions to be asked in determining whether a discharge by accord and satisfaction has taken place are: (1) Did the parties in fact agree that the performance rendered should operate as a final discharge and satisfaction; and (2) does that performance constitute a sufficient consideration for a return promise or for a discharge? 6 Corbin on Contracts, § 1276 (1962). And the question of whether a payment rendered by the obligor, and later asserted to be in satisfaction, was so tendered to the claimant that he knew or should have known that it was tendered as full satisfaction is a question of fact. 6 Corbin on Contracts, § 1277 (1962).

With these principles in mind we examine the evidence. The testimony reveals that some time after the divorce between the plaintiff and Robert Jensen, Jensen called the plaintiff and offered her "some money," and represented to the plaintiff that the back child support totaled $1,640. The plaintiff said that she would accept this, but that she would have to check the court records to see how much child support was owed. She failed to do this, but still accepted the $1,640 payment. No written agreement or memorandum was executed or transmitted between the parties. The defendants rely primarily upon Ruehle v. Ruehle, 161 Neb. 691, 74 N. W. 2d 689 (1956). It is true that Ruehle does stand

for the proposition that an accord and satisfaction with respect to child support can be made between the parties and is not void as against public policy; but Ruehle also stands for the proposition that this court will scrutinize an alleged accord and satisfaction between a husband and wife with reference to child support very carefully, and the evidence must be such that the court is satisfied by the clear weight of the evidence that an accord and satisfaction was intended and accepted. We find that Robert Jensen's misrepresentation as to the amount due on child support to his former wife, whether deliberate or simply a mistake, is enough to demonstrate the lack of fair negotiation and, indeed, demonstrates an overreaching by the defendant husband, Robert Jensen. The trial court was correct in finding that no accord and satisfaction had been made with respect to all the child support and was also correct in exercising its discretion under the doctrine of the Ruehle case to credit this amount against the total judgment for child support.

The other objection claims credit for payments of over $5,000 made directly to his children. The trial court determined that these payments were gifts and intended as such and therefore should not decrease the child support payments that were due to his former wife for their care and expenses. The statute provides that the child support judgments should be paid to the clerk of the District Court. This statute was designed and intended to eliminate disputes and disagreements between parties in this situation. Robert Jensen is charged with knowledge of the law, and it is clear that if he had wished his payments to his children to be in satisfaction of his child support obligations and not gifts, he could have made payment directly to the court, and had his payments properly credited. We observe also that he did pay $1,640 to his wife for which he received credit, but that the payments to the children were directly to them and there is no evidence that

they in any way reduced the obligations of the wife and the expenditures that she was required to make for their care and maintenance. We find no reason to disturb the finding of the trial court in this respect, especially in light of the fact that it saw and heard the witnesses and its finding as to credibility will not be overturned on appeal unless clearly wrong.

There is dispute between the parties as to Social Security payments for her children following Robert Jensen's disabling accident. The trial court found that the plaintiff received $8,652.40 from Social Security and that this amount should be credited against the final judgment. The plaintiff contends that this was error because it was payment to her from a collateral governmental source and did not relieve Robert Jensen from his obligation according to the decree. It is clear that these payments directly resulted from Robert Jensen's accidental disability and in the context of this case were a substitute for his loss of earning power and his obligation to pay for the support of his dependents. In equity we see no difference between this situation and where Robert Jensen had received a gift and applied it to the payment of child support. There was no error in this determination by the trial court.

With reference to the creditor's bill, the District Court found that almost $11,000 of Robert Jensen's money was used to improve a home owned by Vivian Jensen; and the court concluded that a lien should be placed on the house to the extent of the improvements made thereon. The court also found that a certain car had been purchased with Robert Jensen's funds, but it had been placed in the name of Vivian Jensen for the purpose of defrauding creditors of Robert Jensen. The District Court also found that over $3,000 of Robert Jensen's money had been used to buy personal property found in the home of Vivian Jensen; and the court found that this had been done to defraud Robert Jensen's

creditors and therefore a lien was placed on this personal property.

Section 36-401, R. R. S. 1943, provides that conveyances or assignments of property made to defraud creditors are void. This court has also held that: "Where there is a conveyance between close relatives without adequate consideration, the burden is upon the parties to the transaction to establish that it was done in good faith." First Nat. Bank v. First Cadco Corp., 189 Neb. 553, 203 N. W. 2d 770 (1973). Section 36-406, R. R. S. 1943, provides that an issue of fraudulent intent is a question of fact. Defendant Robert Jensen testified as follows:

"Q. Did you (Robert Jensen) purchase anything singularly with the idea that you were going to defraud any creditors?

"A. No."

But the following questioning also occurred on cross-examination:

"Q. Now, the automobile that you own, or that your wife owns, is there any reason why that wasn't put in your name; since it was your funds?

"A. Because I didn't have a driver's license.

"Q. But as far as the title to it, that wouldn't make any difference, would it? * * *

"Q. Mr. Jensen, have you ever been told by anyone to take property out of your hands?

"A. Yes, I was advised by counsel to have the title changed over to have — just to have my name taken off.

"Q. For what purpose?

"A. *Because of this deal going on here.*" (Emphasis supplied.)

It is unnecessary for our determination here to review the evidence and all the collateral circumstances further. The evidence amply supports the trial judge's finding with reference to the fraudulent conveyances.

The combination of conveyances, the time period, and Robert Jensen's own testimony lead to an inference that there was an attempt to defraud or delay Jensen's former wife from collecting the child support judgment. Jensen has not met his burden of proof to establish that it was done in good faith. It was without consideration, and conveyed to his new wife, and according to his own testimony "Because of this deal going on here."

The judgment of the District Court is correct and is affirmed. The plaintiff is allowed $750 for services of her attorney in this court.

AFFIRMED.

SMITH, J., not participating.

EXCHANGE BANK OF GIBBON, NEBRASKA, A NEBRASKA CORPORATION, APPELLEE, V. CHARLES ASHLEY ET AL., APPELLANTS.
214 N. W. 2d 632

Filed February 7, 1974. No. 39030.

1. **Trial: Evidence.** Where the evidence adduced to sustain an issue, although conflicting, is so conclusive that reasonable minds can draw but one conclusion therefrom, it is the court's duty to decide the question as a matter of law, rather than submit it to a jury.
2. **Trial: Instructions.** When a litigant has approved instructions in the trial court, either by word or act, he cannot thereafter effectively complain of instructions given.

Appeal from the District Court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Andrew J. McMullen, for appellants.

Tye, Worlock, Tye, Jacobsen & Orr and Kenneth C. Fritzler, for appellee.

Heard before WHITE, C. J., MCCOWN, and NEWTON, JJ., and LYNCH and WARREN, District Judges.

LYNCH, District Judge.

The plaintiff, Exchange Bank of Gibbon, Nebraska, sued the defendant, Charles Ashley, for $21,058, plus interest, alleged to be due on three promissory notes executed by the defendant.

The defendant answered that the plaintiff had failed to give full credit for payments made and that plaintiff had repossessed certain property in satisfaction of the obligations. Defendant also cross-petitioned, alleging that he suffered a loss of $25,000 because the plaintiff had interfered with his business.

At the conclusion of the evidence, the plaintiff moved for a directed verdict in the sum of $23,066.01, the total amount alleged due plus interest, and for dismissal of the cross-petition. The trial judge sustained only the motion as to the cross-petition and instructed the jury that as a matter of law the plaintiff proved that proper credit had been given for the payments made by the defendant, that the amount due was $23,066.01, but that the plaintiff had the additional burden of establishing that the collateral had been disposed of in accordance with the law as set out in the instructions, submitting to the jury the sole question of the amount due. The jury returned a verdict for the plaintiff in the sum of $17,741.83.

The defendant appealed, assigning as error that: (1) The trial court decided facts and witness credibility in view of conflicting testimony; (2) the court refused to allow defense counsel to argue with respect to payments made by the defendant from exhibits introduced by the plaintiff; and (3) the court submitted one verdict form to the jury although there was testimony favorable to the defendant indicating payments and credits in excess of the amount alleged due the plaintiff. No mention was made of the defendant's cross-petition.

All the assignments of error hinge on the propriety of the trial court ruling as a matter of law that the

plaintiff had given credit for all payments made by the defendant.

During the trial the president of the plaintiff bank identified the notes and testified from records as to payments made by the defendant on each note, the proceeds from property that had been sold and credited to the defendant's account, and the balances due on the three notes. He calculated the total amount due to be $23,066.01. In rebuttal this witness accounted in detail for the collateral disposed of by the bank.

The defendant testified that relative to one note his record of payments coincided with plaintiff's except for defendant's last claimed payment of $11,122.80. The defendant offered no supporting evidence such as a canceled check or receipt, he had no specific recollection of having made the payment, and the figure was exactly the same as the amount due as reflected by the plaintiff's records.

On a second note the defendant claimed a payment of $4,200 not allowed by the bank. This amount also appeared as the balance due on the plaintiff's records as of the date of the alleged payment, which was actually the date of an extension of this note. If the payment had been made as asserted, the defendant would have overpaid on the note. He did not have the canceled instrument or other evidence of the payment although he orally made reference to his records.

On the third note the credits allowed by the plaintiff exceeded those claimed by the defendant.

The defendant also expressed his opinion as to the value of certain items of repossessed personal property.

Was it error for the trial judge to deny the jury the function of deciding whether or not the defendant made a payment of $11,122.80 on the one note and $4,200 on the second note?

This court held in Baxter & Sons v. Sofio, 182 Neb. 599, 156 N. W. 2d 141: "* * * a verdict should be directed

if the evidence is undisputed or if the evidence, although conflicting, is so conclusive that it is insufficient to justify a verdict or sustain the judgment." Also, there is considerable precedent for a trial judge to decide a particular issue as a matter of law, as was done in the case of Anthony v. Poppert, 186 Neb. 509, 184 N. W. 2d 648. The court therein declared in effect that where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the court's duty to decide the question as a matter of law, rather than submit it to a jury for determination. It was also held in that case: "It is the duty of the district court, on its own motion, to submit to the jury only the issues upon which there are controverted questions of fact which must be determined by the jury in order to properly arrive at its verdict."

Concerning the two controversial payments, the defendant's testimony was unsupported. Opposed thereto the court was required to take into account that substantial amounts were involved, that the defendant was an experienced business man, that he exhibited no canceled checks or other convincing evidence to substantiate his testimony, that he had no independent recollection of the payments, and that the amounts stated as payments by the defendant were identical with the figures appearing as balances due in the documentary evidence presented by the bank.

From a review of the record, it is our opinion that the plaintiff established a firm case when weighed against the testimony of the defendant; that reasonable minds could not differ as to the conflicting evidence; and that a factual question was not presented on the issues of the two payments. Therefore the trial court acted without fault or error in not submitting the payment questions to the jury, in not allowing defense counsel to argue relative to those matters, and in giv-

ing to the jury only one verdict form.

Although not specifically assigned as error, the defendant argued that the trial court failed to properly instruct the jury on the issue of the value of the property repossessed and sold by the plaintiff. Counsel for both sides had ample opportunity to examine the court's proposed instructions, and apparently no objections were voiced nor were instructions requested. "When a litigant has approved instructions in the trial court, either by word or act, he cannot thereafter effectively complain of instructions given." Swearingen v. Sloggett, 189 Neb. 482, 203 N. W. 2d 442. In any event, a perusal of the instructions given and the fact that the jury reduced the amount sought by the plaintiff are convincing that the jury was properly and adequately informed of the applicable law.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID PARKER, APPELLANT.

214 N. W. 2d 630

Filed February 7, 1974. No. 39040.

Criminal Law: Probation and Parole: Trial: Evidence. The finding that the defendant has violated the terms of his probation need not be established beyond a reasonable doubt but must be established by clear and convincing evidence.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

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

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

Heard before SPENCER, SMITH, and NEWTON, JJ., and ZEILINGER and BURKE, District Judges.

BURKE, District Judge.

On the 20th day of September 1972, the defendant, David Parker, pleaded guilty to the charge of auto theft. A presentence investigation was ordered.

On the 25th day of October 1972, the trial judge placed the defendant on probation to the adult probation officer for a period of 2 years.

As a result of defendant's arrest on December 8, 1972, the county attorney filed an information charging the defendant with violating the terms of his probation by receiving or concealing an automobile, knowing the same to have been stolen, with the intent to defraud the owner.

On February 20, 1973, a revocation hearing was held. At the conclusion of the hearing the judge found that the defendant had violated the terms of probation and revoked the order of probation. The defendant was represented by counsel at all stages of the proceedings.

The defendant, in this appeal, contends that there was insufficient evidence produced at the revocation hearing to support the finding of the judge that he had violated the terms of the order of probation entered approximately 2 months prior to the hearing.

The county attorney produced the following uncontroverted evidence by sworn testimony:

On December 6, 1972, the owner of a 1970 white over green Chevrolet pickup truck, bearing Douglas County license plates, parked the vehicle in the parking lot of the West "Q" Bar; and the keys were left in the vehicle and the registration certificate was kept on top of the left sun visor. When the owner returned to the parking lot approximately 1 hour later, the vehicle was gone and he notified the police immediately.

On December 8, 1972, officer Charles Martinez of the Omaha police department was driving his cruiser in the vicinity of 17th and Vinton Streets when he observed the defendant, whom he knew, driving a white

over green pickup truck bearing Burt County license plates. The officer stopped the vehicle, obtained the keys from the defendant, and started the vehicle in the presence of another police officer.

The police officer then ascertained the serial number of the vehicle, called the police station to determine if the vehicle had been stolen, and, thereafter, had the vehicle towed to the police tow lot.

The defendant was arrested and transported to the auto theft division of the police department. The officer turned the keys to the vehicle into the property room at the police station.

The following day the owner of the vehicle was advised by the police that his vehicle was at the tow lot. He took a tow ticket to the tow lot where he was directed to his vehicle. He identified the vehicle but noted, among other things, that the vehicle carried Burt County license plates and the mirrors and seat covers were missing.

The owner started the vehicle with a second set of keys and drove to the police station where he was given his keys and registration certificate.

Counsel for defendant apparently seek to equate the revocation hearing to a criminal prosecution with the required proof reaching near serial number certainty. We do not agree.

In Phoenix v. State, 162 Neb. 669, 77 N. W. 2d 237, we held that the accused is entitled to a fair and impartial hearing, but not to a formal trial or trial by jury, nor must the violation of probation be proved beyond a reasonable doubt.

The violation of the order of probation must be established by clear and convincing evidence. See § 29-2267, R. S. Supp., 1972.

At the revocation hearing the county attorney met the quality of proof required. The judgment of the

District Court is correct and is affirmed.

AFFIRMED.

SMITH, J., not participating.

SANDRA K. SCHULLER, APPELLANT, V. FRANCIS C. SCHULLER, APPELLEE.

214 N. W. 2d 617

Filed February 7, 1974. No. 39045.

1. **Divorce: Parent and Child.** In determining the issue of child custody, the paramount consideration is the best interests and welfare of the children.
2. **Divorce: Appeal and Error.** In a divorce action the case is to be tried de novo in the Supreme Court on the issues presented on appeal.
3. **Appeal and Error: Trial.** In a "trial de novo" in the Supreme Court, it is settled law that this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite.
4. **Appeal and Error: Divorce: Parent and Child.** In cases involving determinations of child custody, the findings of the trial court both as to evaluation of evidence and as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion shown.
5. **Trial: Appeal and Error: Evidence.** There is a presumption that the court, trying a case without a jury, in arriving at a decision, will consider such evidence only as is competent and relevant, and the Supreme Court will not reverse a case so tried because other evidence was admitted, when there is material, competent, and relevant evidence admitted sufficient to sustain a judgment of the trial court.
6. ———: ———: ———. Generally, the admission of incompetent or irrelevant evidence is not reversible error, where the cause is tried to the court without a jury.
7. ———: ———: ———. Upon a trial de novo in the Supreme Court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objection by the adverse party, will be disregarded by this court.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

William J. Tighe of Hotz, Byam & Kellogg, for appellant.

Michael J. Mooney of McCormack, Cooney & Mooney, for appellee.

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

WHITE, C. J.

In this divorce case the District Court granted a divorce to the petitioner, Sandra K. Schuller, and gave custody of the three minor children to the respondent father, Francis C. Schuller. The petitioner appeals. We affirm the judgment of the District Court.

In determining the issue of child custody, the paramount consideration is the best interests and welfare of the children. § 42-364, R. S. Supp., 1972; Broadstone v. Broadstone, 190 Neb. 299, 207 N. W. 2d 682; Lanz v. Lanz, 189 Neb. 578, 203 N. W. 2d 761. Secondly, in a divorce action the case is to be tried de novo in this court on the issues presented on appeal. Lienemann v. Lienemann, 189 Neb. 626, 204 N. W. 2d 170; Upah v. Upah, 175 Neb. 606, 122 N. W. 2d 507. We are required to make independent conclusions of fact without reference to the conclusion or judgment reached in the District Court. Our review on appeal is not restricted by the fact that there may be some evidence in support thereof. § 25-1925, R. R. S. 1943. In a "trial de novo" in this court, it is settled law that this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. Magill v. Magill, 114 Neb. 636, 209 N. W. 241; Jones v. Dooley, 107 Neb. 162, 185 N. W. 307;

Dvorak v. Kucera, 130 Neb. 341, 264 N. W. 737; O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403. In cases involving determinations of child custody, such as the present case, the findings of the trial court, both as to evaluation of evidence and as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion shown. Phillips v. Phillips, 188 Neb. 89, 195 N. W. 2d 160; Martin v. Martin, 188 Neb. 393, 197 N. W. 2d 388; Oberg v. Oberg, 188 Neb. 316, 196 N. W. 2d 371.

We summarize the assignments of error. The petitioner asserts as error the reception by the trial court of two items of evidence. The first is a report made by the public welfare division of Sarpy County, Nebraska. This report was requested by the trial judge pursuant to statutory authorization. The petitioner made no objection after being advised by the trial court that it intended to make such an investigation. Citing Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731, the petitioner now contends that such report contained hearsay, conclusions, and opinions, and that because of the introduction of the report in evidence it deprived the petitioner of her right of cross-examination and due process. We do not reach this question under the record presented in this case. The statute clearly authorizes the trial court, since the children are wards of the court, to make an independent investigation of the living conditions and the environment and care of minor children. It contemplates that in a proper case such a report may be taken into consideration and given weight by the trial judge. It follows that the trial court, in such a case, should submit its report to counsel for examination and further hearing where it forms a basis for the conclusions and judgment entered as to the disposition of the children. In this case the District Court found that he did not rely upon the objectionable parts of the report, and it is the settled law of this state that

there is a presumption that the court, trying a case without a jury, in arriving at a decision, will consider such evidence only as is competent and relevant, and the Supreme Court will not reverse a case so tried because other evidence was admitted, when there is material, competent, and relevant evidence admitted sufficient to sustain a judgment of the trial court. Koehn v. Koehn, 164 Neb. 169, 81 N. W. 2d 900. Generally, the admission of incompetent or irrelevant evidence is not reversible error where the cause is tried to the court without a jury. Gray v. Hartman, 181 Neb. 590, 150 N. W. 2d 120; Abel v. Southwest Cas. Ins. Co., 182 Neb. 605, 156 N. W. 2d 166; Richardson v. Doty, 25 Neb. 420, 41 N. W. 282; In re Estate of Enyart, 100 Neb. 337, 160 N. W. 120; Eden v. Klaas, 165 Neb. 323, 85 N. W. 2d 643. We have recently held that upon a trial de novo in this court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objection by the adverse party, will be disregarded by this court. Franks v. Franks, 181 Neb. 710, 150 N. W. 2d 252.

From an independent evaluation of the record, taking into consideration that the trial court saw and observed the parties and the witnesses, we conclude that the trial court is correct in awarding custody of the three minor children to their father. The record shows that the parties were married July 18, 1959. There are three children, Kevin, age 12; Steven, age 11; and Melissa, age 8. The petitioner has been working at the Western Electric plant near Omaha for over 6 years. At the time of the trial she was working the midnight to 8 a.m. shift, which made it necessary for her to leave home about 11 p.m. and not arrive back home until about 8:20 a.m. The parties became separated on August 22, 1972. The evidence shows that for 3 weeks following that date, the petitioner was unable to find a babysitter for her children; and the children were thus

left alone at night when the mother worked. At the end of this 3-week period, the children stayed with the father when the petitioner worked. This situation changed about 2 weeks before the trial. The petitioner then made arrangements for an 18-year-old neighbor boy to stay with the children at night and be a "general handyman." The petitioner was paying this young man $30 per week and according to her testimony, he was staying with the children while she worked, and washed the dishes, cooked, picked up, and performed other tasks. It was necessary for the children to prepare their own breakfast. She conceded that while the husband was at home with the children he had prepared most of the meals. Her husband also works. She herself conceded that she did not consider herself the "best housekeeper in the world." An Omaha police officer, James Wescott, testified that on October 10, 1972, at about 10 p.m., the father, Francis Schuller, came to the police station and asked Officer Wescott to go to the Schuller's residence with him. Wescott did so. He testified that when they arrived the children were home alone. He stated that a box of cereal had been emptied on the kitchen floor and had not been picked up, and dishes were piled on the kitchen table and countertops. The childrens' bedrooms had clothing piled on the floor and the bedding appeared not freshly laundered. In the basement, there was also clothing piled on the floor and there was a substance which "looked like animal waste" on the floor.

The second item asserted as error is admission of exhibit 1, the school attendance record. Mrs. Schuller admitted Melissa's extensive absences from school, and in an attempt to explain them, she stated that the primary reason was Melissa's stomach was continually aching, and that it appeared to be a chronic symptom. Nevertheless, the petitioner testified that she had not yet taken Melissa to a doctor.

The record shows that the respondent is employed as a real estate salesman and his income over the past 10 years averaged about $12,000 per year; that at the time the parties separated the husband prepared the majority of the meals; and that generally the father is prepared to furnish and to give the children the clothing, food, and the care, discipline, and attention that children of tender years deserve and should have.

Summarizing, the record clearly shows that the nature of the respondent's work is such that he is available to give his children his personal care, affection, and attention at various times when needed, and according to a schedule that he himself sets. The objective evidence as to what he has actually done in the past since the time of the separation of the parties strongly supports the conclusion that he is not only a fit and proper person for the custody of these children, but also that the best interests of these minor children require that their custody be given to him. We so determine.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

VIVIAN C. TIGHE, APPELLANT, V. SECURITY NATIONAL LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE.
214 N. W. 2d 622

Filed February 7, 1974. No. 39121.

1. **Insurance: Contracts: Forfeitures and Penalties: Notice.** The general rule is that a provision for forfeiture of an insurance policy for nonpayment of premiums is self-executing, and notice of forfeiture or other affirmative act on the part of the insurer is necessary only if required by statute, by the terms of the contract, or by course of dealing.
2. **Insurance: Forfeitures and Penalties: Time.** A forfeiture or lapse of an insurance policy for nonpayment of a premium generally takes effect from the time the premium is due and unpaid.

3. **Insurance: Waiver.** As a general rule, a mere demand for overdue premiums by an insurer does not amount to a waiver if the insured does not comply with the demand.
4. **Insurance: Estoppel.** To constitute an estoppel, there must be a reliance in good faith upon the conduct or statements of the party to be estopped; and action or inaction based thereon of such a character to change the position or status of the party claiming the estoppel to his injury, detriment, or prejudice.
5. **Insurance: Estoppel: Waiver.** An extension of credit for the payment of premiums by an insurer to the insured may under certain circumstances constitute a waiver or estoppel, but whether credit was so extended is a question of fact.
6. **Insurance: Records: Waiver.** The mere fact that the records of an insurer list premiums due from an insured pursuant to premium notices previously sent him as "account receivable" is not conclusive upon the question of whether the insured intended to and did waive a forfeiture of the policy because of prior nonpayment of premiums.

Appeal from the District Court for Dakota County: JOSEPH E. MARSH, Judge. Affirmed.

Leamer & Galvin, for appellant.

Deutsch & Hagen and Thomas O. Albers, for appellee.

Heard before SPENCER, SMITH, and CLINTON, JJ., and BRODKEY and HASTINGS, District Judges.

BRODKEY, District Judge.

This is an action brought by Vivian C. Tighe, the divorced wife of Paul W. Tighe, deceased, and his beneficiary under a certain policy of insurance upon the life of said deceased. On March 8, 1965, Paul W. Tighe purchased a certain 10-year term convertible insurance policy in the face amount of $6,557 on his life from Bankers Trust Life Insurance Company. The appellee, Security National Life Insurance Company, subsequently assumed all liability under the aforesaid policy. The insured died on May 14, 1970, and notice of death was given to the appellee by the beneficiary. The insurance company thereafter refused to pay the amount of the policy to the appellant; and this action was then

commenced to recover the proceeds of said policy. Trial was held to the court, which held in favor of the appellee insurance company, and this appeal from that decision followed. We affirm.

The issue in this case is whether the policy was in force and effect on the date of decedent's death. The policy in question contains the following provision:

"PAYMENT OF PREMIUMS: This policy is based upon the payment of premiums annually in advance, but premiums may be paid in the manner, for the periods, and at the rates corresponding thereto as shown on the face of the policy. * * * Monthly premiums, where quoted on the face of the policy shall be due at * * * monthly intervals respectively reckoned from the date the first policy year begins. Upon written request to the Home Office a change from one such premium payment interval to another may be made effective on any premium due date with respect to premiums then and thereafter becoming due. All premiums are payable in advance at the Home Office of the Company * * *. If any premium * * * shall not be paid on or before its due date it is in default, and any liability of the Company under this policy shall thereupon cease and terminate except as otherwise provided.

"GRACE PERIOD: If any premium not be paid on or before its due date such premium is in default, but a grace period of thirty-one days will be allowed in the payment of all premiums after the first, during which period this policy will continue in force.

"REINSTATEMENT: Should this policy lapse it may be reinstated * * * upon evidence of insurability, including good health, being furnished satisfactory to and approved by the Company at its Home Office, and upon the payment of past due premiums with interest * * * ."

It appears from the record that during the first policy year from March 1965 to March 1966, the premium on

this policy was paid by a single annual premium of $56.75. Thereafter, commencing March 8, 1966, a special monthly payment of $4.90 was made through the medium of twelve post-dated checks, commonly referred to as the "Econo check method" whereby the insured furnished post-dated checks for twelve monthly premiums; and this method of paying premiums was thereafter followed. The last of the post-dated checks was dated February 8, 1970, and on that date was presented and paid, thereby paying up the policy until March 8, 1970. Prior to that time, however, to-wit, on January 2, 1970, a form letter was sent to the insured requesting that he send a new supply of twelve checks "so your premiums will be paid promptly when they are due" and informing him that the checks should commence with the month of March 1970. The post-dated checks were never sent to nor received by the insurance company, nor were any further premiums ever paid by or received from the insured. Subsequent to the death of the deceased, the beneficiary found among the papers and effects of the deceased the letter from the Security National Life Insurance Company requesting the new supply of post-dated checks and also three form premium notices for the months of March, April, and May 1970. An official of the insurance company testified that when a supply of post-dated checks is requested and not received, it is its practice to change the mode of paying premiums to regular monthly premiums, with premium notices sent through the mail to the last-known address of the insured. He also testified that when premium notices are thereafter mailed out, the amount of the premium is carried on the computer records of the company as an account receivable and that approximately 60 to 90 days after the policy is delinquent, it lapses the policy off its billing records on the computer so that no further premium notices go out to the insured. He further testified that because of the failure to receive premium pay-

ments from the insured, the policy lapsed after expiration of the grace period of 31 days after the policy due date of March 8th. We also point out that the policy in question, being a term policy, had no cash value or provisions for extended insurance.

The general rule is that a provision for forfeiture for nonpayment of premiums is self-executing, and that a notice of forfeiture on this ground, or other affirmative act on the part of the insurer, is necessary only if required by statute, by the terms of the contract, or by course of dealing. 45 C. J. S., Insurance, § 590 b, p. 388; 43 Am. Jur. 2d, Insurance, § 623, p. 632; Dressler v. Commonwealth Life Ins. Co., 105 Neb. 669, 181 N. W. 543 (1921); Novak v. LaFayette Life Ins. Co., 106 Neb. 417, 184 N. W. 64 (1921); Whitehorn v. Royal Arcanum, 131 Neb. 713, 269 N. W. 821 (1936). In the instant case, the policy of insurance involved was a life insurance policy, and there is no statute requiring the giving of notice of forfeiture; nor are there any provisions in the policy itself requiring that such notice of forfeiture be given. Moreover there is no evidence in the record of any course of dealing between the parties which would so require. The rule is that a forfeiture or lapse of a policy for nonpayment of a premium generally takes effect from the time the premium is due and unpaid. 45 C. J. S., Insurance, § 614 e, p. 453. It is the claim of the appellant, however, that by sending out premium notices to the insured and by treating the premiums due as accounts receivable the insurer waived its right to forfeit the policy for nonpayment of premium and is estopped to claim that the previous premiums are unpaid; and that the insurance contract, therefore, remained in force and effect. We do not agree with this contention. The rule is that some act or conduct amounting to a recognition of the continued validity of a policy as a binding obligation upon the insurer is necessary to constitute an effective waiver of policy provision for forfeiture for nonpayment of pre-

miums. John Hancock Mut. Life Ins. Co. v. Tuggle, 303 F. 2d 113 (10th Cir., 1962). As a general rule, a mere demand for overdue premiums by an insurer having knowledge of a cause for forfeiture does not amount to a waiver if the insured does not comply with the demand. Klanecky v. Woodmen of the World, 126 Neb. 809, 254 N. W. 577 (1934); Cady v. Travelers Ins. Co., 93 Neb. 634, 142 N. W. 107 (1913); John Hancock Mut. Life Ins. Co. v. Tuggle, 303 F. 2d 113 (10th Cir., 1962); Goldheim v. Connecticut Mut. Life Ins. Co., 172 F. Supp. 195 (U.S.D.C., D.C., 1959); Laustrup v. Bankers Life Co., 355 Mo. 304, 196 S. W. 2d 260 (1946); Ampy v. Metropolitan Cas. Ins. Co. of New York, 200 Va. 396, 105 S. E. 2d 839 (1958); 43 Am. Jur. 2d, Insurance, § 1123, p. 1044; Annotation, 85 A. L. R. 2d 1414; 6 Couch on Insurance 2d, § 32:302, p. 531, §32:304, p. 533.

With respect to the claim of estoppel made by appellant the required elements to establish such a claim in connection with insurance policies are set out in detail in Pester v. American Family Mut. Ins. Co., 186 Neb. 793, 186 N. W. 2d 711 (1971). Because of their length, we shall not repeat them in this opinion. However, among the requirements set out in the above case is that there must be a reliance, in good faith, upon the conduct or statements of the party to be estopped; and action or inaction based thereon of such a character to change the position or status of the party claiming the estoppel to his injury, detriment, or prejudice. In Goldheim v. Connecticut Mut. Life Ins. Co., *supra,* the court held that the insurer was not estopped from claiming that life policies had lapsed by taking a course of action which allegedly kept policies alive, when there was no showing that the insured changed position in reliance on any representation or course of action of the insurer; and that the act of the insurer which continued to send notices of premiums after default in payment of premiums by insured did not constitute a

waiver of such default. In the instant case there is no showing that the deceased knew the premiums for which he received premium notices were carried as an account receivable on the computer records of the company, and further there is nothing on the premium notices themselves to indicate that the policy was still in force and effect. This being so, we cannot conclude that an estoppel had been established in this case. See, also, Novak v. LaFayette Life Ins. Co., *supra;* Laustrup v. Bankers Life Co., *supra;* Exchange Trust Co. v. Capitol Life Ins. Co. of Colorado, 40 F. 2d 687, (U. S. D. C., N. D. Okla., 1930); Burns v. Prudential Ins. Co. of America, 162 Md. App. 228, 159 A. 606 (1932). While it is true that an extension of credit by the insurer to the insured for the payment of premiums may under certain circumstances constitute a waiver or estoppel, yet the question of whether credit was extended to the insured is a question of fact for the trier of facts. 6 Couch on Insurance 2d, § 32:286, p. 519, § 31:64, p. 72. The case of Martinez v. Great American Ins. Co. of New York, 286 F. Supp. 141 (U. S. D. C., W. D. Tex., 1968), is an exemple of a case where the court held there was a waiver of the right of the insurance company to terminate a policy, and an estoppel against the company to contend that the policy was not renewed, because of the fact that credit for the premium was carried on the books of the agency as an account receivable due to it from the insured. However, that case is readily distinguishable from the facts of the instant case, in that in the Martinez case the insurance company actually issued a renewal certificate to the insured, and also because of the fact that in that case a portion of the premium was paid in cash and the balance was carried as an account receivable. No such persuasive facts exist in this case. The rule is well-established that the insurer's recognition of the validity of a policy is a waiver of its forfeiture is not applied so as to waive a forfeiture

by virtue of the fact that insurer's records show that the policy is in force. 6 Couch on Insurance 2d, § 32:291, p. 523.

In Southie House v. Grand Lodge, Colored Knights of Pythias of Texas, 48 S. W. 2d 674 (Tex. Civ. App., 1932), the court stated as follows: "The appellee further contends that since the insurance company retained the name of the insured on its rolls, after the policy had lapsed, and forwarded to the secretary of the subordinate lodge blank receipts to be used in the event the insured paid the dues that were in arrears, this was a recognition on the part of the appellee that the insured was in good standing and his insurance in force and was a waiver of the right to declare a forfeiture. We cannot agree with this view. The insured remained a member of the lodge notwithstanding his insurance lapsed, and his name was properly retained on the roll of membership. He had the right to have his insurance reinstated if he paid his premiums at the termination of the quarter, and appellee's conduct, in preparing and forwarding blank receipts to the secretary of the local lodge to be used in the event the insured elected to reinstate his insurance as provided in the by-laws, was in no wise inconsistent with a forfeiture of the insurance. The insured having died during suspension, the beneficiary was not entitled to a recovery therein."

In Moss v. Aetna Life Ins. Co., 73 F. 2d 339 (6th Cir., 1934), the court held that the fact the insurer's records showed that life policies with double indemnity provision lapsed as of a date subsequent to insured's death and the expiration of the period of grace did not constitute a waiver of payment of premiums or abandonment of insured's rights clearly defined by the policy, the court stating: "One other contention must be noted. The company's records show that the policies lapsed as of August 26th. But these were routine clerical entries and a part of purely intra-company procedure.

They cannot be construed as a waiver of payment, or as between the company and the insured or his beneficiary an abandonment of rights clearly defined by the contract."

In the case of Laustrup v. Bankers Life Co., *supra,* the court held that in determining whether the life insurer had acted so as to lead insured to believe that terms of an extension agreement had been waived and that insurer treated a premium as having been paid by extending credit in lieu of cash payment, the fact that a policy card in the files of the insurer was marked "lapsed" was immaterial where there was no evidence that insured knew of the existence of the card, or even that the marking was placed thereon before the death of the insured, the court stating: "We place no importance on the fact that the policy card in defendant's files was marked 'lapsed March 1932.' This could not have induced insured to believe his policy was still in force. There was no evidence that insured knew of the existence of such a card or even that the marking was placed thereon before his death."

The foregoing authorities are very persuasive when considered in connection with the facts of the instant case. The fact that the insurance company carried on its computer records as an account receivable the amounts due for premiums under the premium notices for a period of 60 to 90 days would not necessarily indicate that the company intended to waive its right to a forfeiture of the policy for nonpayment of premiums, and would not estop the company from so claiming, particularly in the absence of any showing of any agreement or understanding between the company and the insured, or that the insured was in any way aware of the fact that the amount of the premiums due were carried as an account receivable on the records of the company. We believe the decision of the trial court in

this case was correct and we affirm that decision.

AFFIRMED.

SMITH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. TONY A. HUERTA, APPELLANT.

214 N. W. 2d 613

Filed February 7, 1974. No. 39131.

1. **Trial: Evidence: Waiver.** The failure to object promptly to an offer of evidence waives the objection.
2. **Criminal Law: Trial: Evidence.** In determining whether or not photographic identification procedures have been impermissibly suggestive, the question must be determined by an evaluation of all the surrounding circumstances.
3. **Criminal Law: Right to Counsel.** There is no right to counsel at a pretrial photographic identification.
4. **Criminal Law: Trial: Evidence.** Each case must be considered on its own facts and a conviction based on eyewitness identification at trial, following pretrial identification by photograph, will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
5. ———: ———: ———. Even though an in-court identification may have been tainted by an impermissibly suggestive out-of-court photographic identification, the in-court identification may properly be received if it has an independent source.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

E. Dean Hascall of Hascall, Jungers & Pelton, 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.

A jury found the defendant, Tony A. Huerta, guilty

of robbery. He was sentenced to a term of imprisonment of 9 to 20 years. His appeal involves issues as to the admission of a shotgun as demonstrative evidence and photographic identifications of the defendant.

At about 9 p.m., on October 2, 1972, four masked men entered the Richfield Cafe in Richfield, Sarpy County, Nebraska. They were armed with a shotgun, a knife, and a mallet. A short heavy-set man of dark complexion with long bushy hair and wearing a colored checked shirt, later identified as the defendant, guarded the door with the shotgun while the other three took the proprietor's billfold, and the cash from the cash registers in the cafe. They got $329.16. The proprietor, his wife, an employee, and four patrons witnessed the robbery.

The robbers left the cafe and drove a noisy red car out of town going south. The police were called and descriptions of the robbers broadcast on the police radio. Between 9 and 9:30 p.m., a "loud" car drove into a farmyard, circled in the yard, and stopped at the end of the lane. The farm was approximately half a mile south and three-quarters of a mile east of Richfield. The farmer watched the five occupants working on their red car at the end of his driveway in the light of the yard light. He became suspicious when they hid from a passing car. The farmer's wife called the sheriff. Officers arrived shortly and parked down the road. The farmer fired two shots in the air to alert the officers. Four of the five occupants of the car fled on foot through fields south of the farm house. The fifth occupant, Tom Cecetka, stayed in the car and was arrested at the scene. Pieces of the blanket used for masking were found strewn along the road and one piece was in the car. Cecetka gave the names of the others to the officers. Meanwhile, efforts were made to track the fugitives with dogs. At around midnight four men were pickd up walking along a road in the vicinity. The names given matched the names which had been given to officers by Cecetka, and the

four were arrested. A knife was found on the person of one man named Griger, and a total of approximately $300 in cash was taken from the four men, most of it from Griger.

On the morning after the robbery some distinctive red helmets similar to those worn in the robbery, and a shotgun similar to that used in the robbery, were found. They were lying alongside the tracks of the fugitives in the field near the farm house lane.

At the trial, Cecetka identified all the defendants and testified as to their participation in the planning and carrying out of the robbery. The proprietor of the cafe, his wife, their employee, and two of the patrons in the cafe at the time of the robbery identified the defendant Huerta in court as the man holding the shotgun during the robbery. One or more witnesses also identified in court each of the other defendants as a participant in the robbery.

The first contention of the defendant on appeal is that the admission in evidence of the shotgun found along the path of flight was improper and prejudicial to the defendant Huerta. The finding of the shotgun along the flight path of the robbers was probably enough in itself to make the gun admissible but there was considerably more than that. Each of the eyewitnesses to the robbery testified that one robber had a shotgun with a long barrel. Most of the witnesses identified it as a .410 like the one offered in evidence. Cecetka testified that the robbers had picked up a .410 shotgun at the house of one of the defendants before the robbery. When a fact in issue may be explained by the production of an article or object to which testimony relates, it is proper to bring such article or object into court and exhibit it to the jury. The fact that the evidence connecting the article to the crime is largely circumstantial does not make the article irrelevant nor inadmissible. Even if there were some doubt about the admissibility of the shotgun, the issue is

foreclosed because no objection was made when the gun was offered and received in evidence. The failure to object promptly to an offer of evidence waives the objection. State v. Sanders, 190 Neb. 625, 211 N. W. 2d 412.

The defendant also contends that some pretrial photographic identification procedures were so suggestive as to taint any in-court identification, and deny the defendant due process of law.

The evidence as to any prior photographic identification was produced almost entirely by the defendant in cross-examination. That evidence indicated that after Cecetka had named the four individuals, a set of 7 to 8 black and white pictures of men in suits and ties were drawn from police files and shown to Mr. and Mrs. Peterson and to Mrs. Wilkins sometime before midnight. Pictures of the defendant Huerta and of DeLoa and Shiller, the defendants who were tried jointly with him, were included in this group. None of them were identified.

Colored polaroid photographs of the four men arrested were taken sometime after midnight on the night of the robbery and were shown to the same three individuals at around 2 or 2:30 a.m., along with two other photographs, one a black and white photograph of a white man about 6 feet tall and another colored picture mounted on a stiff backing. Mr. Peterson recognized two individuals. Mrs. Peterson noted that the clothing in the pictures of the four defendants was the clothing she had described to officers following the robbery. She also recognized Griger.

The general descriptions given by Mr. and Mrs. Peterson and Mrs. Wilkins to the deputy sheriff shortly after the robbery identified the robbers as two white men and two Mexicans, one fat and shorter than the others. The shorter one was heavy set, half Indian and half Mexican, with long bushy black hair and wearing a colored checked shirt or jacket. This individual was identified

as the one with the shotgun. A second robber had the knife and was a white man with long hair, wearing glasses, a red shirt, and red helmet. The third robber had long blonde hair and was wearing a red helmet. The fourth robber was slender and of dark complexion and had long dark hair. The robbers had masks over the bottom portion of their faces. Some witnesses noted that the masks were over the mouths but the noses could be seen, as well as the upper portions of their faces.

The eyewitnesses who made in-court identification of the defendants were obviously relying upon physical observation and voice identification during the actual robbery more than upon photographs shown to them at a time shortly after the robbery. Some of the eyewitnesses to the robbery could not and did not specifically identify any of the defendants. It should be noted also that aside from any eyewitness identification there is extensive and substantial evidence of defendant's guilt.

In determining whether or not photographic identification procedures have been impermissibly suggestive, the question must be determined by an evaluation of all the surrounding circumstances. There is no right to counsel at a pretrial photographic identification. State v. Tramble, 187 Neb. 488, 191 N. W. 2d 822.

Each case must be considered on its own facts and a conviction based on eyewitness identification at trial, following pretrial identification by photograph, will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225; Simmons v. United States, 390 U. S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247.

Even though an in-court identification may have been tainted by an impermissibly suggestive out-of-court photographic identification, the in-court identification may properly be received if it has an independent source.

State v. Cannon, 185 Neb. 149, 174 N. W. 2d 181.

In this case the possibility of misidentification stemming from any impermissibly suggestive identification procedures was minimal. Any potential for error in such procedures was fully exposed to the jury in cross-examination by defendant's counsel.

The judgment of the District Court is affirmed.

AFFIRMED.

SMITH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. PAUL HENRY KRIDER, APPELLANT.

214 N. W. 2d 611

Filed February 7, 1974. No. 39140.

1. **Post Conviction: Guilty Plea: Attorneys at Law.** 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.
2. ———: ———: ———. The requirement 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.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Alan Saltzman, for appellant.

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

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

MCCOWN, J.

This is a post conviction proceeding in which the

defendant seeks to challenge his conviction for first degree murder while in the commission of a burglary. The defendant pleaded guilty and was sentenced to life imprisonment by a three-judge court in 1964.

The defendant alleged that a confession obtained by Nebraska law enforcement officers in Phoenix, Arizona, was involuntary and that his counsel was incompetent. An extensive evidentiary hearing was held in this proceeding. At the conclusion of that hearing, the trial judge found that the defendant freely, voluntarily, knowingly, and intelligently entered his plea of guilty, and that the plea was free from any improper pressure or inducements. The trial judge also found that at all times and in all proceedings the defendant was represented by an able, competent, and experienced attorney who properly represented the defendant by giving competent and experienced counsel. Those findings are fully supported by the record.

State v. Hall, 188 Neb. 130, 195 N. W. 2d 201, is determinative here. "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." The requirement 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 record here overwhelmingly establishes the competence of counsel and that the judgment of the District Court was correct in all respects.

AFFIRMED.

BENNIE MEHLING ET AL., APPELLANTS, V. ARTHUR DEINES ET AL., APPELLEES.

214 N. W. 2d 627

Filed February 7, 1974. No. 39142.

1. **Equity: Appeal and Error: Evidence: Witnesses.** On the appeal of an action in equity, when credible evidence on material questions of fact is in conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other.
2. **Easements: Adverse Possession.** A prescriptive right is not looked on with favor by the law.
3. ———: ———. A prescriptive easement can only be established by clear and convincing evidence of an adverse use under claim of right that was continuous, notorious, open, exclusive, with knowledge and acquiescence of the servient owner for the full prescriptive period.
4. ———: ———. A use by express or implied permission or license cannot ripen into an easement by prescription.

Appeal from the District Court for Sioux County: ROBERT R. MORAN, Judge. Affirmed.

Lyman, Meister & Olsen, for appellants.

Robert L. Gilbert, for appellees.

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

BOSLAUGH, J.

This action arose out of a dispute concerning a drainage ditch. The plaintiff, Bennie Mehling, and his wife own the north one-half of the southwest quarter of Section 27, Township 24 North, Range 57 West of the 6th P.M., in Sioux County, Nebraska. The defendant, Arthur Deines, and his wife own the south one-half of the same quarter-section.

There is a large drainage ditch known as the "Dutch Flats Drain" which runs along the south edge of the defendant's property. An extension ditch on the defendant's property runs north from the Dutch Flats

Drain to the edge of a railroad embankment and then diagonally to the northwest, south of and along the railroad. There is a dispute as to whether the extension ditch extended into the plaintiff's property prior to 1965. In that year, employees of the Pathfinder Irrigation District entered the defendant's property, cut a fence between the plaintiff's and the defendant's land, and "pulled" the ditch over to a culvert or tube under the railroad track north of the defendant's property.

In 1970, the defendant sustained crop damage from irrigation waste water draining from the plaintiff's land through the extension ditch. The defendant complained to the Pathfinder District and was advised the extension ditch was not a part of the works of the district and the district would have nothing further to do with it. In April 1971, the defendant closed the ditch. This action was commenced on May 21, 1971, to compel the defendant to reopen the ditch so that it would provide drainage for the plaintiff's land.

Much of the evidence in this case is in conflict. On the appeal of an action in equity when credible evidence on material questions of fact is in conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Messersmith v. Klein, 189 Neb. 471, 203 N. W. 2d 443.

The plaintiff's theory of the case is that he had acquired an easement by prescription to drain water from his land through the extension ditch on the defendant's land. Although an easement may be obtained by prescription, a prescriptive right is not looked on with favor by the law. Wemmer v. Young, 167 Neb. 495, 93 N. W. 2d 837; State ex rel. Game, Forestation & Parks Commission v. Hull, 168 Neb. 805, 97 N. W. 2d 535. To establish an easement by prescription there must be proof by clear and convincing evidence of an adverse use under claim of right that was continuous,

notorious, open, exclusive, with knowledge and acquiescence of the servient owner for the full prescriptive period. Scoville v. Fisher, 181 Neb. 496, 149 N. W. 2d 339; Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N. W. 2d 768.

The plaintiff's evidence in this case does not satisfy the requirement that it be clear and convincing. The record shows there was much confusion concerning the extension ditch on the defendant's land. The evidence is in conflict as to when the ditch was constructed; how far it extended from the Dutch Flats Drain; and whether the plaintiff or his predecessors in title made any use of it before 1965. There is little or no evidence as to who constructed the ditch originally.

The defendant's land was subject to a reservation contained in the original government patent for rights-of-way for canals and ditches constructed or to be constructed by the United States. The record shows that both the plaintiff and the defendant originally believed the extension ditch was a ditch of the Pathfinder District, the successor to the Federal Bureau of Reclamation. This controversy arose after the district disclaimed any interest in the extension ditch.

The record further shows it had been a general practice in the area to use Pathfinder drainage ditches to dispose of irrigation waste water. Use of the ditch by the plaintiff on the assumption it was a Pathfinder ditch and the district permitted such use would be permissive and not an adverse use under claim of right. See Weisel v. Hobbs, 138 Neb. 656, 294 N. W. 448. A use by express or implied permission or license cannot ripen into an easement by prescription. Scoville v. Fisher, *supra.*

The evidence shows the natural slope or course of drainage in the area is generally from north to south and floodwaters on the plaintiff's land will eventually flow onto and across the defendant's land if they are

of sufficient quantity. The land, however, is relatively flat and there is no pronounced depression or natural drainageway across the defendant's land. As we view the record it does not support the plaintiff's claim that a natural drainage course or watercourse existed across the defendant's land. In this regard we have considered the fact that the trial court viewed the premises.

We conclude the proof failed to establish a prescriptive right in the plaintiff for drainage across the defendant's land. The judgment of the District Court is affirmed.

AFFIRMED.

SMITH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. RICHARD GERALD DELOA, APPELLANT.

214 N. W. 2d 621

Filed February 7, 1974. No. 39158.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Joseph J. Vance, for appellant.

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

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

MCCOWN, J.

The defendant, Richard Gerald Deloa, was convicted of robbery and sentenced to a term of 9 to 20 years imprisonment.

The defendant was tried jointly with two other codefendants. The facts of the robbery are fully set out in State v. Huerta, *ante* p. 280, 214 N. W. 2d 613. That

case is determinative of all issues in this case except for the contention here dealing with the validity of the indeterminate sentence. Defendant's contention that the minimum sentence imposed by the court cannot exceed one-third of the maximum sentence imposed by the court was answered in State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES STANLEY SHILLER, APPELLANT.

214 N. W. 2d 616

Filed February 7, 1974. No. 39177.

1. **Criminal Law: Trial.** Cases may be consolidated for trial if the offenses charged are based on the same act or transaction.
2. ———: ———. A ruling on a motion for consolidation will not be disturbed on appeal in the absence of an abuse of discretion.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Stern, Harris, Feldman, Becker & Thompson, for appellant.

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

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

MCCOWN, J.

The defendant, James Stanley Shiller, was convicted of robbery and sentenced to a term of 9 to 20 years imprisonment.

The defendant was tried jointly with two other codefendants. The facts of the robbery are fully set out in

State v. Huerta, *ante* p. 280, 214 N. W. 2d 613. That case is determinative of all issues in this case except for the assignment of error dealing with the consolidation of the defendant's trial with that of two other joint defendants.

The defendant here contends that the trial court erred in granting the State's motion to consolidate the cases of the three defendants for trial. Cases may be consolidated for trial if the offenses charged are based on the same act or transaction. § 29-2002, R. R. S. 1943.

The defendants were represented by separate counsel. Virtually all the evidence was admissible against all the defendants. There was no showing of any substantial prejudice to any defendant as a result of the consolidation. A ruling on a motion for consolidation will not be disturbed on appeal in the absence of an abuse of discretion. State v. Shimp, 190 Neb. 137, 206 N. W. 2d 627.

The judgment is affirmed.

AFFIRMED.

FRIEHE FARMS, INC., A NEBRASKA CORPORATION, APPELLEE, v. REX S. HABERMAN ET AL., APPELLANTS.
214 N. W. 2d 916

Filed February 14, 1974. No. 39031.

1. **Specific Performance: Trial: Appeal and Error.** An action for specific performance is triable de novo on appeal to this court.
2. **Contracts: Tender: Time: Waiver.** An unqualified renunciation of an executory contract before time for performance by one party excuses tender of performance by the other party at the time set for performance.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

Frederick E. Wanek and McGinley, Lane, Mueller, Shanahan & McQuillan, for appellants.

Cunningham Law Office, for appellee.

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

SPENCER, J.

This is an appeal from a decree for specific performance in favor of Friehe Farms, Inc., plaintiff, against defendants Rex S. Haberman and Phyllis L. Haberman, husband and wife. The issue involved is a narrow one: Can specific performance be decreed for the cash price specified in the contract, or did seller have the right to terminate the agreement upon a belief that the buyer could not procure land desired by seller to trade for seller's land? We affirm.

Defendants employed William B. Weir to sell their property in Red Willow County upon terms agreeable to them. Plaintiff will hereinafter be referred to as Friehe, because all transactions on its behalf were conducted by Ervain J. Friehe, its president. Friehe called Rex Haberman direct regarding a possible purchase of the property and was referred to Weir. Friehe made a trip from his home in McCook to Imperial, Nebraska, to meet with Haberman and Weir. Friehe offered to purchase the property for $97,500. The terms were as follows: "The sum of One thousand dollars deposited herewith as evidenced by receipt appearing below and the balance of $96,500.00 to be paid as follows: in cash on closing date or at the sellers option the buyer agrees to purchase land in Chase County for $97,500.00 or any part thereof and enter into a trade agreement for such land with the seller. Seller agrees to assign a First Mortgage loan with Metropolitan Insurance Company of approximately $35,000.00 * * * This transaction shall be closed on or before 1 March, 1972 at which time seller (sellers) shall convey said property to Friehe Farms Inc. by good and sufficient warranty deed * * *." The offer, which is dated September 25, 1971, was accepted by the Habermans under date of September 27, 1971.

The parties, previous to executing the contract, had

discussed the possibility of a land trade to avoid income tax problems for Habermans, and an agreement was reached that if Rex Haberman could find land he desired Friehe would purchase it to trade, pursuant to the option in the offer.

Subsequently, Weir told defendants that Erling S. German had land in Chase County which he desired to sell, and that Weir was German's agent for its sale. Haberman indicated he would accept this land in trade. Weir communicated this information to Friehe, and sent him an offer to purchase the German land, together with a memorandum of agreement which would have tied the transaction to this trade. Neither of these documents was signed by Friehe. A meeting was held in Weir's office in Imperial on December 2, 1971, with Friehe, Haberman, Friehe's attorney Cloyd Clark, Jr., and Weir. At this meeting Clark produced a new offer of purchase for the German land to replace the one sent by Weir. Friehe signed this contract and deposited $5,000 with Weir as earnest money for the German land.

While German was told about the transaction and orally agreed to it, the contract was not submitted to him for his signature. Neither German nor Haberman signed it. German, who testified by deposition, stated he was told the contract was in the possession of Weir, but was never asked to sign it. German indicated he was ready, willing and able to sell his land to Friehe on January 3, and again on January 11, 1972.

The contract of sale for the German land provided for acceptance by German on or before December 15. This date was subsequently changed to December 30, 1971. On that date, Weir informed Friehe's attorney by telephone that German would not sell. The record indicates Weir was apparently concerned with some problem which German testified had been worked out. The evidence also indicates that Weir apparently knew German could have cleared title to the land in question but did

not convey this information to Friehe or his attorney.

Defendants knew the time for closing the contract between Friehe and German had been extended to December 30, 1971. They also knew Friehe was ready to perform at that time. However, German and Weir had agreed to postpone the closing until January 3, 1972.

When Weir advised Clark on December 30 that German would not sell, Clark on behalf of Friehe, wrote Weir as follows:

"Dear Bill:

"I was sorry to hear from you on the phone this morning that Mr. Haberman was not ready to close the German land sale and the Friehe Farms, Inc. land sale as scheduled at 1:00 p.m. on December 30, 1971. However, the contract between Haberman and Friehe Farms, Inc. which you drafted and have in escrow does provide for closing on March 1, 1972, which is plenty of time.

"In confirmation of our telephone conversation, Friehe Farms, Inc., hereby withdraws his offer to purchase Section Thirty-five (35) in Township Seven (7) North of Range Thirty-eight (38) West of the Sixth P.M. in Chase County, Nebraska. But as I told you on the phone, he stands ready to remake his offer for the German land or for other land if Mr. Haberman wishes to exercise his trade option under the Haberman-Friehe Farms, Inc. contract. If Haberman does not desire to exercise his trade option, Friehe Farms, Inc. is ready to close the Red Willow County land purchase on a cash basis at any time on or before March 1, 1972.

"Please remember that Mr. Friehe and Friehe Farms, Inc., has relied on your professional ability as a realtor in this land transaction and still relies on you to arrange the time table on his closing." A copy of this letter was sent to Rex Haberman.

On January 11, 1972, Rex Haberman wrote the following letter to Weir: "Under the terms of the contract that I have with Friehe Farms Inc., I am going to exercise the

option that the buyer agree to purchase land for me in Chase County, and trade for my land in Red Willow County.

"I have been advised that the land Friehe Farms Inc. was to purchase from Mr. German; which was to be traded for my farm in Red Willow County, is not available.

"I therefore wish to resend (sic) the contract, and have you return to Friehe Farms Inc. any down payment that they may have made."

Weir then wrote Clark on January 13, 1972, as follows: "I am enclosing a copy of a letter I have received from Mr. Haberman instructing me to return the $1,000.00 escrow check from Friehe Farms, Inc. on his purchase contract dated 25 September, 1971.

"Mr. Haberman feels that he has the option to cancel this contract at this time."

Under date of January 19, 1972, Clark wrote Rex Haberman the following:

"Mr. Friehe is not going to allow you to rescind your contract. As I stated in a letter dated December 30th, Mr. Friehe has always been and is ready at the present time to tend (sic) a complete payment for your Red Willow County property.

"Your action instructing Mr. Weir to return Mr. Friehe's escrow deposit constitutes a breach of your contract with Mr. Friehe and unless you correct that action, Mr. Friehe will resort to the courts for performance of your contract."

Defendants assert the agreement is a conditional one. They argue that failure of the condition precedent voids the contract. Plaintiff contends the agreement does not contain a condition precedent but merely gave the seller an opportunity to receive payment in land rather than cash. It is plaintiff's position that the contract was binding until March 1, 1972. Until that time defendants possessed an option to have plaintiff acquire available land

and enter into a trade agreement. If defendants did not select available land for trading purposes, then Friehe would be obligated to pay the cash price.

We do not agree with defendants that their option was a condition precedent. We interpret it as merely an option to take payment in land rather than cash. The word "or" is a disjunctive participle used to express an alternative, or to give a choice among two or more things. Sellers had an option to designate available property to be secured for trading purposes but they could not defeat the agreement by failing to exercise this option.

The parties by their subsequent actions have to some extent clarified the sales contract. They are in agreement that the selection of land for trading purposes was solely within defendants' discretion. It is also clear that the total cost to Friehe was to be the same even if a trade were involved. Defendants chose the German land and made this selection known to Friehe through their agent, Weir. The fact that the German deal fell through was in no way attributable to Friehe or his attorney.

Pursuant to the contract, defendants selected the German land as suitable for trade. They advised Weir to notify Friehe. Friehe promptly executed the offer to purchase German's land which was referred to earlier. On December 30, 1971, the date for German's acceptance of that offer, Friehe's attorney was told by Weir that German's land was not available. Neither Friehe nor his attorney was ever subsequently informed otherwise. Friehe then withdrew his offer for the German land but advised both Weir and Rex Haberman that he was ready to remake the offer if the land became available, or procure other land if Haberman wished to exercise his trade option under the contract. Friehe also advised them he was ready to close the land purchase on a cash basis at any time on or before March 1, 1972, the date specified in the contract.

Defendants attempt to premise their rescission on the

withdrawal of Friehe's offer for the German land. In fact, that offer for the German property had expired by its own terms. German had never signed the contract, and Friehe was told the property was not available. It is evident that Friehe was merely securing the return of his $5,000 earnest money because his offer had expired. It is also evident that Friehe was willing to do whatever was necessary to consummate his contract with the Habermans.

The evidence conclusively shows that both Weir and Haberman knew Friehe remained ready to perform. Weir knew that on January 3, 1971, the German land was still available, but he did not transmit this information to Friehe. His silence in this regard is not explained. Weir's listing contract with German was oral but German substantiated the agency. Yet, although German was shown the Friehe offer and testified he at all times was willing to go along with it, Weir at no time asked him to sign it.

On January 11, 1972, Haberman informed Weir he wished to rescind because the German land was not available. At this time nearly 2 months remained prior to the March 1, 1972, closing date for the contract between plaintiff and defendants. German testified his land was still available on January 11, 1972. When Friehe was advised of defendant's action, his attorney immediately wrote Rex Haberman reiterating Friehe's willingness to complete the contract and demanding that defendants fulfill their obligations thereunder. Defendants ignored this demand for performance. None of the parties thereafter made any effort to consummate the transaction.

An action for specific performance is triable de novo on appeal to this court. § 25-1925, R. R. S. 1943.

The trial court held defendants' action in canceling the contract was unilateral and unprovoked. It also held that further tenders by plaintiff would have been of no effect and were not required. We interpret the trial

court's holding to be that plaintiff's performance of the trade option was excused by defendant's rescission.

Rex Haberman testified that after December 30, 1971, he considered the deal off, but he would have performed at all times up to and including March 1, 1972, if plaintiff had secured the German land. However, defendants at no time informed plaintiff of this readiness to perform. Defendants made no response of any kind to the letter of January 19, 1972, which indicated Friehe's willingness to perform the terms of the contract and his intention to hold defendants to it.

We interpret defendants' action as an unequivocal statement that they would not perform. An unqualified renunciation of an executory contract before time for performance by one party excuses tender of performance by the other party at the time set for performance. See Lang v. Todd (1947), 148 Neb. 726, 28 N. W. 2d 434. Since plaintiff's further performance was excused and specific performance of the trade agreement became impossible due to action of the defendants, the relief granted to plaintiff by the trial court is correct.

There is an additional ground for affirmance of this case. Weir, while acting in an agency capacity for defendant, frustrated Friehe's attempts to secure the German land. Friehe first contacted Rex Haberman about the property and was referred to Weir. With reference to the German land, Weir, who was the agent for its sale, contacted defendants. They approved it as acceptable trade property and directed him to communicate this information to plaintiff. All plaintiff's dealings with reference to the German land were with Weir and Rex Haberman. Friehe did not know and had never met German. German testified that he had never seen nor met Friehe. All German's conversations concerning his property were with either Rex Haberman or Weir. Friehe throughout appears to have done everything reasonable to comply with the requests of defendants.

Weir was the agent of defendants at all times pertinent to the transactions herein. He was so appointed in the listing contract. Friehe was referred to him by Rex Haberman. Weir was also the agent of Erling G. German. This dual agency, however, did not affect his continuing agency for defendants. The two, under these circumstances, were compatible. It is obvious Friehe relied on Weir as the agent for both defendants and German throughout the transaction. The evidence would indicate that Weir may have been negligent or even deceitful in the transaction. To the degree that plaintiff justifiably relied on Weir as defendant's agent in these matters, defendants must bear the responsibility. Regardless of who is responsible for the failure to close the German purchase prior to the rescission on January 11, 1972, defendants must bear the entire burden for the failure of the transaction thereafter. This action foreclosed any possibility of performance by Friehe.

For the reasons given above, the judgment of the trial court is affirmed.

AFFIRMED.

SMITH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. KEITH ALLEN RUSS, APPELLANT.

214 N. W. 2d 924

Filed February 14, 1974. No. 39101.

Trial: Evidence. Error in the admission of evidence is not grounds for reversal if no substantial miscarriage of justice occurred.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Eugene D. O'Sullivan, for appellant.

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

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

BOSLAUGH, J.

The defendant was convicted of murder in the perpetration of a burglary and sentenced to life imprisonment. He contends the judgment should be reversed because the jury during its deliberation was allowed to be informed that the defendant was on parole at the time the offense was committed.

The evidence shows the defendant and Edward Jenkins broke into and entered the home of Edward Charles Johnson in Omaha, Nebraska, on January 29, 1973. After ransacking the house they decided to wait until Johnson returned so they could rob him. When Johnson entered the house, the defendant and Jenkins accosted Johnson. In the ensuing struggle the defendant stabbed Johnson in the chest with a kitchen knife, killing him. After taking Johnson's money, the defendant and Jenkins left the property.

On the following day the defendant returned to the Johnson home with Willie Nevels and took a blender from the property. Johnson's body was not discovered until January 31, 1973, when fellow workers went to his home.

Nevels gave a statement to the police on February 3, 1973. The defendant was then arrested and later confessed to his participation in the murder. The evidence was clearly sufficient to permit the jury to find the defendant guilty of felony murder.

In his confession the defendant stated he met Jenkins downtown on Monday and told him, "I had seen my parole officer, and told my parole officer, that I had found me a job." The confession had been recorded on a Dictaphone tape recorder and the recording was received in evidence. The recording was heard by the jury during

the trial but the jury was not allowed to hear the statement concerning the parole officer. The trial court explained to the jury that the part of the recording they were not allowed to hear had nothing to do with the case.

At the hearing on the motion for new trial it was stipulated that the jury had played the tape recording of the confession twice during its deliberations. Because the recording allowed the jury to learn that the defendant had been on parole, the defendant contends the judgment should be reversed.

The fact the defendant was on parole was not relevant and should not have been disclosed to the jury. It is unfortunate that by inadvertence the tape recorder was taken into the jury room and the jury was allowed to hear the tape in its entirety. However, this does not automatically entitle the defendant to a new trial.

Error in the admission of evidence is not grounds for reversal if no substantial miscarriage of justice occurred. State v. Schumacher, 184 Neb. 653, 171 N. W. 2d 181. The evidence of guilt in this case is conclusive. Under these circumstances we conclude no substantial miscarriage of justice occurred. See, State v. Brooks, 189 Neb. 592, 204 N. W. 2d 86; State v. Rice, 188 Neb. 728, 199 N. W. 2d 480.

The judgment of the District Court is affirmed.

AFFIRMED.

HENRY SCHMIDT, APPELLEE AND CROSS-APPELLANT, V. ROY KNOX, APPELLANT AND CROSS-APPELLEE, IMPLEADED WITH MORRILL COUNTY BEAN GROWERS ASSOCIATION, A CORPORATION, APPELLEE AND CROSS-APPELLEE.

215 N. W. 2d 77

Filed February 14, 1974. No. 39124.

1. **Trial: Evidence.** In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party and every controverted fact must be

resolved in his favor and he should have the benefit of every inference that can be reasonably drawn thereform.

2. **Interest.** The general rule is that, in the absence of agreement to the contrary, liquidated demands bear interest whereas unliquidated demands do not.
3. ———. In order to be liquidated so as to bear interest, a claim must be fixed and determined or readily determinable; but it is sufficient for this purpose if it is ascertainable by computation or a recognized standard.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Lyman, Meister & Olsen, for appellant.

Atkins, Ferguson, Nichols & Hahn, for appellee Schmidt.

Holtorf, Hansen, Kovarik & Nuttleman, for appellee Morrill County Bean Growers Assn.

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

WHITE, C. J.

Henry Schmidt, the plaintiff, filed suit based upon six causes of action against Roy Knox and Morrill County Bean Growers Association (hereafter referred to as Association) on certain warehouse receipts issued by Knox. The Association cross-claimed against Knox. The jury found in favor of the plaintiff for $5,786.01 on all six causes of action against defendant Knox. The trial court awarded 6 percent interest from the date of demand on August 18, 1966, rather than relief requested by the plaintiff under section 88-510, R. R. S. 1943. Knox appeals from the jury verdict challenging the sufficiency of the evidence and the trial court's allowance of prejudgment interest. The plaintiff cross-appeals challenging the refusal to grant relief under section 88-510, R. R. S. 1943. We affirm the judgment of the District Court.

In his first cause of action the plaintiff claims that he delivered beans to Knox and in return received a warehouse receipt. Schmidt subsequently presented the

warehouse receipt to the Association at the direction of Knox. Schmidt endorsed the warehouse receipt. The warehouse receipt was later returned to Schmidt by the Association stating that Knox had never delivered the beans to it. In his other causes of action, Schmidt claims as assignee of warehouse receipts from other persons similarly victimized. All parties agree that the plaintiff has never received the beans or their value. The value of the beans at the time of demand was stipulated.

The plaintiff and his assignors, at the direction of Knox, took their warehouse receipts to the Association in July and August of 1966 and endorsed them. Agnes Knox testified that on August 15 or August 16, 1966, she received a call from the Association advising her it needed beans to cover the warehouse receipts involved in this suit. The person asked Knox to deliver them. Knox testified that he delivered the beans to the Association on August 17 or August 18, 1966. Knox then said he requested the warehouse receipts from the Association and delivery of the receipts was refused. Knox contends that he was sufficiently overdelivered on beans to cover the warehouse receipts.

The Association contends that the deliveries made on August 17 and August 18, 1966, were to cover prior delivery orders. The Association strongly urges that nobody called Agnes Knox on August 15 or August 16, 1966, and requested a delivery of beans. The Association claims that on August 18, 1966, after Knox made deliveries to cover prior delivery orders, it asked Knox for the first time to make deliveries to cover the warehouse receipts in question. The Association said Knox stated he did not have any more beans, so it did not turn over the warehouse receipts.

The central question at trial was whether Knox had delivered the beans covered by the various warehouse receipts to the Association. The jury found in favor of the plaintiff and against Knox. In testing the suffi-

ciency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party and every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonably drawn therefrom. Marquardt v. Nehawka Farmers Coop. Co., 186 Neb. 494, 184 N. W. 2d 617 (1971). The verdict will not be disturbed unless it is clearly wrong. Hayes v. Anderson Concrete Co., Inc., 186 Neb. 771, 186 N. W. 2d 477 (1971).

To show that he had delivered beans to cover the warehouse receipts, Knox introduced his handwritten bookkeeping records, the testimony of an accountant who was hired to review the records, and the report of a state warehouse inspector. There is sufficient conflict in the record to support the jury determination that Knox did not deliver the beans to the Association. The record does not clearly show the jury was wrong.

Knox argues that his books show conclusively that he was overdelivered to the Association on beans. The books consist of summaries based upon warehouse receipts issued to those storing grain, scale tickets of grain stored for farmers, and scale tickets on grain delivered to the Association. The warehouse receipts issued by Knox to persons storing grain, which would substantiate the bookkeeping records, were never introduced into evidence, therefore, the jury was not conclusively bound by the books. Similarly, there was a dispute as to the validity of two scale tickets included in the records showing deliveries by Knox to the Association. There was a question whether approximately 85,000 pounds of grain covered by these two scale tickets was ever delivered and even if delivered, whether the weight on the tickets was accurate. Since Knox' records included these two scale tickets, the jury was not conclusively bound by them. As will be shown through the accountant's testimony, the bookkeeping records themselves are subject to conflicting interpretations, therefore not conclusively

showing Knox had delivered the beans to the Association.

Knox next argues that the state warehouse inspector's report clearly shows that he had delivered the beans to the Association and therefore the jury was clearly wrong. A part of the report is based upon Knox' own assertion to the inspector that Knox storage was overdelivered on beans to the Association. The inspector admitted that he did not know whether this asserted overdelivery on beans had been verified at the time or not. The jury was not bound by the unverified assertions of Knox as shown in the state warehouse inspector's report.

Knox finally argues that his accountant's testimony clearly shows he had delivered the beans to the Association. The accountant testified that he was hired to check the records of Knox storage. His summary from Knox' records concluded that Knox was sufficiently overdelivered to the Association on beans to cover the warehouse receipts which are the basis of this suit. The accountant admitted his conclusions were only as accurate as the books which he used to arrive at his conclusions. Likewise, he had used the two disputed scale tickets in reaching his conclusions.

The accountant on cross-examination testified that Knox' records showed that Knox storage had graded more beans than their own records showed they had received from farmers, and also the records indicated that Knox had delivered less beans than he had received.

The above evidence and inferences therefrom were for the jury to weigh and resolve. It resolved them against Knox. The evidence is sufficient to support the verdict.

Knox next challenges the trial court's allowance of prejudgment interest. The trial court allowed interest from the date of demand. The general rule is that, in the absence of agreement to the contrary, liquidated demands bear interest whereas unliquidated demands do not. Mid States Engineering v. Rohde, 182 Neb. 590, 156 N. W. 2d 149 (1968); 47 C. J. S., Interest, § 19 a, p. 28. In order

to be liquidated so as to bear interest, a claim must be fixed and determined or readily determinable; but it is sufficient for this purpose if it is ascertainable by computation or a recognized standard. Mid States Engineering v. Rhode, *supra*; 47 C. J. S., Interest, § 19 b, p. 30; Dobbs, Law of Remedies, § 3.5, p. 164 (1973); McCormick, Law of Damages, §§ 50 to 59, pp. 205 to 233 (1935). The claim here was readily determinable and ascertainable by computation. Mintken v. Nebraska Surety Co., 187 Neb. 215, 188 N. W. 2d 819 (1971). Knox owed the beans or their value to the plaintiff upon demand. The demand date was August 18, 1966. The exact weight of the beans in dispute was known and the only item left for computation was the market value of the beans. This was not only readily ascertainable, but was stipulated by the parties. Awarding of interest by the trial court from the date of demand was correct.

The plaintiff cross-appeals challenging the refusal to grant relief under section 88-510, R. R. S. 1943. That provision states: "For any grain not delivered within twenty-four hours after such demand, the warehouseman shall be liable, upon his bond, to the owner in damages *not exceeding* one cent a bushel for each days' delay * * *." (Emphasis supplied.) It is clear that the words "not exceeding" express a legislative intent of limitation only. The trial court, allowing interest from the time of demand, fully compensated the plaintiff. The award of damages under the statute was within the discretion of the trial court. We find nothing, considering all the evidence in this case, which indicates an abuse of this discretion by the District Court.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

SMITH, J., not participating.

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

I disagree with the portion of the opinion which indi-

cates that an award of interest or of damages under section 88-510, R. R. S. 1943, were appropriate alternatives under the facts of this case. I would hold that section 88-510, R. R. S. 1943, applies only where there is a delay in delivering the property evidenced by the warehouse receipt. There was not here a mere delay in delivery of the beans. They were converted. The value of the beans and interest was the proper measure of damages.

BOSLAUGH, J., joins in opinion of CLINTON, J.

IN RE ESTATE OF JOHN URBANOVSKY, DECEASED.
ADOLF J. URBANOVSKY ET AL., APPELLANTS, V. OLGA ANN FORAL, APPELLEE.
215 N. W. 2d 74

Filed February 14, 1974. No. 39145.

1. **Trial: Wills.** When the proponent has secured the verdict of the jury, in reviewing the evidence it must be considered in the light most favorable to the proponent, every controverted fact must be resolved in proponent's favor, and the proponent must have the benefit of every inference that can reasonably be deduced therefrom.
2. **Wills.** A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument and same was not procured by undue influence.

Appeal from the District Court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

Lyle Winkle of Winkle & Allphin, for appellants.

Robak & Geshell, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, McCOWN, NEWTON, and CLINTON, JJ., and ZEILINGER, District Judge.

NEWTON, J.

In this action Adolf and Joseph Urbanovsky are contesting an instrument submitted as the last will and testament of their father John Urbanovsky, deceased. The proponent is Olga Ann Foral a daughter of testator. For convenience the parties will be hereinafter referred to by their first names. The will in question was executed on April 1, 1970. Testator died on March 23, 1971, and the will was subsequently admitted to probate in the county court. On appeal trial was had to a jury which culminated in a verdict and judgment for proponent. We affirm the judgment.

On appeal to this court, the primary thrust deals with the sufficiency of the evidence to establish both a prima facie case and final showing of testamentary capacity. In oral argument contestants failed to urge the element of undue influence except as the evidence along that line might bear on the question of testamentary capacity. It is not disputed that the will was properly executed.

To establish a prima facie case of testamentary capacity proponent called the attorney who drafted the will and his secretary who were the subscribing witnesses. John Urbanovsky had migrated to this country from Czechoslovakia as a young man and talked broken English so the conversation was largely in Czech, which both witnesses understood and spoke. The attorney, who had not previously been acquainted with John, visited with him 30 to 35 minutes and received instructions from John in regard to the preparation of the will. John stated "he had already helped the two boys considerably and he wanted to do more for Mrs. Foral." This witness stated that in his opinion John was of sound mind and knew the objects of his bounty. John was accompanied by his daughter Olga who introduced her father, said he wanted a will made, and took no further part in the conversation. The attorney received the impression that John wanted all three of his children to receive the same

but did not mention any specific statement of John's to that effect with the exception of the one above quoted. He did not dictate the will to his secretary. She typed it up from his notes. The witness also stated that John walked with difficulty and his hearing and eyesight were poor.

The secretary did not have as vivid a recollection of the event but said she overheard the conversation between the attorney and John and prepared the will. In her opinion he knew the objects of his bounty and was of sound mind. She does not recall John saying he wanted to treat his children equal but did say he wanted to give everything to his daughter because he had already provided for his sons.

The evidence is sufficient to establish a prima facie case of testamentary capacity. The testator, without assistance or interference, made known the disposition he wanted made of his property and displayed awareness of his three children who were his apparent heirs-at-law.

The evidence reflects that testator was 87 years of age when the will was made. His hearing and eyesight were poor. He had had high blood pressure for a number of years and had sustained a stroke of slight to medium severity and was in a hospital from February 16 to 23, 1970. At this time he was subject to some mental confusion but regained his ability to get around and his clarity of mind according to the testimony of several witnesses, including that of a physician whom he consulted about his eyes just 5 days after the will was executed. Others testifying to testator's mental competency were the daughter, a real estate dealer, a sister-in-law, two young women acquaintances, an elderly lady acquaintance, and a granddaughter.

The record further discloses that from the time of his wife's death in 1964, John Urbanovsky spent about 5½ years in his daughter's home and most of the balance of the time in his brother's home. It was the daughter who

primarily cared for her father in his last years and her mother in her last illness. The jury apparently did not believe that having made gifts to all three children testator wished to evenly divide his remaining property as contestants insist. The only remark made by testator, as disclosed in the record, was that "he had already helped the two boys considerably and he wanted to do more for Mrs. Foral." It is not denied that he had made substantial donations to "the boys." The use of the word "more" is significant. It indicates that he had also helped Mrs. Foral but that notwithstanding that help he wished to do more for her. In view of the circumstances outlined above, this is not surprising.

There was testimony that testator had a daughter in Czechoslovakia before coming to this country and marrying the mother of his three children here. It is conceded that he hid knowledge of such a daughter from his family and never displayed any intention to make her a beneficiary of his will. This evidence would appear to be immaterial to the questions raised.

The evidence was conflicting but we are mindful of the rule that when the proponent has secured the verdict of the jury, in reviewing the evidence it must be considered in the light most favorable to the proponent, every controverted fact must be resolved in proponent's favor, and the proponent must have the benefit of every inference that can reasonably be deduced therefrom. See, Hober v. McArdle, 173 Neb. 510, 113 N. W. 2d 625; In re Estate of Hunter, 151 Neb. 704, 39 N. W. 2d 418.

That testator was aged and physically infirm is conceded by all parties. This is not sufficient to sustain a denial of probate of his will. "A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at

the time of the execution of such testamentary instrument and same was not procured by undue influence." Westover v. Kerr, 168 Neb. 494, 96 N. W. 2d 421.

A review of this record compels the conclusion that there is ample evidence to sustain the finding of the jury that testator was mentally competent and free of undue influence.

The judgment of the District Court is affirmed.

AFFIRMED.

ZEILINGER, District Judge, not participating.

HAROLD PETTIGREW, APPELLANT, V. THE HOME INSURANCE CO., A CORPORATION, ET AL., APPELLEES.

214 N. W. 2d 920

Filed February 14, 1974. No. 39155.

1. **Statutes.** Legislative intent is the cardinal rule in the construction of statutes.
2. ———. In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account in order to determine the legislative will.
3. ———. In construing a statute to determine legislative intent, the courts may consider the history of its passage.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate and Kenneth Cobb, for appellant.

James M. Bausch of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, McCOWN, NEWTON, and CLINTON, JJ., and ZEILINGER, District Judge.

SPENCER, J.

Plaintiff, who was employed by M. W. Anderson Construction Company, suffered severe injuries in the course of his employment, for which he received compensation pursuant to the Nebraska Workmen's Compensation Act. This action is against the workmen's compensation carrier of employer, The Home Insurance Company, seeking recovery for those same injuries. The employer was joined solely because of subrogation rights. Plaintiff predicates his action on the theory that defendant negligently performed its agreement with his employer to provide safety engineering inspections. The trial court sustained a demurrer to the petition. We affirm.

Plaintiff's specific allegations of negligence are substantially that defendant: (1) Failed to use reasonable care in the inspection of the premises and equipment used in construction on the job site; (2) failed to require use of a safety hook on the hydrocrane; and (3) failed to provide periodic inspections of the equipment used on the job site.

For the purposes of this appeal all the allegations of fact contained in the petition stand admitted by the demurrer. We must therefore accept as fact the allegation that defendant did provide safety engineering for the benefit of the employees and did advise the employer in safety practices.

The sole issue involved herein is the construction and applicability of section 48-111, R. R. S. 1943, which reads as follows: "Such agreement or the election provided for in section 48-112 shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in sections 48-109 to 48-147, and an acceptance of all the provisions of said sections, and shall bind the employee himself, and for compensation for his death shall bind his legal representatives, his widow and next of kin, as well as the employer, and the legal representa-

tives of a deceased employer, and those conducting the business of the employer during bankruptcy or insolvency. For the purpose of this section, if the employer carries a policy of workmen's compensation insurance, the term employer shall also include the insurer."

Plaintiff argues that defendant is liable both in tort and in contract. He asserts that where an insurer undertakes to provide safety inspection services for an employer, a duty devolves upon the insurer to perform those services in a non-negligent manner and failure to do so renders the insurer liable for damages to anyone injured by the insurer's negligence. He then argues that where an employer contracts with a workmen's compensation insurance carrier to provide safety inspection services for the benefit of its employees, the negligent performance of the services by the insurer constitutes a breach of contract for which an injured employee may recover damages as third-party beneficiary of the contract.

Third-party litigation under workmen's compensation has been fast developing in recent years. Defendant contends it is immune from liability herein by virtue of section 48-111, R. R. S. 1943. The weight of authority from other jurisdictions supports defendant's position. Plaintiff urges our consideration of the leading cases to the contrary. Color-matching cases would serve no useful purpose herein where our problem is one of statutory construction and our statute is not identical to those involved in other jurisdictions.

Legislative intent is the cardinal rule in the construction of statutes. Hubbell Bank v. Bryan (1932), 124 Neb. 51, 245 N. W. 20.

" 'In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary

and popular sense, should be taken into account, in order to determine the legislative will.' " Pierce Co. v. Century Indemnity Co. (1939), 136 Neb. 78, 285 N. W. 91.

We have said on several occasions in construing a statute to determine legislative intent, the courts may consider the history of its passage. School Dist. of Omaha v. State Board of Education (1971), 187 Neb. 76, 187 N. W. 2d 592.

The sentence "For the purpose of this section, if the employer carries a policy of workmen's compensation insurance, the term employer shall also include the insurer" came into our law in 1965, undoubtedly because in 1964 the Illinois Supreme Court held the compensation carrier did not share the employer's immunity and sustained a sizeable judgment for an employee. The principal backer of the amendment so testified before the legislative committee considering the bill, without identifying the state where the case arose. He specifically stated his bill was intended to eliminate the possibility of double collection from the carrier. Page 6, Hearing on L.B. 518, before the Labor Committtee of the Nebraska State Legislature, March 10, 1965.

It is evident to us that the legislative intent in adopting the language quoted was to place the insurer in the same situation as the employer and to eliminate actions of this type.

Text writers who have considered the Nebraska statute have so construed it, as illustrated by the following: "* * * the emphasis is on trying to extract from the language of the act any clues on whether the carrier was meant to be assimilated to the employer, or in any other way excluded from the third-party category.

"For the sake of completeness, we may begin with statutes that virtually dispose of the issue by express language. Among these statutes, some of which, as we have seen, were deliberately enacted to reverse or confirm judicial holdings, are those of * * * Nebraska * * *."

2 Larson, Workmen's Compensation Law, § 72.90, p. 226.40.

Plaintiff argues: "The term 'employer' is used three times in Section 48-111, R. R. S. 1943, and in those places where it is used the employer is given no additional protection by the statute. Instead it is simply said that the employer, representatives of deceased employers, and those persons conducting the employer's business in bankruptcy are bound by the workmen's compensation agreement, and by statutory word substitution the insurer is also bound. The statute at that point only places an obligation upon the employer. It gives no additional rights, privileges or immunities to the employer which may be extended to the workmen's compensation carrier. If the insurer would otherwise be liable at common law in an action for negligence, there is nothing in the statute which prevents this liability from attaching. Yet it was solely upon this statute that the lower court rested its decision.

"The language which the lower court relied on simply makes clear that the insurer will be bound by the terms of the agreement between the employer and its employees. It authorizes an employee's action directly against the insurer and will not permit the insurer to assert its policy defenses against the employee. There is nothing in the language of the statute conferring upon the workmen's compensation carrier the windfall of being relieved of the consequences of its own negligence."

It is to be noted that section 48-111, R. R. S. 1943, exclusive of the last sentence added in 1965, is one sentence. We mention this because plaintiff contends that in order to interpret section 48-111, R. R. S. 1943, as conferring immunity on the workmen's compensation carrier, the term "insurer" must be read into the term "parties," and for the court to do this would amount to judicial expansion of the statute.

In interpreting the meaning of a statutory provision

the whole provision should be read in order to arrive at a conclusion as to its proper meaning. Section 48-111, R. R. S. 1943, should not be dissected so as to frustrate its obvious intent. As we read the section, it compels the conclusion that the employer and the employees are parties who are bound by the election. These parties gain certain benefits and incur certain obligations as the result of this provision. As a result of the last sentence supplied by the amendment in 1965, the term "employer" includes the term "insurer" for the purposes of the whole section. In this sense, the insurer is one of the parties.

In view of the legislative history and the clear and concise wording of the last sentence of section 48-111, R. R. S. 1943, plaintiff has no cause of action against the insurer. Plaintiff has elected to take under the statute. He has done so with the insurer paying the compensation benefits. He may not now change his course and recover in either tort or contract.

For the reasons stated the judgment is affirmed.

AFFIRMED.

ALLEN J. HENGGELER ET AL., APPELLANTS, V. ADOLPH A. JINDRA ET AL., APPELLEES.
214 N. W. 2d 925

Filed February 14, 1974. No. 39163.

1. **Contracts.** In building and construction contracts, in the absence of an express agreement to the contrary, it is implied that the building will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose.
2. **Contracts: Damages.** Where a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects.

Appeal from the District Court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

Otradovsky & Bieber and Robert D. Westadt, for appellants.

Baker & Tessendorf and Douglas R. Milbourn, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, McCOWN, NEWTON, and CLINTON, JJ., and RONIN, District Judge.

BOSLAUGH, J.

This case arose out of a controversy concerning a construction contract. The defendants entered into a contract to purchase a house to be erected by the plaintiff, Allen J. Henggeler. A part of the contract price was financed by a loan from the plaintiffs secured by a mortgage on the property. After the controversy developed, this action was commenced to foreclose the mortgage.

The defendants' amended cross-petition alleged the basement of the house was not constructed in a good and workmanlike manner; that during construction a part of the basement wall "caved in"; Henggeler attempted to repair the wall and later promised to "make it good"; satisfactory repairs were not made and the basement was wet and damp; and the reasonable cost of repairs was in excess of $3,000.

The trial court found the plaintiffs were entitled to recover $2,280 on the loan less a credit of $2,000 because the house was not constructed in a good and workmanlike manner. The plaintiffs appeal.

There is no dispute concerning the amount due the plaintiffs on the loan. The only matter in dispute relates to the damages claimed by the defendants because of faulty construction of the house.

As a general rule a contractor constructing a building impliedly warrants that the building will be erected in a workmanlike manner and in accordance with good us-

age and accepted practices in the community in which the work is done. 13 Am. Jur. 2d, Building and Construction Contracts, § 27, p. 29. See, also, Robertson Lumber Co. v. Stephen Farmers Cooperative Elevator Co., 274 Minn. 17, 143 N. W. 2d 622; Markman v. Hoefer, 252 Iowa 118, 106 N. W. 2d 59. In the Markman case the Iowa court said: "In building and construction contracts, in the absence of an express agreement to the contrary, it is implied that the building will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose."

While the house was under construction, mud and water ran into the basement and it was necessary to brace the walls to prevent them from collapsing. After the defendants moved into the house, water continued to run into the basement when it rained. The moisture problem was severe and damaged the furniture and other equipment in the basement.

Although there was some conflict in the evidence, it was clearly sufficient to support the finding of the trial court on the cross-petition. The basement of the house was unsatisfactory in its existing condition and a substantial amount of work was necessary to correct the condition.

Where a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects. Jones v. Elliott, 172 Neb. 96, 108 N. W. 2d 742. A cement contractor with 21 years of experience testified that the cost of repair and reconstruction to correct the basement water problem would be approximately $2,000. This evidence sustained the finding as to the amount of damages.

The judgment of the District Court is affirmed.

AFFIRMED.

JOHN R. GRAHAM, APPELLEE, V. SIMPLEX MOTOR REBUILDERS, INC., A CORPORATION, APPELLANT, IMPLEADED WITH TAKIN BROTHERS FREIGHT LINE, INC., A CORPORATION, APPELLEE.

215 N. W. 2d 641

Filed February 14, 1974. No. 39166.

1. **Trial.** An objection to argument and a motion for a mistrial may be made at the close of argument.
2. **Trial: Waiver.** A failure to ask for a mistrial is ordinarily a waiver of the misconduct.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded with directions.

Theodore J. Stouffer of Cassem, Tierney, Adams & Henatsch, for appellant.

Alfred A. Fiedler of Weinberg & Fiedler, for appellee Graham.

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

BOSLAUGH, J.

This is the second appearance of this case in this court. The facts are stated in detail in Graham v. Simplex Motor Rebuilders, Inc., 189 Neb. 507, 203 N. W. 2d 494.

On the second trial the jury returned a verdict for the defendant. The defendant has appealed from the trial court's order sustaining the plaintiff's motion for a new trial.

The plaintiff was injured on January 16, 1968, when he fell on the defendant's loading dock while attempting to lift a steel plate that was used as a bridge or ramp in loading trucks. The plaintiff testified that he had raised one end of the plate "about a foot" when it slipped from his hands because the other end was stuck in snow and ice on the dock.

As a part of its case the defendant produced a steel plate which was identified as the plate involved in the accident. During the trial there was some controversy over the fact that the plate was not covered while it was being moved to the courtroom and some of the jurors may have seen the plate before it was received in evidence. Since the plate was received in evidence as exhibit 3 without objection from plaintiff's counsel, no prejudicial error could result from failing to cover the exhibit before it was received in evidence.

In his argument to the jury, plaintiff's counsel stated that exhibit 3 was not the plate involved in the accident. The argument was based upon photographs of the dock taken on January 14, 1969.

Defendant's counsel, in his argument to the jury, stated that plaintiff's counsel had "played a dirty trick" by arguing that exhibit 3 was not the plate involved in the accident, and held up a packet which he stated contained photographs that could have been introduced in evidence and would have eliminated any question as to the identity of the plate. No objection was made during the argument. After the argument had been completed and before the jury had been instructed, plaintiff's counsel made a formal objection to the argument and requested the court to admonish the jury to disregard the remarks of defendant's counsel. The trial court refused to admonish the jury but offered to declare a mistrial. Plaintiff's counsel stated that he did not desire a mistrial. The case was then submitted to the jury.

In Sandomierski v. Fixemer, 163 Neb. 716, 81 N. W. 2d 142, this court held that an objection to argument and a motion for a mistrial may be made at the close of argument. However, a failure to ask for a mistrial is ordinarily a waiver of the misconduct.

The complaint here is that the trial court should have admonished the jury to disregard the statements of defendant's counsel. We think it was within the discretion

of the trial court, under the circumstances of this case, to determine that no admonition should be given after the arguments had been completed, and require the plaintiff to elect whether a mistrial should be declared. The plaintiff's election not to request a mistrial then waived the misconduct.

The plaintiff also complains that it was misconduct for the defendant's counsel to permit the president of the defendant corporation to assist defendant's counsel in a demonstration during argument. The demonstration consisted of lifting one edge of the plate approximately 1 foot from the floor to show that the opposite edge of the plate would then be the only point of contact with the floor. While the plate was being held by defendant's counsel, defendant's president moved his hand back and forth underneath the plate to show that it was not touching the floor. The action of defendant's president did nothing more than demonstrate something that was obvious to all. Although it is not good practice to permit parties to engage in demonstrations which are a part of the closing arguments, there was no prejudice to any substantial right of the plaintiff under the facts in this case.

The judgment of the District Court is reversed and the cause remanded with directions to reinstate the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL ZEIGLER, APPELLANT.

215 N. W. 2d 80

Filed February 14, 1974. No. 39169.

Criminal Law: Sentences. A sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record.

Appeal from the District Court for Dawson County: HUGH STUART, Judge. Affirmed.

Padley & Dudden and David T. Schroeder, for appellant.

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

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and FLORY, District Judge.

SPENCER, J.

The jury found defendant guilty of the offense of breaking and entering with the intent to steal property of value. He was sentenced to a term of not less than 1 nor more than 3 years in the Nebraska Penal and Correctional Complex. Defendant prosecutes this appeal, asserting the sentence imposed was arbitrary, unreasonable, and not warranted by the circumstances. We affirm.

The only issue involved herein is the excessiveness of the sentence. This was defendant's first felony conviction. Defendant, who at the time was 18 years of age, argues that he should have been placed on probation.

Defendant throughout the prosecution denied his involvement in the breakin. The evidence of his participation, which appears very credible, was believed by the jury.

While defendant has had no previous felony conviction, he has not been a model citizen. In 1969, he was on 6-months probation under the North Platte youth bureau for petit larceny. In 1970, he was charged with destruction of property, and in October of 1971, with vandalism of a schoool. Six days later, he was fined for negligent driving, and 3 days later was charged and fined for petit larceny for stealing personal property from a parked automobile. Previous to the present offense he was again fined for negligent driving and while on bond herein was charged with procuring liquor for minors. That case was pending at the time of the sentencing herein.

It is evident the 6 months defendant served on probation had little or no rehabilitative effect. The petit larceny charges and procuring liquor for minors are serious offenses even though they are only misdemeanors. In view of his past record, defendant's insistence on his innocence in the face of strong evidence otherwise undoubtedly indicated to the trial judge that his attitude was not yet conducive to rehabilitation.

On this record, we cannot say that the trial judge abused his discretion in accepting the recommendation of the probation officer that defendant not be placed on probation. We have repeatedly said that a sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record. State v. Haines (1973), 190 Neb. 645, 211 N. W. 2d 414.

The judgment of the District Court is affirmed.

AFFIRMED.

IN RE ESTATE OF ALMA LOIS BENTON, DECEASED.
HANS NIELSEN ET AL., APPELLANTS, V. A. C. SIDNER, EXECUTOR, ET AL., APPELLEES.
215 N. W. 2d 86

Filed February 14, 1974. No. 39172.

1. **Taxation: Wills.** Under section 77-2108, R. R. S. 1943, estate taxes will be equitably apportioned in accordance with statutory rules unless there is a clear and unambiguous direction to the contrary. Ambiguities are to be resolved in favor of apportionment.
2. ———: ———. The burden of Nebraska inheritance taxes will be imposed upon the individual beneficiaries of the decedent in accordance with the statutory pattern unless there is a clear and unambiguous direction to the contrary in the will or other governing instrument. Ambiguities will be resolved in favor of the statutory pattern.

Appeal from the District Court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Bernard T. Schafersman of Yost, Schafersman, Yost & Lamme, for appellants.

Sidner, Svoboda, Schilke & Wiseman and Kerrigan, Line & Martin, for appellees.

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

MCCOWN, J.

This is an action to determine the allocation of estate taxes and inheritance taxes on property passing under the will of Alma Lois Benton. Taxes involved here are on the benefit received by the appellants, Hans Nielsen and Jerry Nielsen, by reason of the exercise of a bargain purchase option on real estate granted in the will. The District Court determined that the estate taxes due to the United States and the State of Nebraska should be apportioned and prorated among the persons interested in the estate as provided for in section 77-2108, R. R. S. 1943. The District Court also ordered that any inheritance taxes assessed with respect to the benefit received by Hans Nielsen and Jerry Nielsen by exercise of the bargain purchase option should be assessed to them and not to the residuary heirs. Hans Nielsen and Jerry Nielsen have appealed. We affirm.

Alma Lois Benton died March 27, 1972. Her will, executed on June 6, 1963, and three subsequent codicils were admitted to probate. The bargain purchase option was granted to the appellants, her tenants for many years, under paragraph Seventh of her will. The testatrix directed that the two farms be sold "to Hans and Jerry Nielsen on the following terms:

"(a) Total price to be on basis of $200.00 per acre to be payable in cash, if necessary to obtain funds with which to close my estate, or if the cash is not needed, the executors may sell on the basis of 1/15th down and 1/15th

each year with first four years without interest and thereafter at 4% interest with buyers paying taxes, assessments and insurance during this period.

"(b) If the buyers elect to purchase at this price, they shall notify the executors in writing by March 1st, following the admission of this will to probate.

"(c) In order to carry out the provisions of this paragraph, I have left deeds with this will which my executors can deliver upon payment as provided for herein."

The total purchase price of the farms under the provisions of the option was $39,200 and the value of the farms as of the date of death of the decedent, and as appraised and returned for federal and state estate tax purposes, was $143,600. The value of the bargain purchase right obtained and exercised by the appellants under paragraph Seventh was $104,400.

The District Court ordered that the executor recover from the Nielsens the sum of $26,674.20 as an equitable apportionment of estate taxes pursuant to section 77-2110, R. R. S. 1943, and also ordered that any inheritance taxes with respect to the benefit received by the Nielsens should be assessed to them and not to the residuary heirs.

The relevant provisions of the testatrix' will in addition to paragraph Seventh already set out are as follows:

"FIRST. I hereby direct that all of my just debts, funeral expenses and costs of administering my estate be paid out of my personal property * * *.

"THIRTEENTH. In the event that after paying debts, expenses and taxes, there is not enough on hand in my estate to pay the legacies in Section Tenth and Twelfth and the devise in Section Eighth, I direct that the legacies be reduced proportionately and the devisees in Paragraph Eight share proportionately based on appraised value in order to pay this shortage, if any.

"FOURTEENTH. In the event there is any surplus, I direct that it be divided equally between my cousin,

Phyllis Benton Franklin Griffin, 119 Ricardo, and her two children, Gary Griffin, Englewood, Colorado and Judy Griffin Carr, Atwater, California."

By subsequent codicils, the testatrix revoked the legacies in paragraph Twelfth and the devise in paragraph Eighth, as well as some other legacies and bequests, including one in paragraph Tenth. As of the time of her death, paragraph Tenth applied only to a bequest of $5,000 to a cousin and his wife and the gift of her automobile to one Gus Herndon.

The foregoing quoted provisions are the only provisions of the will or of any codicil which mention taxes of any kind. There is no mention of either inheritance taxes or estate taxes as such, nor any specific direction to the executors to pay taxes of any kind.

The appellants' contentions do not distinguish between inheritance taxes and estate taxes but treat them as identical and interchangeable. Their assignments of error refer to the payment of "inheritance taxes," while the critical statute, section 77-2108, R. R. S. 1943, applies only to estate taxes. For clarification we find it necessary to point out that inheritance taxes in Nebraska are imposed on each beneficiary's right to receive a portion of the property of a decedent, and the amount of the tax on each beneficiary is based upon the value of the property "received by each person." §§ 77-2001 to 77-2037, R. R. S. 1943. Estate taxes imposed by the United States and Nebraska are taxes upon the right to transmit property by a decedent and the amount of the tax is based upon the value of the whole estate transmitted by the decedent, regardless of the number of beneficiaries.

In the absence of statute, or effective provisions in the will, the general rule in most states was that estate taxes were normally chargeable first to the residuary estate. Statutes in most states have now altered that rule. In Nebraska such an apportionment statute was adopted in 1949. Section 77-2108, R. R. S. 1943, now provides:

"Whenever * * * an executor * * * has paid or may be required to pay any estate tax levied or assessed under Chapter 77, article 21, or under the provisions of any estate tax law of the United States heretofore or hereafter enacted, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid or payable, *except as otherwise directed in the decedent's will,* * * * shall be equitably apportioned and prorated among the persons interested in the estate. * * *." (Emphasis ours.)

The appellants contend that the language of the will indicates the testratrix' intention to make a gift to them free from any inheritance or estate taxes, and that the will therefore constitutes a direction against apportionment. They rely largely upon cases involving judicial attempts to ascertain the intent and purpose of a testator as disclosed by the language of a will. Obviously, the intent of a testator is of basic importance. In this case, however, the intent of the testatrix is, at best, ambiguous.

Most, if not all, states have adopted proration statutes similar to that of Nebraska as to estate taxes. Such statutes express the policy that each and every portion of the estate that created the tax shall bear its fair share of the tax burden. "The object sought to be accomplished by the proration statutes is the equitable allocation of the burden of the tax among those actually affected by that burden." Estate of Buckhantz, 120 Cal. App. 2d 92, 260 P. 2d 794.

Estate taxes in Nebraska are apportioned equitably in accordance with section 77-2108, R. R. S. 1943, unless a testator has directed otherwise in his will. An effective direction must be at least clearly inferable. Naffziger v. Cook, 179 Neb. 264, 137 N. W. 2d 804. The statute is mandatory in its terms. It has been in effect since 1949, and unaltered since 1953. The will of the testatrix and all the codicils were prepared by Nebraska counsel after

consultation with the testatrix and were executed in 1963 and later. If the testatrix had desired to direct that taxes of any kind should not be apportioned as provided by the statute, it would have been easy enough to say so clearly and unambiguously, but she did not do so. There is no language in the will which can be said to amount to an express direction against proration. Neither is there any express direction to the executors as to the payment of any taxes. At best, the language in the will, which expresses the testatrix' intention, is ambiguous, but the statute is unambiguous. We hold that under section 77-2108, R. R. S. 1943, estate taxes will be equitably apportioned in accordance with statutory rules unless there is a clear and unambiguous direction to the contrary. Ambiguities are to be resolved in favor of apportionment. See Estate of Armstrong, 56 Cal. 2d 796, 17 Cal. Rptr. 138, 366 P. 2d 490. The District Court was correct in directing the apportionment of estate taxes here in accordance with the provisions of section 77-2108, R. R. S. 1943.

The rules which require a clear and unambiguous direction in the will to shift the ultimate burden of estate taxes from the statutory pattern apply with even greater force to inheritance taxes. Under the provisions of Chapter 77, article 20, R. R. S. 1943, the appellants are chargeable with the payment of inheritance tax on the value of the benefit received by them under the bargain purchase option. Under the provisions of section 77-2011, R. R. S. 1943, the executors are required to deduct the tax from any property distributed, or to collect the tax "from the legatee or person entitled to such property." The statutory pattern imposes the inheritance tax on each beneficiary and the amount of the tax is based upon the value of the benefit received. The burden of inheritance taxes will be imposed upon the individual beneficiaries of the decedent in accordance with the statutory pattern unless there is a clear and unambiguous direction to the contrary in the will or other governing instrument.

Ambiguities will be resolved in favor of the statutory pattern.

The judgment and decree of the District Court was correct in all respects and is affirmed.

AFFIRMED.

STATE EX REL. CLARENCE A. H. MEYER, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLANT, V. WILLIAM E. PETERS, TAX COMMISSIONER OF THE STATE OF NEBRASKA, APPELLEE.

215 N. W. 2d 520

Filed February 14, 1974. No. 39268.

1. **Legislature: Constitutional Law.** The Legislature cannot invoke its powers of statutory definition to nullify constitutional provisions.
2. **Words and Phrases: Constitutional Law.** We hold that the language "as defined by law," in Article VIII, section 2, of the Nebraska Constitution, referred to extant law in a descriptive and limitational manner.
3. **Taxation: Constitutional Law: Due Process.** When financial burdens are imposed upon property owners through an exercise of judicial power pursuant to specific terms of a statute, due process of law requires notice and an opportunity to be heard.
4. ———: ———: ———. Where an increase in the assessed valuation of any classes of property as returned by any county or counties is made by the State Board of Equalization and Assessment without notice to such county or counties and without affording sufficient opportunity to be heard, such increase amounts to confiscation of property without due process, and is therefore a void increase of assessment.
5. **Taxation: Constitutional Law.** The true principle of taxation, the one enjoined by our Constitution, is that of uniformity as to persons and property within the particular district for which the tax is imposed.
6. ———: ———. Under the provisions of Article VIII, section 1, of the Constitution of Nebraska, the taxation of personal property, except as otherwise authorized by such provision, must be uniform not only as to the rate of taxation, but as to the valuation of the property as well.

7. ———: ———. There can be no difference in the method of valuation or the rate of tax to be imposed unless the separate classification rests on some reasonable public policy, some substantial difference of situation or circumstance that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded.

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

Crosby, Pansing & Guenzel and Theodore L. Kessner, for appellee.

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

SPENCER, J.

This declaratory judgment action seeks a judicial determination of the constitutional validity of L.B. 945, Eighty-second Legislature, First Session, 1971. L.B. 945 makes several unrelated changes in the property tax laws. These are contained in sections 1, 2, and 3. Sections 4 to 11 of the Act constitute completely new and separate legislation directed toward solving the difficult problem of intercounty equalization where a taxation district overlaps two or more counties. Sections 1, 2, and 3 are not related or interdependent in any way, and sections 4 to 11 have no essential relationship to sections 1, 2, or 3. The only characteristic common to these sections is their relation to property taxation.

This is the second appearance of the action. See State ex rel. Meyer v. Peters (1972), 188 Neb. 817, 199 N. W. 2d 738. In that earlier appearance we held section 1 to be unconstitutional and section 3 to be constitutional. This opinion is particularly concerned with sections 2 and 7 to 11.

Section 2 amended section 77-202 (1) (d), R. S. Supp., 1969, to read as follows: "(1) The following property

shall be exempt from taxes: * * * (d) Houshold goods, *including major appliances either attached or detached to real property,* and personal effects when such property is not owned or used for financial gain or profit to either the owner or user." (Emphasis supplied.)

The italicized portion of the above statutory language was added by L.B. 945. The Attorney General, who will hereinafter be referred to as plaintiff, attacks this exemption as contravening that portion of Article VIII, section 2, of the Constitution of Nebraska, which states: "Household goods and personal effects, as defined by law, may be exempted from taxation in whole or in part, as may be provided by general law, * * *."

The key question is the intention of the amenders of the Constitution relating to the words "as defined by law." Is the power of definition given to the Legislature? Or did the framers of the amendment intend to adopt the common law concepts relating to fixtures?

Prior to 1954, Article VIII, section 2, of the Nebraska Constitution, provided: "Household goods of the value of two hundred ($200.00) dollars to each family shall be exempt from taxation." The 1954 amendment deleted the $200 maximum limit for this exemption. The parties to this action, however, disagree as to the significance of the phrase "as defined by law" which was added by that amendment. Was it intended to mean within the specific dollar limit set by law, or was it intended to give the Legislature the power to define household goods? The previous provision neither defined the phrase "household goods" nor authorized the Legislature to do so. It specifically set the limit of the exemption at $200.

The trial court held that Article VIII, section 2, was a grant of power to the Legislature to define "household goods" by the enactment of general laws, and found that section 2 of L.B. 945 was such an enactment. The court further found that nothing in the Constitution re-

stricted these definitional powers of the Legislature to the common law concepts relating to fixtures.

Frost v. Schinkel (1931), 121 Neb. 784, 238 N. W. 659, reviews the common law rules relating to fixtures. These rules are largely codified in section 77-103, R. R. S. 1943. The term "household goods" would not normally encompass fixtures. Plaintiff relies upon Moeller, McPherrin & Judd v. Smith (1934), 127 Neb. 424, 255 N. W. 551, for the proposition that the Legislature cannot invoke its powers of statutory definition to nullify constitutional provisions.

Plaintiff assumes for the sake of discussion that the major appliances in question are those which are permanently installed in the home, and could not be removed without major damage to the home. Examples are built-in dishwashers which are put into a space in the kitchen especially built for them and attached to the plumbing so that they could not ordinarily be removed by the average homeowner. Other examples would be garbage disposal units and built-in ranges and ovens. Certainly they can be and are replaced, but only by plumbers, electricians, and other skilled workmen, and their removal without replacement would leave the real estate scarred, disfigured, and incomplete. As long as the exemption is given only to detached personal property, no great difficulty is encountered in identifying household goods and personal effects. But, if we start including built-in appliances which have traditionally been a part of the real estate, where do we stop? An ordinary window air conditioner is included in the exemption. How about a central air-conditioning system or a furnace, if attachment to the real estate does not disqualify? All these appliances are regarded as part of the real estate for the purpose of descent and distribution, conveyances, mortgages, homestead exemptions, or other purposes of like nature.

Plaintiff argues that the Legislature, in amending sec-

tion 77-202 (1) (d), R. S. Supp., 1969, assumed that major appliances attached to real estate were a part of that real estate or there would have been no occasion to make specific provision for them. This points up the question of whether the voters who adopted the constitutional amendment authorizing the exemption of household goods and personal effects had in mind authorizing an exemption of real estate. Obviously, they did not.

Plaintiff states that after extensive research the only case which casts any light on the subject is Kramer v. Beebe (1917), 186 Ind. 349, 115 N. E. 83. In that case the court said: "In our opinion 'household goods,' as used in § 119, must be understood to mean those articles with which a residence is equipped, other than fixtures, designed in their manufacture as instruments of the household, and embrace the articles necessary, convenient, or ornamental, requisite to enable the delinquent not merely to live, but to live in a convenient and comfortable manner." This is certainly the common and ordinary meaning of the term. It is not illogical to assume it is the one the voters had in mind when they approved the constitutional amendment.

Any definitional powers given to the Legislature are prefixed and limited. The power to define household goods and personal effects necessarily is limited to those articles which ordinarily would be understood to be embraced within that term. Certainly, it cannot be interpreted to give the Legislature power to include air-conditioning systems, furnaces, automobiles, or real estate within the term "household goods and personal effects." Since there must be a limit to such powers, it is reasonable to find the common law concepts serve as guides.

To this point, we have been assuming that the Legislature was expressly granted certain definitional powers. This point, however, is not so clear when we read Article VIII, section 2, in its entirety. The critical portion thereof refers to household goods *"as defined by law,"* and

states they may be exempted in whole or part *"as may be provided by general law."* This of itself reveals a distinction of some sort. We believe it was intended to give the Legislature unlimited power to specify exemptions within the usual limits of the meaning of "household goods and personal effects." The phrase *"as may be provided by general law"* refers to actions of the Legislature which are to occur in the future. The former phrase, if different, refers to the legal meaning of household goods as understood and judicially defined. Both the common law and the then current statutory definitions distinguished household goods from fixtures.

We find the intention to be to allow the exemption of all household goods as that term was understood and legally defined. In that sense, the phrase in question would serve both to describe and limit the allowable exemption. Such an interpretation seems to us to be more plausible than the one asserted by the defendant.

This interpretation finds support in the remainder of Article VIII, section 2. To be particularly noted is the language: "The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation." This indicates that the framers of the constitutional provision knew well how to employ language to grant broad powers of definition and classification. It is significant that similar language was not utilized in regard to household goods. We thus hold that no broad definitional powers were granted to the Legislature by Article VIII, section 2.

In any event, any power to define household goods must be limited for the term "household goods" to have any meaning whatever. It is obvious that the Legislature could not be allowed to define all property in the state as household goods and personal effects. To permit it to do so would allow it to negate other parts of the Constitution. We therefore hold that the language

"household goods and personal effects, as defined by law," referred to extant law in a descriptive and limitational manner. We find that part of section 2 of L.B. 945 to be unconstitutional.

We are next concerned with sections 7 through 11 of L.B. 945, or sections 77-1506.04 through 77-1506.08, R. R. S. 1943. They provide as follows:

"When a taxing district lies in two or more counties, the total amount of taxes levied by such district shall be apportioned by each respective county on the basis of equalized valuations for the current assessment year, as determined by application of the respective county assessment ratio developed by the Tax Commissioner, in the proportion that the equalized valuation of that part of such district lying in each county bears to the equalized valuation of the whole district." § 77-1506.04, R. R. S. 1943.

"It shall be the duty of the county board of equalization which has the responsibility for fixing the mill levy for such overlapping district to determine the average ratio of assessment of real estate developed by the Tax Commissioner for each of the respective counties into which such taxing district extends or includes." § 77-1506.05, R. R. S. 1943.

"When the county board of equalization finds that the average assessment ratio for any of the respective counties varies not more than five percentage points from those ratios for other counties into which such district extends, apportionment as provided in section 77-1506.05 shall not be deemed necessary. When the county board of equalization finds that the average assessment ratio for any of the respective counties varies more than five percentage points from those ratios for other counties into which such district extends, apportionment of the tax levied, as provided in section 77-1506.05, shall be made as provided." § 77-1506.06, R. R. S. 1943.

"When apportionment of the total taxes levied by any

district lying in two or more counties has been accomplished as provided in sections 77-1506.04 to 77-1506.06, the county board of equalization shall fix separate and distinct mill levies for those parts of such districts lying in each county into which it extends. Such mill levy shall be fixed at a rate which, when applied to the assessed valuations of property within such part of a district in each respective county, will raise the amount of taxes apportioned pursuant to section 77-1506.05." § 77-1506.07, R. R. S. 1943.

"The provisions of sections 77-1506.04 to 77-1506.07 shall not be applicable when the mill levy adopted by the levying authority of any governmental subdivision is five mills or less." § 77-1506.08, R. R. S. 1943.

There is a complete absence of any provision for notice to the taxpayers in the taxing district of an intention to adjust the mill levies in accordance with the above sections. It is also apparent that no provision has been made for any hearing on the adjustment. Further, there is no provision for notice and hearing before the Tax Commissioner when he develops the assessment ratios referred to in section 77-1506.04, R. R. S. 1943. Nor is there any express provision for appellate review.

The absence of notice and hearing are particularly pertinent when we consider the fact that the assessed valuations are presumptively correct. The county board of equalization has a duty to assess the property at 35 percent of its actual value, and, in the absence of evidence to the contrary, it is presumed to have performed that duty. Carpenter v. State Board of Equalization & Assessment (1965), 178 Neb. 611, 134 N. W. 2d 272.

The particular activities mandated by sections 77-1506.04 through 77-1506.08, R. R. S. 1943, are judicial rather than legislative in character, according to the standards enunciated in Ruwe v. School District (1931), 120 Neb. 668, 234 N. W. 789. It is obvious that the effect of these sections will be to require some property

owners to pay more taxes than they would pay otherwise. Since financial burdens will be imposed upon property owners through an exercise of judicial power pursuant to specific terms of these statutes, due process of law requires notice and an opportunity to be heard.

It is also apparent that the activities mandated by these sections are equivalent to increasing assessed valuations. We have long held that where an increase in the assessed valuation of any classes of property as returned by any county or counties is made by the State Board of Equalization and Assessment without notice to such county or counties and without affording sufficient opportunity to be heard, such increase amounts to confiscation of property without due process, and is therefore a void increase of assessment. Northwestern Bell Telephone Co. v. State Board of Equalization & Assessment (1929), 119 Neb. 138, 227 N. W. 452.

The procedures contemplated by these sections will inevitably result in nonuniform taxation in violation of the uniformity provision of Article VIII, section 1. The true principle of taxation, the one enjoined by our Constitution, is that of uniformity as to persons and property within the particular district for which the tax is imposed. Clother v. Maher (1883), 15 Neb. 1, 16 N. W. 902.

Under the provisions of Article VIII, section 1, of the Constitution of Nebraska, the taxation of personal property, except as otherwise authorized by such provision, must be uniform not only as to the rate of taxation, but as to the valuation of the property as well.

There can be no difference in the method of determining valuation or the rate of tax to be imposed unless the separate classification rests on some reasonable public policy, some substantial difference of situation or circumstance that would naturally suggest the justice or expediency of diverse legislation with respect to the ob-

jects to be classified. State ex rel. Meyer v. McNeil (1970), 185 Neb. 586, 177 N. W. 2d 596.

It is evident from section 77-1506.05, R. R. S. 1943, and from the Tax Commissioner's testimony that the figures developed by the Tax Commissioner are based on assessment ratios of real estate only. Personal property and centrally assessed railroad property are not taken into account. It is also evident that the adjusted mill levies required by section 77-1506.07, R. R. S. 1943, are applicable to all taxable property, including locally and centrally assessed personal property and centrally assessed railroad property. The Tax Commissioner testified there was no necessary correlation between the assessment ratio of real estate in a particular county and the assessment ratio of locally assessed personal property. Certainly there was none with respect to centrally assessed personal property.

The assessment ratios developed by the Tax Commissioner are predicated upon the idea that real estate valuations tend to be unequal. The evidence adduced herein, however, indicates that valuations of locally assessed personal property tends to be uniform. Regardless, the mill levies determined under this statutory procedure are applied to *all* taxable property within the taxation district. The result necessarily is that identical centrally assessed property within the district is taxed differently, depending upon the county in which it is located. The effect upon locally assessed personal property is not clear, but to the extent valuations tend to be uniform the taxes imposed would necessarily be nonuniform.

The assessment ratios developed by the Tax Commissioner are intended to equalize tax burdens upon real property within a given taxation district. Plaintiff challenged defendant to show this would not cause nonuniformity in regard to other taxable property within the same district. That challenge was not met. The statute

necessarily causes nonuniformity as to centrally assessed property located in different counties of the same taxation district. Further, insofar as valuations of locally assessed personal property are uniform as between counties of that district, the scheme compels nonuniform taxation as to that property. This procedure is unconstitutional as violative of Article VIII, section 1, Constitution of Nebraska.

Plaintiff's brief discusses other factors which indicate the unconstitutionality of the statute. In view of what has been said heretofore, we see no occasion to consider them.

For the reasons given, we find section 77-202 (1) (d), as amended by section 2 of L.B. 945, and sections 77-1506.04 to 77-1506.08, R. R. S. 1943, to be unconstitutional. The judgment of the trial court is reversed and the cause is remanded for further proceedings pursuant to this opinion.

REVERSED AND REMANDED.

SMITH, J., not participating.

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

I agree that those sections of L.B. 945 dealing with intercounty equalization where a taxation district overlaps two or more counties are unconstitutional.

I do not agree that the portion of section 77-202 (1), R. R. S. 1943, exempting "(d) household goods, including major appliances either attached or detached to real property" is when properly construed unconstitutional because in violation of Article VIII, section 2, of the Constitution. That section of the Constitution, in my judgment, does not, as the majority opinion in effect states, authorize the Legislature to call black, white, and make it so. The Legislature has not attempted to do that in L.B. 945.

Subsection (1) (d) is obviously intended to exempt from taxation those items of property such as ovens, stoves, washing machines, clothes dryers, and dishwash-

ers which in recent history because of changes in home design and construction are now sometimes built in and semipermanently attached to the home, and which for this reason occupy an uncertain status in the technical terms of property law. The constitutional amendment was intended to meet this situation and enable the Legislature to treat on the same basis those homeowners who own such items attached or semiattached and those homeowners who own the same items but which are clearly personal property. As so limited and construed the statute ought to be said to be constitutional.

JAMES H. CARNER, APPELLEE, V. RICHARD ANDERSON, CHIEF OF THE POLICE DEPARTMENT OF OMAHA, NEBRASKA, ET AL., APPELLEES, CHRISTINE FRANCES CARNER BAGLEY, INTERVENER-APPELLANT.

215 N. W. 2d 82

Filed February 21, 1974. No. 39009.

1. **Infants: Parent and Child: Trial: Appeal and Error.** In cases involving child custody, the finding of the trial court both as to the evaluation of the evidence and as to the matter of custody will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence.
2. **Infants: Habeas Corpus.** When a court's jurisdiction is invoked by a habeas corpus petition seeking custody of a child, the child becomes a ward of the court and the prime consideration is the best interests and welfare of the child.
3. **Infants: Divorce: Comity.** Child custody provisions of a divorce decree entered in a sister state have no extraterritorial effect upon questions of proper custody arising under circumstances materially changed with reference to the welfare of the children.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

John F. Brennan and William L. Monahan, for intervener-appellant.

Jerome P. Grossman of Grossman, Sloma, Murphy & Brown, for appellee Carner.

Heard before SPENCER, SMITH, and CLINTON, JJ., and COLWELL and HASTINGS, District Judges.

HASTINGS, District Judge.

This case involves the custody of three minor children of plaintiff and intervener. The defendants, Richard Anderson, chief of police of the City of Omaha, Donald Knowles, county attorney, and Michael McGill, deputy county attorney of Douglas County, in response to a writ of habeas corpus issued by the District Court for Douglas County on September 19, 1972, surrendered the custody of the children to the court and were thereafter dismissed from the case. Intervener was allowed to file a pleading in the nature of a petition in intervention. Custody pending trial was retained by the court with temporary possession given to plaintiff. Upon trial on the merits, the court found that a Wyoming divorce decree, which had awarded custody of the children to intervener when neither she nor the children had been present during any of the proceedings, was void as to the custody provision; that it was in the best interests and welfare of the children that their care, custody, control, and possession be granted plaintiff; and that the custody of the court should be terminated. A final decree was entered accordingly, from which intervener appeals. We affirm the judgment of the District Court.

It should be said at the outset that the evidence contained in the record is, to a certain extent, vague, indefinite, uncertain and, although not undisputed, the degree of conflict is minimal. Furthermore, although plaintiff filed a motion requesting the court to appoint an independent investigator to make a report to the court upon the background and suitability of the parties to have custody of the children, no ruling was ever made on the motion and if any court-sponsored investigation was undertaken, it does not appear of record.

Nevertheless, in deciding this case, we are committed to the doctrine set forth in the case of State v. Vogt, 190 Neb. 205, 206 N. W. 2d 849, as follows: "We have said, in cases involving child custody, the finding of the trial court both as to the evaluation of the evidence and as to the matter of custody will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence. State v. Randall, supra."

The parties, whose home was originally in Omaha, were married in Wyoming in 1962 following which were born James, Jr., Glen, and Tina, ages 9, 7, and 6 at the time this action was brought. The family returned to Omaha in about 1963.

The evidence would support a finding that marital troubles developed and intervener left the plaintiff and took the children to California to live. The plaintiff joined the Air Force but was forced to seek an early discharge because intervener told him his children were apt to end up in a home unless he returned to the States. He then took care of the children for a while, got the intervener out of the Job Corps which she had joined in the interim, following which she was found to be mentally ill on her own petition, was paroled, and left again for California without the children. Plaintiff then took the children to her, returned to Wyoming, obtained a divorce in February of 1969, was asked by intervener shortly after that to take the children, which he did, and made them a part of his new family, consisting of a wife, and later two children. Intervener returned to Omaha in the summer of 1971, visited in plaintiff's family for a week, and then, with the aid of the Omaha police to whom she displayed the Wyoming divorce decree, obtained possession of the children and took them back to California. Plaintiff then went to California a year later, found the children to be living in what he felt were intolerable conditions—the ap-

pearance of a boy friend living in intervener's household who had given the daughter Tina a "hickey" like "he did Mama," so he returned the children to Omaha. Child stealing charges were filed against him in California which prompted his arrest in Omaha and the taking of the children into protective custody by the defendants, which precipitated this action.

Intervener does not deny the basic facts, although she insists that each time plaintiff took the children, except the last time, was by her permission with the understanding that they would be brought back when requested, and denies any improper living relations with her boy friend. She stated that she did not intend to work, but would continue to live off welfare so she could be home with the children.

Plaintiff's employer testified that he managed one of their oil stations and earned around $800 per month, that he was one of their better managers, that his home was neat, and that the children appeared to be well treated and supervised.

At best, the behavior of both parties, engaging as they have in a "tug of war" over these children, is far from exemplary, and this opinion should not be construed as condoning the employment of self-help by parents to gain an advantage in settling child custody cases. However, these children have been uprooted and transplanted far too many times, which must be stopped, and regardless of foreign divorce decrees, criminal charges, or the desire of parents, the welfare of the children must be the overriding consideration. See Copple v. Copple, 186 Neb. 696, 185 N. W. 2d 846, wherein this court said: "It is the position of this court that when a court's jurisdiction is invoked by a habeas corpus petition seeking custody of a child, the child becomes a ward of the court and the prime consideration is the welfare of the child."

It is not necessary for us to decide the efficacy or

the jurisdictional validity of the Wyoming divorce decree relating to child custody as this Court also found in Copple v. Copple, *supra*: "Child custody provisions of a divorce decree entered in a sister state have no extraterritorial effect upon questions of proper custody arising under circumstances materially changed with reference to the welfare of the children."

Considering the length of time that the children have been with the plaintiff and his ability to provide proper care and the somewhat questionable stability and attitude of intervener as demonstrated by the evidence, it is our opinion that the trial court did not abuse its discretion in finding that the best interests and welfare of the children would be served by placing custody with the plaintiff, and the decree is affirmed.

AFFIRMED.

SMITH, J., not participating.

JAYNE E. SCHMIDT ET AL., APPELLEES, V. RICHMAN GORDMAN, INC., A CORPORATION, ET AL., APPELLANTS.
215 N. W. 2d 105

Filed February 21, 1974. No. 39065.

1. **False Imprisonment.** False imprisonment consists in the unlawful restraint against his will of an individual's personal liberty. Any intentional conduct that results in the placing of a person in a position where he cannot exercise his will in going where he may lawfully go, may constitute false imprisonment.
2. **Malicious Prosecution.** In a malicious prosecution case, the necessary elements for plaintiff to establish are: (1) The commencement or prosecution of the proceeding against him; (2) its legal causation by the present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage, conforming to legal standards, resulting to plaintiff. If any one of these elements is lacking, the result is fatal to the action.
3. **Trial: Damages.** A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the

result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law.

4. ———; ———. In an action for damages, where the law furnishes no legal rule for measuring them, the amount rests largely in the sound discretion of the jury, and the courts are reluctant to interfere with a verdict rendered by the jury.

5. **Appeal and Error.** The Supreme Court may, at its option, consider a plain error not specified in appellant's brief.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed on condition.

Thomas J. Walsh and Michael R. O'Malley of Walsh, Walentine & Miles, for appellants.

Arthur D. O'Leary of McGrath, North, Dwyer, O'Leary & Martin, and Steven J. Lustgarten, for appellees.

Heard before WHITE, C. J., BOSLAUGH, and MCCOWN, JJ., and TESAR and HAMILTON, District Judges.

TESAR, District Judge.

These are two tort actions brought by plaintiffs, Schmidt and Clifton, who are sisters, and, as the same facts are involved in both cases, the actions were consolidated for trial.

These actions arose out of an incident which occurred in the store of defendant Richman Gordman, Inc., at 120th and West Center Road in Omaha, Nebraska, on November 24, 1971. The plaintiffs came to the store on said date and shopped. The plaintiffs were stopped as they left the store by the defendant Gladys Horan, who is employed as a security guard by the defendant Richman Gordman, Inc. The plaintiffs were taken to the office in the store, held for approximately 45 minutes, and ultimately were taken to the Omaha police station by members of the Omaha police department, who were called by the defendants and who were advised that the plaintiffs were observed shoplifting in the store. Plaintiffs were held in jail for a period of 3½ to 4 hours and they were "mugged" and fingerprinted. They

were charged with petit larceny and were released on bail at about 10 o'clock p.m. that evening. Subsequently the plaintiffs appeared in the municipal court of the City of Omaha to answer the charge of petit larceny, and the cases were dismissed.

Suit was instituted by both plaintiffs and each alleged the same three causes of action: The first, for slander; the second, for false arrest and imprisonment; and the third, for malicious prosecution. Trial was held and at the close of plaintiffs' evidence the trial court sustained defendants' motion in each case for a directed verdict on the cause of action for slander, but permitted the cases to proceed as to the other two causes of action. The jury found in favor of each plaintiff in the sum of $4,500 on their cause of action for false arrest and imprisonment, and in favor of each plaintiff in the sum of $10,500 on their cause of action for malicious prosecution.

Briefly, the evidence indicates as follows: Kathleen A. Clifton, age 21, and her sister, Jayne E. Schmidt, age 19, along with their two brothers and a sister, all of whom ranged in age from 5 to 10 years, went at about 4 p.m. into the defendants' store for the purpose of buying birthday presents for their father. They went to the men's department and picked out a shirt priced at $7.99 and then they selected a sweater-vest, and were going to buy a tie to go with the shirt and vest. They went to the tie department and plaintiff Clifton put the vest over the shirt, which shirt was on a hanger. They attempted to find a tie to match, but didn't find one, so they selected a pair of gloves. They shopped around the store for a while and then went to the cashier to check out their purchases. While the plaintiffs were making their selection of a tie they were observed by the defendant Gladys Horan, the security guard, who concluded that plaintiffs were attempting to shoplift the shirt. Miss Horan warned the

checkout girl to give the plaintiffs the opportunity of paying for the shirt. When the plaintiffs went through the checkout stand the checkout girl, one Miss Ellefson, age 21, who had worked as a cashier for a period of about 1 month, asked if the vest and shirt on the hanger was a "one-piece or two-piece" item. Both plaintiffs testified that they answered it was "two pieces." Miss Ellefson testified that she did not see more than one price tag on the items, but she couldn't remember whether or not she separated the items when they were brought to the counter. The plaintiffs both testified positively that the cashier separated the items and took the vest off the shirt from the hanger, and that the price tags were plainly visible on the items. The cashier then sacked the items and stapled the cash register receipt showing payment for the purchases onto the bag, which sealed or closed the bag, and the plaintiffs left the store. As soon as the plaintiffs left the checkout stand, Miss Ellefson signaled Miss Horan, with a prearranged signal, who then stopped the plaintiffs in the vestibule and escorted them to the office, where they were charged with attempting to procure a shirt without making payment therefor. When the plaintiffs left the checkout stand they did not count their change from the $20 bill that had been tendered for payment of the articles because of some commotion caused by one of their younger brothers.

Miss Ellefson, the checkout cashier, although she knew that the shirt and vest were separately priced items, at no time made any attempt to eliminate any possible misunderstanding which may have existed as to whether the items were a one-piece or two-piece item. Richman Gordman had a price code system to prevent pilfering two one-piece items as if they were a set. We feel it is important to recite Miss Ellefson's cross-examination verbatim: "Q. Would you tell me, if you know, how Richman-Gordman, codes the price tag? A. If I re-

member right, for a two-piece item they have 'two-piece' on the tag, and I think it is a green tag. Q. So they are coded? A. Yes. * * * Q. Do you know whether these items were coded? A. No, I don't. I don't know. * * * Q. One of the girls, when you asked, said it was two pieces? A. Yes. Q. And most of the time the items were coded to indicate whether or not it was a set or two pieces or two items or two outfits? A. Yes, they are."

When the plaintiffs were accosted by the defendant Horan, in the vestibule, she showed them her badge and credentials and asked that they accompany her to the office. Miss Horan was about 20 years of age with no training in security work except her employment for the defendant store for a period of slightly over 1 year. In the office Miss Horan asked permission to examine their purchases enclosed in the bag. They answered in the affirmative. What transpired then is reflected in the testimony of plaintiff Jayne Schmidt: "Q. When you got to the office, Jayne, what happened? A. Well, the girl asked us if she could look in our sack, and we said yes, and she told us that we had not paid for the shirt, and Kathy told her we had just gone through the checkout stand and paid for everything. She showed us the register ticket and said it wasn't rung up. And we said that wasn't our fault that it wasn't rung up, that we planned to pay for it and we would gladly pay for it. And she said no, we were planning to get out without paying for the shirt. And then she called some guy, and some guy came up, and he told us that we were trying to get away without paying for the shirt, and we tried to explain it to him, and he wouldn't listen to us at all."

The facts in evidence conclusively show that Miss Horan apprehended and detained these plaintiffs at the defendant store. She testified that she personally made the determination not to let the plaintiffs leave the

Richman Gordman Store. Plaintiffs testified that they felt they could not leave the room where they were confined, and in this connection, Horan testified that if the plaintiffs had started to run she would have chased them. Officer Pensyl testified he received the call, "to pick up a shoplifter" at the store. The call was made by Miss Horan. Officer Pensyl testified numerous times that when he arrived at the store the plaintiffs were in custody of the defendants and were under arrest. He made out his report based on information furnished by said security personnel. Thereafter he took the security officer's report and as "conveying officer" took the plaintiffs to the city jail for confinement.

Defendants contend that the trial court erred in defining what constitutes an "arrest" in its instruction No. 11. This assignment of error was cited and argued in their brief. The court gave an almost verbatim definition of "arrest" as defined in 5 Am. Jur. 2d, Arrest, § 1, p. 695, which properly defines what constitutes an arrest, and said instruction, given by a very able trial judge, was correct.

Defendants contend that one who merely states to a police officer what he knows of a supposed offense, without making a charge or an arrest, is not liable for false arrest. The facts here do not fit the cases cited to support their contention. In Herbrick v. Samardick & Co., 169 Neb. 833, 101 N. W. 2d 488, this court said: "False imprisonment consists in the unlawful restraint against his will of an individual's personal liberty. * * * Any intentional conduct, chargeable to the defendant, that results in placing of a person in a position where he cannot exercise his will in going where he may lawfully go, may constitute false imprisonment. * * * Where there is a conflict in testimony in an action for false imprisonment, credibility of witnesses and weight of evidence are questions for the jury." See, also,

Robertson v. Safe Way Stores, Inc., 130 Neb. 82, 264 N. W. 153.

Defendants also place reliance on the statutes of the State of Nebraska, to-wit: Sections 29-402.01 and 29-402.03, R. R. S. 1943. Suffice it to say that the trial judge properly instructed the jury on the statutes. The jury found that the defendants detained plaintiffs without probable cause, in an unreasonable manner, for an unreasonable length of time.

Proceeding now to plaintiffs' cause of action for malicious prosecution, this court has said: "In a malicious prosecution case, the necessary elements for the plaintiff to establish are: (1) The commencement or prosecution of the proceeding against him; (2) its legal causation by the present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; (6) damage, conforming to legal standards resulting to plaintiff." Kersenbrock v. Security State Bank of Osmond, 120 Neb. 561, 234 N. W. 419. All the above elements must coalesce, and if any of these elements are lacking the result is fatal to the action. In White v. Chicago, B. & Q. R. R., 417 F. 2d 941, Judge Lay said: "The defendant relies upon the Nebraska common law rule that a person who supplies information to prosecuting authorities is not liable for his action as long as any ensuing prosecution is left entirely to the official's discretion. (Citing cases.) * * * *Its application, however, is not without limitations.* Where the informant knowingly gives *false or misleading information* or in any wise directs or counsels officials in such a way so as to actively persuade and induce the officer's decision, then the informant may still be held liable (Citing cases.) * * * In view of the verdict, the plaintiff is entitled to have the evidence viewed in the light most favorable to his cause and be

given the benefit of all reasonable inferences arising from the facts. (Citing cases.)"

Here the defendant Horan made out a conclusionary report. The report was given to the prosecutor for determination of what action was to be taken. It is apparent that the defendant Horan, while acting for and on behalf of Richman Gordman, and while in the course and scope of her employment, set the machinery of the law in motion. It need not be shown that the defendant Horan actively participated in getting the complaint filed, or for that matter, signed the complaint if she, on her own motion, gave information or made complaint to the officers of law in such a manner as that, in the regular and ordinary course of events, a complaint must issue, then this is sufficient to warrant the jury in finding her the real prosecutor. Her conduct and the overall circumstances surrounding this case could properly be viewed by the jury in terms of persuasion and inducement to prosecute.

Here, the defendants failed to give the city prosecutor *all* information and particularly the plaintiffs' version. Mr. Bucchino, the city prosecutor, testified that he made his decision to prosecute upon the report furnished by the defendants and he stated that the complaints would not have been filed if there had been no call from Richman Gordman.

On the question of probable cause, defendants place reliance upon Brumbaugh v. Frontier Refining Co., 173 Neb. 375, 113 N. W. 2d 497. The court there held that in an action for malicious prosecution, where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant. We have no quarrel with that rule, but in the case at bar there was not sufficient undisputed evidence to show probable cause. On the disputed facts which were properly presented to the jury by the court's instructions, the fact finders found against the defendants by their ver-

dict, and thus found a want of probable cause to exist. See 52 Am. Jur. 2d, Malicious Prosecution, § 52, p. 218. See, also, Annotation, 87 A. L. R. 2d 183.

Malice must be shown, as well as want of probable cause, but it may be deducible from the facts and circumstances surrounding the transaction and is inferable from the absence of probable cause. The law never presumes malice, although in a proper case its presence may be inferred from want of probable cause. This inference is one of fact which may be drawn only by the jury, but is one which it is not required to draw. The jury under proper circumstances herein, drew the conclusion that the acts were done maliciously by the defendants and with that finding we have no quarrel. As this court in Hackler v. Miller, on rehearing, 79 Neb. 209, 114 N. W. 274, approved an instruction stating "in law, the want of probable cause does not of itself show malice, but the jury are at liberty to infer malice therefrom as a conclusion of fact, if from all the evidence in the case they deem such an inference justifiable." Here the triers of fact felt it justifiable. There can be no question that damages have been sustained by the plaintiffs in conformity to legal standards, but as to whether said verdicts were excessive we will consider under defendant's next assignment of error.

We now consider defendants' assignment of error that the verdicts were excessive and were the result of passion, prejudice, or mistake. The law relating to review of amount of jury verdicts is well settled in this state. In Fridley v. Brush, 161 Neb. 318, 73 N. W. 2d 376, this court said: "A verdict may be set aside as excessive only when it is so clearly exhorbitant as to indicate that it was a result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law." It likewise said: "In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in

the sound discretion of the jury, and courts are reluctant to interfere with a verdict so rendered." See, also, Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701; Sutton v. Inland Constr. Co., 144 Neb. 721, 14 N. W. 2d 387; Peacock v. J. L. Brandeis & Son, 157 Neb. 514, 60 N. W. 2d 643.

Defendants assert that these plaintiffs did not suffer any damage. When one is unlawfully restrained of his personal liberty, arrested and paraded through a store under guard of a police officer, confined in the local jail for 3½ to 4 hours, fingerprinted and "mugged" for permanent FBI records, charged with a criminal offense, and compelled to retain counsel for their defense, damage is obvious and serious. Mental anguish and distress, humiliation and disgrace are virtually presumed.

We affirm the verdicts in these causes with one condition. The verdict in each case for malicious prosecution should be reduced to $10,000 which is the amount of the prayer in each case. The jury verdicts in each case, were in the amount of $10,500. No motion having been made by the plaintiffs to increase their prayer on these causes, we are confronted by the rule of law announced in Gable v. Pathfinder Irr. Dist., 159 Neb. 778, 68 N. W. 2d 500, wherein this court said: "The office of the ad damnum in a pleading is to fix the amount beyond which a party may not recover on the trial of the action." Again, in Davis v. Hall, 70 Neb. 678, 97 N. W. 1023, the court said: "Where a verdict exceeds the amount claimed in his pleadings, by the party gaining it, it is error to enter judgment for the full amount found."

This court can, at its option, consider plain error not specified in appellant's brief. § 25-1919, R. R. S. 1943; Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482.

For the reasons stated, the judgments rendered herein are, on both causes of action, affirmed, on condition that each plaintiff, within 20 days from the date this opinion is filed, file in the office of the Clerk of the Dis-

trict Court for Douglas County, Nebraska, a remittitur in the amount of $500 on their third cause of action (for malicious prosecution) and in the event of such remission, judgments are affirmed for the sum of $10,000 on the third cause of action in each case, and in default thereof, the judgments on said third cause of action shall be reversed, and that cause remanded for further proceedings according to law.

AFFIRMED ON CONDITION.

NADINE R. CHRISTENSEN, APPELLANT, V. ROBERT A. CHRISTENSEN, APPELLEE.
215 N. W. 2d 111

Filed February 21, 1974. No. 39077.

1. **Divorce: Infants: Parent and Child.** In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children.
2. **Trial: Appeal and Error: Evidence.** There is a presumption that the court, trying a case without a jury, in arriving at a decision, will consider such evidence only as is competent and relevant and the Supreme Court will not reverse a case so tried because other evidence was admitted, where there is material, competent, and relevant evidence admitted sufficient to sustain the judgment of the trial court.
3. ———: ———: ———. Upon a trial de novo in this court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objection by the adverse party will be disregarded by this court.
4. **Trial: Appeal and Error: Judges.** A ruling of a trial judge on a motion to disqualify himself is immaterial where the cause is an action triable de novo in this court.

Appeal from the District Court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Thomas J. Walsh of Walsh, Walentine & Miles, for appellant.

Robert G. Decker, for appellee.

Heard before WHITE, C. J., BOSLAUGH, and MCCOWN, JJ., and TESAR and HAMILTON, District Judges.

WHITE, C. J.

This is an appeal by the petitioner, Nadine R. Christensen, from a decree of divorce in which the custody of the parties' two minor children was granted to the respondent husband, Robert A. Christensen. Petitioner contends that she is entitled to the custody of the two children and that certain evidentiary errors entitle her to a new trial. We affirm the judgment of the District Court.

On de novo review, we have examined the evidence and abstract that portion which we consider pertinent to a final decision. The parties were married in 1964 and petitioner is now 24 years of age. There are two children, Matthew, born in 1966, and an adopted daughter, Melissa, born in 1969. Petitioner is a high school graduate, has done some secretarial and factory work since her marriage, her longest period of employment being about 6 months. At the time of the trial she was doing some babysitting for which she received about $20 per week. She testified that after the divorce was granted she intended to leave Omaha. She had no definite plans, she considered moving to Eagle, Nebraska, which is close to her parents' home. Summarizing her evidence as to her planning for the care of the children, it revealed nothing more than an indefinite plan to move from Omaha, possibly settle in Eagle, near where her mother resided, and use her mother to babysit in the event she secured employment. She had no personal knowledge of the housing market or employment opportunities in the Village of Eagle.

On the other hand the father, Robert Christensen, is employed as a production control supervisor, has been for approximately 3 years, and has a take-home pay of approximately $158 per week. He has continually at-

tempted to make conciliation efforts with the petitioner. He has paid all the child support payments, has made all the house payments on their home, kept the insurance payments on the family current, and in fact has increased the coverage for the benefit of the petitioner and the minor children. He has a definite plan to take care of these two small children in the parties' present home. His mother is living on a farm at Exira, Iowa, has raised six children, and would move to Omaha to care for the children. The father is willing to be supervised by the court and undertake anything that the court saw fit with reference to the detailed care of the minor children. It also appears from the evidence in this case that both the petitioner and the respondent would necessarily have to be away from the children during the period of time of their employment. Undoubtedly the trial court was impressed by the definite plan of taking care of these two children in their family home and the evidence and testimony of respondent's mother as to moving to Omaha to help. The record reveals that the petitioner had been hospitalized in Omaha for psychiatric treatment for a period of about 2 weeks. Her doctor testified on behalf of the petitioner. He appeared to testify and to explain a previous report that had been sent to the court investigator DeLene Maxwell. This witness testified that his report was sent to counsel for the petitioner and should have been in his possession prior to the time of the original hearing on November 1, 1972. The witness testified fully as to his examinations of both the petitioner and the respondent father. He found the respondent father normal but concerned about his marriage. He testified that the petitioner had "more contact than formerly," and had good "composure," but "was unrealistic at times, transferred her blame to her husband."

In determining the question of who should have the care and custody of children upon the dissolution of a

marriage, "the paramount consideration is the best interests and welfare of the children." Broadstone v. Broadstone, 190 Neb. 299, 207 N. W. 2d 682. See, also, Lanz v. Lanz, 189 Neb. 578, 203 N. W. 2d 761; § 42-364, R. S. Supp., 1972. The judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case. The general considerations of the moral fitness of the parents, of respective environments offered by each parent, the emotional relationship between the children and their parents, their age, sex, and health, the effect on the children of continuing or disrupting an existing relationship, the attitude and the stability of character of each parent, and the capacity to furnish the physical care and education and needs of the children are some of many factors for the court to consider. In evaluating the general concept of the best interests and welfare of the children it is settled and fundamental law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parents at the trial. It is clear from the examination of all the undisputed and competent evidence that the trial court's judgment as to the custody of these two small children was correct and should be affirmed.

We briefly note other assignments of error. Petitioner contends that the court was in error in ordering an independent investigation, and that the petitioner was deprived of the right to a copy of the report thereon and an opportunity to adduce evidence in relation to the statements and allegations therein. The investigation on September 5, 1972, ordered by the court, is specifically authorized by section 42-351, R. S. Supp., 1972. It has long been settled law that a trial judge in a divorce action has independent jurisdiction to inquire into matters concerning the status of the marriage, the custody and support of minor children, the

support of either party, and the settlement of property rights of the parties. The record reveals that the trial judge advised both parties, in the presence of counsel, that such an investigation was going to be made by the Douglas County welfare department. The answer to the contention of the petitioner is threefold. First the petitioner asserted error in the reception and consideration of the report in her motion for new trial filed on January 29, 1973. The trial court in hearings on March 9, 1973, on March 15, 1973, and on April 4, 1973, granted to the petitioner a complete opportunity to explore, examine, and call witnesses with reference to the report of the investigation, which the petitioner did. These witnesses included the investigator DeLene Maxwell and also Dr. Merle Sjorgen, the petitioner's psychiatrist, and they were examined in connection with matters in the investigative report, and counsel was given a copy of the investigation. There is no evidence of any curtailment of counsel's exploration of the investigative report or his right to adduce testimony concerning it. Secondly, the trial judge specifically found that he reached his judgments and findings in the case independent of matter in the investigative report. It is settled law that there is a presumption that the court, trying a case without a jury, in arriving at a decision, will consider such evidence only as is competent and relevant and the Supreme Court will not reverse a case so tried because other evidence was admitted, where there is material, competent, and relevant evidence admitted sufficient to sustain the judgment of the trial court. Schuller v. Schuller, *ante* p. 266, 214 N. W. 2d 617; Koehn v. Koehn, 164 Neb. 169, 81 N. W. 2d 900. This holding follows the general rule that the admission of incompetent or irrelevant evidence is not reversible error, where the cause is tried to the court without a jury. Schuller v. Schuller, *supra;* Gray v. Hartman, 181 Neb. 590, 150 N. W. 2d 120; Abel v. Southwest Cas. Ins.

Co., 182 Neb. 605, 156 N. W. 2d 166. Thirdly, it is settled law that upon a trial de novo in this court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objection by the adverse party, will be disregarded by this court. Franks v. Franks, 181 Neb. 710, 150 N. W. 2d 252. Summarizing, the trial court awarded the petitioner a full opportunity and hearing to explore and introduce evidence with reference to the investigation report. Assuming arguendo, that inadmissible evidence was received, it will be presumed that the lower court did not base its decision thereon and it will be disregarded by this court in a determination de novo.

Petitioner urges disqualification of the trial judge. The record reveals at least six hearings in this case, an adjournment of the case so the petitioner could secure new counsel, and a representation by present counsel in at least five hearings in which the court actually gave petitioner a complete opportunity to explore all areas of the issues raised. The purport of the petitioner's contention seems to be that after a judge has entered a decree and made findings in a case, he then becomes disqualified to hear a motion for a new trial or to rule on evidence he has permitted to be introduced on the grounds that he has made up his mind in the original decree. Such a contention needs no answer. We also observe that a ruling of a trial judge on a motion to disqualify himself is immaterial where the cause is an action triable de novo in this court. Franks v. Franks, *supra.* We also observe that there was no formal motion before the judge to disqualify himself but merely a suggestion or contention by the petitioner in the discussion or argument before the judge in connection with the motion for new trial. This contention is utterly without merit.

The assignments of error are without merit and the

judgment of the District Court is correct and is affirmed.

AFFIRMED.

BOSLAUGH, J., concurring.

While I agree with the opinion of the court in this case, I believe a word of caution should be added regarding the report of an investigator in a divorce proceeding. Such a report, as distinguished from testimony of the investigator and other witnesses, does not constitute evidence, is not binding upon the parties, and cannot be the basis for any adjudication. Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731.

WILLA D. SOMMERS, APPELLANT, v. JACK E. SOMMERS, APPELLEE.

215 N. W. 2d 84

Filed February 21, 1974. No. 39180.

Divorce: Parent and Child: Alimony. The fixing of child support and alimony rests in the sound discretion of the court and, in the absence of an abuse of discretion, will not be disturbed on appeal.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

William A. Wieland of Swartz & Wieland, for appellant.

Rollin R. Bailey of Davis, Bailey, Polsky, Huff & Denney, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, McCOWN, NEWTON, and CLINTON, JJ., and RONIN, District Judge.

NEWTON, J.

This is a divorce action. The sole questions raised deal with the propriety of the division of property and allowances of alimony and child support. We affirm the judgment of the District Court.

The parties were married in 1957 and two daughters, ages 10 and 11, were born to them. Custody was awarded to the mother, the petitioner in this action and the appellant on appeal. Both parties were working at the time of the divorce, petitioner's take-home pay being $385.66 per month and respondent's about $680. Petitioner had received an inheritance of $13,975 which was used for family purposes, with $7,500 being invested in the home property consisting of 16⅓ acres having a stipulated value of $47,667. This valuation rated the improvements at $15,000 and the land at $2,000 per acre. Petitioner was awarded 5.41 acres on which the improvements were located with a stipulated value of $25,820, the balance of the land valued at about $21,847 going to respondent. Household furnishings and a 1969 Thunderbird automobile of unspecified value were awarded to petitioner. Respondent was awarded a 1965 Ford pickup valued at $500, a 1967 Chevrolet van valued at $1,000, a Ford tractor of minimal value, and 42 hogs valued at $1,500. Respondent was required to pay all taxes then due on the real estate and each party assumed one-half of the outstanding mortgage. Although not specifically mentioned as to payment respondent also had outstanding debts of $1,250. He was directed to pay $170 per month child support and costs, including attorney's fees. No cash alimony was awarded. Respondent apparently had no savings as his income through the years had gone to support his family.

It appears that both of the parties had contributed to the family assets. There was an approximately equal division of these assets. Respondent's earnings are not overly substantial and the child-support allowance appears reasonable, particularly in view of the fact that the wife and children will have the benefit of the family home and its furnishings. Should conditions change, this is subject to adjustment.

"The fixing of child support and alimony rests in the

sound discretion of the court and, in the absence of an abuse of discretion, will not be disturbed." Person v. Person, 189 Neb. 329, 202 N. W. 2d 629. See, also, Prell v. Prell, 181 Neb. 504, 149 N. W. 2d 104; Martin v. Martin, 188 Neb. 393, 197 N. W. 2d 388.

No abuse of discretion appearing, the judgment of the District Court is affirmed. Costs, including an allowance to petitioner of attorney's fees in the sum of $350, are taxed to respondent.

AFFIRMED.

GLEN E. FUDGE, APPELLANT, V. MAE B. BYROM ET AL., APPELLEES.

215 N. W. 2d 71

Filed February 21, 1974. No. 39184.

1. **Contracts: Vendor and Purchaser: Husband and Wife: Specific Performance.** An executory contract for the sale of nonhomestead land in which the husband of the vendor has not joined is specifically enforceable against the vendor to the extent of her interest, but not as to the marital interest of her husband in the land.
2. **Specific Performance.** The discretionary remedy of specific performance together with abatement of purchase price should not be granted by a court of equity if it operates with injustice and oppression.

Appeal from the District Court for Saunders County: JOHN D. ZEILINGER, Judge. Affirmed.

Haessler, Sullivan & Inbody, for appellant.

Crosby, Pansing & Guenzel, Theodore L. Kessner, and Lynn R. Carey, Jr., for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, McCOWN, NEWTON, and CLINTON, JJ., and RONIN, District Judge.

RONIN, District Judge.

This is an action for specific performance with abate-

ment in the purchase price of a written agreement to purchase a farm. The District Court denied specific performance but awarded plaintiff purchaser judgment against the defendant Mae B. Byrom in the sum of $2,000 as provided in the liquidated damages provision of the written purchase agreement. Plaintiff has appealed. We affirm the judgment of the trial court.

The plaintiff, Glenn E. Fudge, was a tenant of an 80-acre farm in Saunders County, Nebraska, the record title owner of which was the defendant Mae B. Byrom. The defendent William Byrom was the husband of Mrs. Byrom. The farm was not the homestead of the Byroms.

Several days prior to the execution of the purchase agreement, the defendants discussed the sale of the farm with the plaintiff. William Byrom expressed a desire to retain 2 acres from the sale which was apparently never agreed to by plaintiff. On March 6, 1970, the plaintiff and Mrs. Byrom met with her lawyer, Claude Lutton of Ashland, who prepared a form contract for the sale of Mrs. Byrom's farm. William Byrom was not present and no provision was made for him to sign the contract. The plaintiff signed the form contract as purchaser, and Mrs. Byrom as the seller of the entire 80-acre tract. The plaintiff delivered his check for $2,000, the required downpayment on the $36,000 total sale price, which check was never cashed.

On the following day Mrs. Byrom informed plaintiff that her husband was upset about her signing the contract without their retaining 2 acres. Mrs. Byrom never produced the abstract of title to the farm for plaintiff's attorney to examine. On April 28, 1970, Mrs. Byrom's attorney sent a letter to plaintiff's attorney stating that the difference over the 2 acres meant there was no acceptable solution, and enclosed the plaintiff's downpayment check, and also one of Mrs. Byrom for the same amount of $2,000, the sum stated in the contract for liquidated damages in the event of either party's failure

to perform. Plaintiff refused to accept the $2,000 payment by Mae B. Byrom as damages. Plaintiff seeks in this action against both defendants specific performance of the contract with abatement of purchase price.

The contention of the defendant Mae B. Byrom that the purchase agreement was not enforceable because certain provisions and terms were omitted is without merit. Parol evidence was adduced by both parties concerning these provisions. The trial court was correct in finding a valid purchase contract existed between plaintiff and Mae B. Byrom.

The defendant William Byrom as the husband of Mae B. Byrom possessed marital rights in her real estate. William Byrom was not included in the purchase agreement and it is clear that specific performance may not be decreed against him. The failure to include William Byrom in the contract did not void the agreement. It is enforceable against whatever interest Mae Byrom possesses in the farm.

A similar question was involved in Hughes v. de Barberi, 171 Neb. 780, 107 N. W. 2d 747 (1961), in which our court stated: "It seems clear that under this provision (section 30-105, R. R. S. 1943) if the husband, Louis de Barberi, was seized of an estate of inheritance in the property described in the purchase agreement, he could not be divested of such interest by a conveyance of the property by the wife in which he did not join. * * * The husband not having signed the purchase agreement has not divested himself of his estate of inheritance. * * * In Zvacek v. Posvar, 118 Neb. 163, 223 N. W. 792, the court in its headnotes stated the rule as follows: 'A party to a written contract for sale of his real estate, not a homestead, will not be excused from performance because the wife did not sign the agreement and refused to join in the deed, if the other party is willing to accept conveyance by the vendor, without the wife joining in the deed. * * * In such case, the court may decree specific performance

of the agreement against the vendor alone, if the other party consents thereto; the wife's marital rights in such real estate not being affected by such decree.' See, also, Davis v. Merson, 103 Neb. 397, 172 N. W. 50; Gartrell v. Stafford, 12 Neb. 545, 11 N. W. 732, 41 Am. R. 767; Lutjeharms v. Smith, 76 Neb. 260, 107 N. W. 256."

The plaintiff in the instant case seeks more than specific performance of the interest of Mae B. Byrom in the purchase contract. Plaintiff's request for specific performance is coupled with a specific insistence of abatement of the purchase price. The order sought by plaintiff would for all practical purposes divest William Byrom of his rights in the farm. In the cases cited above there was no abatement of purchase price allowed with the granting of specific performance.

The only Nebraska case cited by plaintiff in support of his request for abatement is the recent case of Struempler v. Peterson, 190 Neb. 133, 206 N. W. 2d 629 (1973). In Struempler, *supra,* an option to sell real estate was signed by all the interested parties and their spouses, but was not acknowledged. A portion of the real estate was the homestead and not enforceable. Our court denied specific performance for the reason that the provisions of the contract were not clearly severable as to the nonhomestead property. Our court did state that specific performance may be obtained as to nonhomestead land with an abatement of the total price where the contract is clearly severable. All interested parties had signed the option which distinguishes it from the present case. The plaintiff cites no other Nebraska authority in support of his request for abatement in purchase price.

The discretionary remedy of specific performance should not be granted by a court of equity if it operates with injustice and oppression, and particularly with abatement of the purchase price.

In Russell v. Western Nebraska Rest Home, Inc., 180 Neb. 728, 144 N. W. 2d 728 (1966), our court stated:

"The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right, but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust and may be denied when the party seeking it has failed to perform."

The facts in this case do not support a decree of specific performance with an abatement in the purchase price. The trial court properly awarded the plaintiff judgment against the defendant Mae B. Byrom for $2,000 in accordance with the liquidated damages provision of the agreement. The judgment of the District Court denying plaintiff's prayer for specific performance of the purchase agreement is affirmed.

AFFIRMED.

IN RE INTEREST OF KARLA KAY KINKNER, A CHILD UNDER EIGHTEEN YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. MARJEAN KINKNER ET AL., APPELLANTS.
216 N. W. 2d 165

Filed February 28, 1974. No. 39036.

1. **Infants: Appeal and Error: Trial.** An appeal from a finding and judgment of the District Court by authority of Chapter 43, article 2, R. R. S. 1943, that a child is neglected or dependent is disposed of in this court by trial de novo upon the record.
2. **Infants: Parent and Child: Words and Phrases.** A neglected child is a child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child.
3. **Infants: Parent and Child.** Where a parent has been shown

to be unfit to have the care and custody of a minor child, the primary concern of the court is the best interests and welfare of the child.

Appeal from the District Court for York County: JOHN D. ZEILINGER, Judge. Affirmed.

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

Joseph P. McCluskey, for appellee.

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

STUART, District Judge.

This is an action brought by the county attorney of the County of York to have Karla Kinkner declared to be a dependent and neglected child under Chapter 43, article 2, R. R. S. 1943. The petition was filed in the York county court, and, after trial, the county judge adjudged Karla Kinkner to be a neglected child, committed her custody to the Department of Public Welfare of the State of Nebraska, and terminated all parental rights. Since the trial in the county court on August 18, 1969, the actual custody of Karla Kinkner has remained with the Department of Public Welfare. Marjean Kinkner, the mother of the child, appealed to the District Court. The case was consolidated for trial with the case brought in the interest of Michael Kinkner, the younger brother of Karla. After trial, the District Court found Karla Kinkner was a neglected child and committed her to the care and custody of the Department of Public Welfare. Marjean Kinkner and Edna Schaeffer, the maternal grandmother, have appealed.

An appeal of a case brought under Chapter 43, article 2, R. R. S. 1943, is heard in this court by trial de novo upon the record. Mullikin v. Lutkehuse, 182 Neb. 132, 153 N. W. 2d 361. The fact the trial judge heard and observed the parties and witnesses is an important consideration in determining the weight and significance

of the testimony. Mingus v. Stuchlick, 185 Neb. 139, 174 N. W. 2d 194.

The evidence is summarized as follows: At the time the incidents occurred, which resulted in the filing of the petition, Leslie Kinkner, the father of the children, was hospitalized for alcoholism. The children were in the care of Marjean Kinkner. In March 1969, when the family was living in Sioux Falls, South Dakota, Marjean Kinkner left the children with a baby sitter, did not return to pick them up at the appointed time, and finally returned for the children 5 days later. The home occupied by Marjean Kinkner and the children at this time was described as dirty, smelling of urine, having dirty diapers and rotten food about, with dirty dishes in the sink, and having dirty and unmade beds. Although the children's parents were not divorced, Marjean Kinkner then came to York, Nebraska, with one Paul Evans and commenced living with him. At about this time, Michael Kinkner sustained bodily injuries, including bite marks on his buttocks, bruises on his legs, and serious head injuries necessitating a skull operation described as a bilateral coronal trephine. The cause of his injuries was not established, but they were of such a nature that it is reasonable to conclude that Michael was a "battered" child. The sheriff was called to the apartment occupied by Marjean Kinkner, Paul Evans, and the children on June 28, 1969. He found a fight in progress with Paul Evans pushing a butcher knife against Marjean's throat. After being placed in a foster home, Karla Kinkner was highly nervous for a time, appeared to be afraid of any man, and stated, "Paul beat my mommy up and there was blood all over her face."

A neglected child is a child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper

or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child. Mullikin v. Lutkehuse, *supra.*

It is conceded the father of the children is unfit by reason of alcoholism. The evidence in the case shows the mother of the children to be unfit by reason of failing to maintain a reasonably clean and wholesome home, by placing the children in an immoral climate, and by exposing the children to a situation where one or both of the children were in danger of sustaining serious and permanent injuries.

Where the parents have been shown to be unfit to have the care and custody of a minor child, the primary concern of the court is the best interests and welfare of the child. Mullikin v. Lutkehuse, *supra.* Under the evidence, the trial judge was fully justified in choosing to place the children with the Department of Public Welfare in preference to the home of the maternal grandmother.

Karla Kinkner is a "neglected child" as defined by law. The care and custody of Karla Kinkner is committed to the State of Nebraska Department of Public Welfare and all parental rights of Leslie Kinkner and Marjean Kinkner are terminated. The judgment of the trial court is affirmed.

AFFIRMED.

WILLUS D. DUNNICK ET AL., APPELLANTS, V. STOCKGROWERS BANK OF MARMOUTH, A CORPORATION, ET AL., APPELLEES.
215 N. W. 2d 93

Filed February 28, 1974. No. 39080.

1. **Highways: Adverse Possession: Easements.** To establish a road or highway by prescription there must be use by the general public under a claim of right, adverse to the owner of the land, of some particular or defined line of travel. The use

must be uninterrupted and without substantial change for a period of time necessary to bar an action to recover the land.

2. **Adverse Possession: Easements.** Where the use of an easement has been adverse, notorious, and uninterrupted for the statutory period, it will be presumed to have been under a claim of right. The owner of the servient tenement is charged with knowledge of such use and acquiescence in it is implied.

3. **Evidence: Adverse Possession: Easements.** Payment of taxes is not a necessary element of proof of adverse possession unless made so by express statutory requirement.

4. **Highways: Adverse Possession: Easements.** It is not necessary that a right to a road or highway obtained by prescription or use be equal in all respects to that which would have resulted from the formal establishment of a road by statutory proceedings.

5. ———: ———: ———. The title and ownership of land acquired by adverse possession and prescriptive use by the public as a road or street is the same as it would have been if the land had been dedicated as a street or highway and accepted by the appropriate governmental entity.

Appeal from the District Court for Dakota County: JOSEPH E. MARSH, Judge. Affirmed as modified.

Ryan & Scoville and Robert G. Scoville, for appellants.

Smith, Smith & Boyd, for appellees.

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

MCCOWN, J.

This is an action to quiet title to accretion land along the Missouri River and in the City of Dakota City, Nebraska. The District Court quieted title in the plaintiffs to all the accretion land, except the extension of an alley and a road along the river bank. Title to the river road was quieted in the City of Dakota City. This appeal by plaintiffs involves only that road.

The accretion land here was originally platted as a part of the Village of Dakota City, and lies between block 273 and the Missouri River. Plaintiffs' immediate

predecessor in title acquired all of block 273 by deed dated May 11, 1952. Plaintiffs' interest in the land rests on possession since 1964 under a contract of purchase and a warranty deed to plaintiffs dated September 14, 1970. The deed conveyed all of block 273 and accretion thereto, but the warranty was limited to "that part of said real estate which is not accretion land." Plaintiffs commenced this quiet title action on November 5, 1970.

The accretion land here was east of the old high bank of the river. It was basically unenclosed and uncultivated land with timber, willows, and brush on most of it. The river road in question ran north and south along the river on the most easterly portion of the accretion land. The evidence was in some dispute as to the location of the road, the nature and extent of its use, and the period of time it had existed. There is evidence that before 1959 the road was used by hunters, fishermen, and sightseers. In 1959 some river stabilization work was done along the river bank. The road was used extensively by rock trucks during that time. There is ample evidence that from 1959 on, the road has been used continuously by the public and has been regularly maintained by the City of Dakota City. Aerial photographs in 1959 and on later dates confirm the existence of the road in the same location through the 10-year prescriptive period. The trial court found "that said City and the public have maintained and used said road continuously and adversely for more than ten years" and quieted and confirmed the fee simple title to the road in the City of Dakota City.

Plaintiffs contend that the evidence is insufficient to establish any title in the city by adverse possession or prescriptive use. To establish a road or highway by prescription there must be use by the general public under a claim of right, adverse to the owner of the land, of some particular or defined line of travel. The use must be uninterrupted and without substantial change for a

period of time necessary to bar an action to recover the land. Where the use of an easement has been adverse, notorious, and uninterrupted for the statutory period, it will be presumed to have been under a claim of right. The owner of the servient tenement is charged with knowledge of such use and acquiescence in it is implied. See State ex rel. Game, Forestation & Parks Commission v. Hull, 168 Neb. 805, 97 N. W. 2d 535. The evidence is more than sufficient to support the factual findings as to adverse possession and prescriptive use for the statutory period of 10 years.

Plaintiffs also contend that a governmental subdivision which has the power of eminent domain is barred as a matter of law from obtaining adverse possession of real property because the Constitution prohibits the taking of property without just compensation. Adverse possession or use of real property, whether by the State or by an individual, does not diminish nor destroy the owner's rights at any time during the running of the statutory period of limitation. The statute of limitations, however, requires the owner to exercise his rights within the 10-year time period. See Commonwealth of Kentucky v. Stephens, 407 S. W. 2d 711 (Ky., 1966). See, also, Annotation, 18 A. L. R. 3d 678. It is also significant that "the public" which used and acquired the right to this road is distinct from the city. The individual members of "the public," whose combined use created the right to this road, did not have the power of eminent domain. Where "the public" has acquired rights in land by adverse prescriptive use of the land as a road or highway, the appropriate corporate governmental unit, in this case the city, holds title for the benefit of the public.

Plaintiffs also assert that the city cannot obtain any title or rights by adverse possession or use of this real estate because it accepted payment of taxes on the land from plaintiffs. Cases cited in support of the proposition

are largely from states which have statutes requiring payment of taxes on property as a necessary element of proof of adverse possession. Payment of taxes is not a necessary element of adverse possession unless made so by express statutory requirement. There is no such statutory provision in this state. The payment of taxes is an element and circumstance which may be considered together with all the circumstances of the case with respect to the subject of adverse possession. Wells v. Tietge, 143 Neb. 230, 9 N. W. 2d 180. In view of the nature and description of the land, and the facts and circumstances here, the acceptance of taxes by the city did not create an estoppel nor bar its acquisition of title through adverse possession and use of the property by the public.

An issue remains as to the nature of title to the road which is to be held by the city. The decree of the District Court assigned a fee simple title to the city but did not specify any purpose for use. It is not necessary that a right to a road or highway obtained by prescription or use be equal in all respects to that which would have resulted from the formal establishment of a road by statutory proceedings. State ex rel. Game, Forestation & Parks Commission v. Hull, 168 Neb. 805, 97 N. W. 2d 535. Nevertheless, we think the Hull case clearly indicates that the nature of public rights in a highway acquired by prescriptive use should be equated with those flowing from an implied dedication of the land as a road or highway. We therefore hold that the City of Dakota City holds title to the road involved here for use as a public street, and the nature and extent of its title and ownership is the same as it would have been if the road described in the decree had been dedicated as a street and accepted by the city on the date of the decree. The decree is modified accordingly.

AFFIRMED AS MODIFIED.

NEWTON, J., concurring.

I concur in the result arrived at in the majority opinion but would clarify the nature of the interest acquired by the City of Dakota City.

It is the rule in this jurisdiction that "the title of a street vested in a municipality is not a fee simple title absolute but a qualified base or determinable fee and that the title which the municipality has is held in trust for the purposes for which the street is dedicated." Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N. W. 2d 76. See, also, Dell v. City of Lincoln, 170 Neb. 176, 102 N. W. 2d 62; Seefus v. Briley, 185 Neb. 202, 174 N. W. 2d 339. Insofar as cities of the second class are concerned, the rule remains unchanged by legislation and conforms to the general rule. It is stated in 39 Am. Jur. 2d, Highways, Streets, and Bridges, § 158, p. 531, that: "As a rule, and whether a highway is established by dedication or prescription, or by the direct action of the public authorities, the public acquires merely an easement of passage, the fee title remaining in the landowner. The general rule is that the law will not by construction effect a grant of a greater interest or estate than is essential for the public use."

In the present case we have a situation where the street has been acquired by prescription, not by dedication or formal opening under statutory proceedings. In other words, the public has acquired an easement. There has not been a conveyance of the fee. The fee has simply been subjected to the easement permitting the use of the land for purposes of travel by the public. " 'If an easement is acquired by prescription, the purpose for which the easement may be used is limited by the user under which the easement was acquired. The presumption of a grant is afforded only because possession amounting to a continuous claim of title has been acquiesced in for a period necessary to give a prescriptive right. Therefore, the presumed grant can

never extend further than the user in which the other party has acquiesced.' * * *

" 'The creation of a private way does not take away from the owner of the land over which it passes any portion of the fee of the soil. Regardless of how acquired, a private way carries with it by implication only such incidents as are necessary to its reasonable enjoyment.' " Drieth v. Dormer, 148 Neb. 422, 27 N. W. 2d 843. See, also, Elsasser v. Szymanski, 163 Neb. 65, 77 N. W. 2d 815.

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

WILLIE NARED, APPELLEE, V. SCHOOL DISTRICT OF OMAHA IN THE COUNTY OF DOUGLAS, IN THE STATE OF NEBRASKA, APPELLANT, IMPLEADED WITH CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

215 N. W. 2d 115

Filed February 28, 1974. No. 39156.

Negligence: Police Officers: Licensees. A police officer who is called to investigate a burglary on premises and is injured as a consequence of a condition upon a portion of the premises not open to the public has the status of a licensee. The occupier of the premises owes to the licensee the duty to warn, if an opportunity is afforded, of hidden dangers known to the occupier but unknown to and not readily observable by the licensee. The means by which or the person from whom notice comes to the officer or the police department of the need for the officer's services is immaterial to a determination of his status.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded with directions to dismiss.

Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellant.

J. V. Benesch and Alfred A. Fiedler, for appellee Nared.

George Selders, for appellee City of Omaha.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, McCOWN, NEWTON, and CLINTON, JJ., and FLORY, District Judge.

CLINTON, J.

Plaintiff, a policeman, was injured when he fell through a false ceiling at Kellom School in Omaha while investigating a report of a possible burglary in progress. He bases this action on certain claims of negligence on the part of the school district. The defendant school district denied negligence and alleged contributory negligence and assumption of risk. The case was filed under the Political Subdivisions Tort Claims Act and was therefore tried by the court alone. Plaintiff was awarded a judgment. The defendant school district appeals. We reverse and direct dismissal.

On the night of August 10, 1971, the plaintiff and another officer responded to a radio call from their headquarters, apparently initiated as a result of a signal from an automatic alarm system at the school which was directly connected with police headquarters. Upon arrival at the school the officers captured one juvenile intruder and searched for others who had been observed. In the course of searching the building they discovered an open trap door or scuttle hole in the ceiling of a janitor's closet on the second floor of the school. The scuttle hole opened upon the air space between the roof of the building and the false ceiling of the second floor. Following a fruitless attempt to turn on lights in the attic space, the plaintiff, using closet shelves as a ladder, climbed into the attic and with the aid of a flashlight began his search. The scuttle hole opened upon a catwalk which extended through the attic a distance of 104 feet. The officer proceeded down the catwalk searching with his flashlight. The catwalk consisted of two parallel widths of plank laid upon wooden or steel

stirrups which in turn were supported from the ceiling by steel straps. The floor of the catwalk was immediately above the false ceiling and adjacent to the catwalk on both sides at about floor level were various utility pipes. After the plaintiff had moved along the catwalk for 50 or 75 feet he stumbled from the catwalk and fell through the false ceiling to the floor 10 feet below. He testified: "I just stumbled and fell. . . . Q Did you trip over some object as you fell? A I would say so, yes. . . . Q And you did feel yourself tripping? A Falling to the left of the catwalk there." Plaintiff was unable to identify any object over which he tripped. However, photographs taken a few days after the accident disclose a loose 2″ x 4″ perhaps 5 or 6 feet in length with a single nail projecting from each end and resting upon some utility pipes. One end of the board extended part way over the catwalk. The other extended over and slightly down into the break in the false ceiling made by the plaintiff when he fell. There was no evidence to indicate how the 2″ x 4″ came to be there, or how long it had been there, or that any of the agents of the school district had notice of its presence.

The trial court found that the plaintiff had stumbled over the board and that the attic did not have any operable lighting system at the time. It adopted the plaintiff's theory that he was an invitee by reason of the alarm having been given by the automatic signal connected directly to the police building; that the position of the board in the dark attic constituted a dangerous condition; and that the school district should have anticipated possible use of the catwalk by investigating officers. The District Court further found that the defendant had a duty to make the attic area "safe as to those dangerous conditions of which it knew or in the exercise of reasonable care should know, or to give the invitee warning adequate to enable him to avoid harm."

Policemen and firemen who are privileged to enter

premises in the course of their duties as public officers without reference to any express or implied invitation from the owner or occupier are in some jurisdictions held to be in the same class as a business invitee and in others to have the status of a licensee. 65 C. J. S., Negligence, §§ 63 (110), 63(111), pp. 861, 865. This court has heretofore classified firemen as licensees. Wax v. Co-Operative Refinery Assn., 154 Neb. 805, 49 N. W. 2d 707; New Omaha Thomson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89. Restatement, Torts 2d, § 345, p. 226, classifies such persons generally as licensees, but gives them the status of invitees if they are on the premises for a public purpose and suffer harm because of a condition on a part of the premises held open to the public. The duty of the possessor of the premises to the public officer under these separate classifications is illustrated by the following examples taken from Restatement: "1. A is in possession of a building in which, on a back stairway not open to the public, there is a step which is dangerously defective. A and his employees do not know of the defect, but by the exercise of reasonable care could easily discover it. In the middle of the night a fire breaks out in the building, and B, a public fireman, comes to extinguish it. He ascends the stairway, and is injured by the collapse of the defective step. A is not liable to B. . . .

"3. The same facts as in Illustration 1, except that A knows that the step is dangerously defective, is present when B arrives and starts to ascend the stair, and fails to warn B. A is subject to liability to B. . . .

"5. A, a police officer, enters B's department store, which at the time is open to the public, to make an official inquiry concerning a former employee. On his way into the store he is injured by the collapse of the entrance steps. B does not know of the defective condition of the steps, but by the exercise of reasonable care in in-

spection should have discovered it. A is an invitee, and B is subject to liability to him." Restatement, Torts 2d, § 345, pp. 228, 229.

Restatement does not make the officer's status depend upon whether or not the occupier has specifically requested the officer's services or not, nor upon the means by which he is notified that his services are required. We can see no reason why the duty which an occupier owes to a public officer who rightfully comes upon the premises in the exercise of his duty should depend upon the means by which or the person by whom he is notified that he is needed. Whether he is summoned by the occupier or by some third party, or whether because of facts which come to his attention he acts on his own initiative, should not affect the measure or nature of the duty of the occupier to him. We therefore do not in this case regard the fact that the school burglary alarm was directly connected to the police station as having any significance. An express invitation does not by itself create the status of invitee. Restatement, Torts 2d, § 332b, p. 176. The cases which have noted the question do not suggest that an invitation in the case of a public officer has any effect on his status. Lunt v. Post Printing & Publishing Co., 48 Colo. 316, 110 P. 203; Baxley v. Williams Constr. Co., 98 Ga. App. 662, 106 S. E. 2d 799; Roberts v. Rosenblatt, 146 Conn. 110, 148 A. 2d 142; Baker v. Otis Elevator Co., 78 App. Div. 513, 79 N. Y. Supp. 663. We cite the above four cases only for the limited purpose mentioned.

It is clear under the evidence that the plaintiff was injured as a result of the condition on a portion of the premises not held open to the public. He was therefore a licensee under the rules set forth in Restatement, Torts 2d, § 345, p. 226, as well as the past precedents of this court. The duty of the defendant to the plaintiff under the circumstances was only to warn, if there was an opportunity to do so, of a hidden danger known to the

defendant but unknown to the plaintiff and unobservable by the plaintiff in the exercise of ordinary care. Wax v. Co-Operative Refinery Assn., *supra;* Johnson v. Goodier, 182 Neb. 172, 153 N. W. 2d 445.

In this case there is no evidence that the defendant knew of the condition or that it had any opportunity to warn of it. No agent or employee of the defendant was present on the premises when the accident occurred. It cannot be said that the defendant had any reason to anticipate the presence of the plaintiff in the area. It is clear that under both the past decisions of this court and under Restatement rules the defendant did not breach any duty it owed the plaintiff.

Building codes and ordinances cited by the plaintiff as affecting the defendant's duty have been closely examined and they are clearly not applicable.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

ACTION REALTY CO., INC., APPELLANT, V. MARJORIE L. MILLER, FORMERLY MARJORIE L. AMEN, ET AL., APPELLEES.
215 N. W. 2d 629

Filed February 28, 1974. No. 39165.

1. **Judgments: Liens: Property.** A judgment is not a lien upon the judgment debtor's equitable interest in real estate until the commencement of the creditor's bill to subject the equitable interest to the payment of the judgment or until execution is levied upon the interest of a judgment debtor who is in possession of the real estate in which he has the equitable interest.
2. ———: ———: ———. A lien of a judgment does not attach to the mere legal title of a judgment debtor where the equitable and beneficial interest is in another.
3. ———: ———: ———. The interest of a vendee under the contract to purchase where no deed has been delivered is an equitable one which may be subjected to the judgment of a creditor of the vendee by appropriate proceedings.
4. **Judgments: Liens: Divorce: Alimony.** The lien of a judgment

for child support or alimony constitutes a lien the same as other monetary judgments and is a lien not only for past due installments but also as security for installments to fall due in the future.

5. ———: ———: ———: ———. A party acquiring an interest in real estate after the judgment lien for child support has attached takes the property subject to the lien of the judgment for all installments due or to become due.

6. **Deeds: Escrows.** The general rule is that the delivery by the grantor of a deed to a third person to hold until the happening of a contingency does not operate as a delivery.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded.

Muffly & Watkins and William M. Berlowitz, for appellant.

Pierson, Pierson & Fitchett and John F. Akin, for appellees.

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

CLINTON, J.

The question involved on this appeal is whether or not a judgment for child support rendered on August 13, 1958, against Ronald J. Amen became a lien on certain real estate. The plaintiff, a purchaser of the property in question, sought to quiet title as against the claimed lien. The District Court quieted title in the plaintiff subject to the judgment lien for child support. The plaintiff appeals. We determine the judgment never became a lien upon the interest of Ronald J. Amen and reverse and remand the cause with directions to grant the relief prayed for.

On appeal of an action in equity to this court we try the case de novo. Wecker v. Wecker, 166 Neb. 19, 87 N. W. 2d 624; State ex rel. Heintze v. County of Adams, 162 Neb. 127, 75 N. W. 2d 539.

There is no fundamental conflict in the evidence nor, as we see it, in the inferences to be drawn therefrom and on trial de novo we determine the facts to be as follows: On August 13, 1958, the defendant, Marjorie L. Miller, then Marjorie L. Amen, was divorced from Ronald J. Amen and was awarded judgment for child support in the amount of $50 per month. On August 13, 1963, the award was increased to $80 per month. Amen, on or about June 18, 1962, entered into a contract to purchase the subject property from one Payne. The contract is not in evidence, but such evidence as is before us indicates that it required a cash downpayment of $250 and monthly installments over a period of years. The $250 was paid by Amen to Payne. A deed from Payne to Amen and his present wife was executed but not delivered. On or about August 14, 1962, Amen and his wife entered into a written contract to sell the property to Brocks. At that time an escrow agreement was executed as well as a deed from Amens to Brocks. This deed, together with a copy of the contract, was placed in escrow with the Union Bank. The escrow agreement signed by the Amens and the Brocks referred to deposit of one deed and made reference to the contract of sale. The escrow agreement contained the following instructions: "4. DELIVERY INSTRUCTIONS: Deliver to buyer upon fulfillment of this contract or upon the signatures of all of the parties whose signatures are attached hereto. 5. OTHER INSTRUCTIONS: Escrow office will set up savings account for sellers and place collections to their account as received. *Escrow office will pay on escrow account of Lorango D. Payne and Frances G. Payne. Husband and wife Forty five and no/100 ($45.00) dollars each month from sellers savings account until fulfillment of this contract.*" (Emphasis supplied.)

The contract between Amen and Brock called for a purchase price of $3,600 with a downpayment of $900

and the balance, including interest, at the rate of $55 per month. Brock made the downpayment and took possession. After Brock had made two installment payments to the escrow agent, Payne contacted Brock and the same day the two of them went together to the Union Bank escrow office. What transpired on that occasion is not shown by the evidence except by inference. Brock made all his payments to the Union Bank. In October 1965 Brock sold his interest to plaintiff Action Realty Co., Inc., and received therefor $3,500. Thereafter plaintiff made the installment payments to Union Bank and on August 1, 1966, paid the balance of $700.88. At that time it received from Union Bank the deeds from Payne to Amen and from Amen to Brock. Both deeds were recorded on August 2, 1966. Neither Amen nor Brock had at any time possession of either of these deeds. The evidence is not clear as to the time when the Payne-Amen deed was delivered to the Union Bank. The evidence is clear, however, that there was never any delivery to Amen. It is a reasonable inference from the evidence that Payne, probably on the occasion of his visit to the Union Bank in the company of Brock, placed the deed in escrow for delivery under the same terms as provided under the written escrow agreement between Amen and Brock.

Not until after August 1, 1966, did the plaintiff make any record check or cause an abstract to be made and examined. If a lien of the child support judgment attached to the interest of Amen then the plaintiff took subject to it.

The plaintiff's theory is that the lien of a judgment does not attach to an equitable interest; that Amen had only an equitable interest which continued only until final payment was made to the bank as escrow agent just before delivery of the deed; and that when the deed from Payne together with the deed from Amen to Brock were delivered to the plaintiff by the agent on

August 1, 1966, only the bare legal title passed through Amen and the lien can affect only the judgment debtor's actual interest which was then nil.

The following principles from the decided cases in this jurisdiction support the plaintiff's position. A judgment is not a lien upon the judgment debtor's equitable interest in real estate until the commencement of the creditor's bill to subject the equitable interest to the payment of the judgment or until execution is levied upon the interest of a judgment debtor who is in possession of the real estate in which he has the equitable interest. Nowka v. Nowka, 157 Neb. 57, 58 N. W. 2d 600; Nessler v. Neher, 18 Neb. 649, 26 N. W. 471; Rosenfield v. Chada, 12 Neb. 25, 10 N. W. 465; 92 C. J. S., Vendor & Purchaser, § 315c, p. 206; Flint v. Chaloupka, 72 Neb. 34, 99 N. W. 825; First Nat. Bank of Plattsmouth v. Tighe, 49 Neb. 299, 68 N. W. 490; Steven v. Ford, 187 Neb. 401, 191 N. W. 2d 446; First Nat. Bank v. Spelts, 94 Neb. 387, 143 N. W. 218.

The lien of a judgment does not attach to the mere legal title where the equitable and beneficial interest is in another. Cresswell v. McCaig, 11 Neb. 222, 9 N. W. 52; Withnell v. Courtland Wagon Co., 25 F. 372; 49 C. J. S., Judgments, § 481, p. 920; Knaak v. Brown, 115 Neb. 260, 212 N. W. 431, 51 A. L. R. 237; First Nat. Bank v. Spelts, *supra;* Roberts v. Robinson, 49 Neb. 717, 68 N. W. 1035.

The interest of a vendee under the contract to purchase where no deed has been delivered is an equitable one which may be subjected to the judgment of a creditor of the vendee by appropriate proceedings. 92 C. J. S., Vendor & Purchaser, § 315, p. 205; 49 C. J. S., Judgments, § 480 b, p. 920; Rosenfield v. Chada, *supra;* Nessler v. Neher, *supra;* Nowka v. Nowka, *supra.*

The lien of a judgment for child support or alimony constitutes a lien the same as other monetary judgments and is a lien not only for past due installments

but also as security for installments to fall due in the future. Nygren v. Nygren, 42 Neb. 408, 60 N. W. 885; Wharton v. Jackson, 107 Neb. 288, 185 N. W. 428; Lynch v. Rohan, 116 Neb. 820, 219 N. W. 239.

A party acquiring an interest in real estate after the judgment lien for child support has attached takes the property subject to the lien of the judgment for all installments due or to become due. McCord v. McCord, 128 Neb. 230, 258 N. W. 474.

The appellee Miller relies upon Milligan v. Milligan, 161 Neb. 499, 74 N. W. 2d 74, to support the proposition that delivery to the escrow agent of the Payne to Amen deed passed legal title to Amen while he still had a beneficial interest. The cited case does not support the position of the appellee. In that case the evidence showed that there had been an unconditional delivery of the deed to the third party escrowee. In this case despite the paucity of evidence as to the circumstances under which the Amen-Payne deed came into the escrow agent's possession, it is clear that there was no unconditional delivery and that neither Amen nor any other person for him had unconditional possession of the deed. The general rule is that the delivery by the grantor of a deed to a third person to hold until the happening of a contingency does not operate as a delivery. Ladman v. Ladman, 130 Neb. 913, 267 N. W. 188; Mason v. Strickland, 73 Neb. 783, 103 N. W. 458; Soward v. Moss, 59 Neb. 71, 80 N. W. 268.

Nowka v. Nowka, *supra,* was a creditor's bill to subject the equitable interest of the defendant (legal title being held by his wife) in certain real estate to the lien of a child support judgment. This court there said: "At the time of commencement of this action the title of Frank Nowka as an individual was equitable. Prior thereto no lien for the judgments for alimony and child support existed against it. The lien came into existence with the service of summons in this action."

Previous to 1883 alimony judgments were not liens upon real estate. In that year the Legislature enacted the predecessors to sections 42-319, 42-320, and 42-323, R. R. S. 1943. Thereafter judgments for alimony and child support became liens upon real estate. Nygren v. Nygren, *supra*. The portions of the statute relevant in this case were not changed until 1972. The pertinent provisions are: "All judgments and orders for payment of alimony or of maintenance in actions of divorce or maintenance shall be liens upon property in like manner as in other actions, *and may in the same manner be enforced and collected by executions and proceedings in aid thereof, or other action or process as other judgments.*" (Emphasis supplied.) The same statute was thereafter amended by provisions for the release of judgments for "maintenance" of a child and to provide for the period of limitation on the lien for alimony and for "child maintenance." § 42-319, R. R. S. 1943. "In all cases where alimony or other allowance shall be decreed for the wife or for the children, the court may require sufficient security to be given by the husband for the payment thereof, according to the terms of the decree. Upon the neglect or refusal of the husband to give such security, or upon his failure to pay such alimony or allowance, his real or personal estate may be sold as upon execution for the payment of any sums due upon such decree. . . . Judgments and decrees for alimony or maintenance shall be liens upon the property of the husband, and may be enforced and collected in the same manner as other judgments of the court wherein they are rendered." § 42-323, R. R. S. 1943.

The 1972 amendment retains the following provision: "All judgments and orders for payment of money under sections 42-347 to 42-379 shall be liens upon property as in other actions and may be enforced or collected by execution and the means authorized for collection of money judgments." § 42-371, R. S. Supp., 1972.

It is clear that under the statutes and decisions of this court the lien of the judgment for child support did not attach to the equitable interest of Amen in the subject property. No appropriate steps were taken to subject his interest in that property to the lien while his equitable interest remained. When the deed from Payne to Amen was delivered to the plaintiff only the bare legal title without any existing beneficial interest passed through Amen.

The judgment of the lower court is reversed and the cause remanded with directions to grant the relief prayed for.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND WINGATE, APPELLANT.

215 N. W. 2d 90

Filed February 28, 1974. No. 39167.

1. **Criminal Law: Intent: Assault and Battery.** In a prosecution for violation of section 28-729.01, R. S. Supp., 1972, specific intent is not an essential element of the crime.
2. **Criminal Law: Sheriffs: Trespass.** A county sheriff serving a distress warrant and levying on personal property is not a trespasser in a prosecution under section 28-729.01, R. S. Supp., 1972.
3. **Criminal Law: Instructions.** An instruction based on a statute is not erroneous if it correctly states the substance of the statute. It is not necessary to quote the statute verbatim.

Appeal from the District Court for Madison County: MERRITT C. WARREN, Judge. Affirmed.

Lathrop, Albracht & Dolan, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH,

McCOWN, NEWTON, and CLINTON, JJ., and FLORY, District Judge.

FLORY, District Judge.

Appellant, Raymond Wingate, was convicted by a jury of forcibly assaulting and resisting, with a dangerous weapon, a law enforcement officer while engaged in the performance of his official duties. § 28-729.01, R. S. Supp., 1972.

From the evidence the jury could easily have found beyond a reasonable doubt the following facts: The sheriff of Madison County, Nebraska, with two deputies, went to the defendant's farm about 10:30 a.m., on October 27, 1972, to serve a distress warrant for delinquent personal property taxes. They were in full uniform with badges and shoulder insignia. Previously a courtesy notice of the delinquent taxes which had been mailed to the defendant was returned with an obscene suggestion as to what to do with it. On arrival at the defendant's home they knocked on the door and receiving no response went around the farm buildings looking for the defendant and personal property upon which to levy. The sheriff started a tractor intending to levy on it. The defendant then came out of the house with a loaded shotgun, ran towards them pointing the gun at the sheriff, and threatened to shoot him. With the gun continually pointed at him, the sheriff and the deputies backed the defendant up a distance of some 200 feet through a gate to the porch of the house where he was disarmed by one of the deputies. No weapons were drawn by the sheriff or his deputies. It was later learned that the tractor belonged to defendant's father. The sheriff and one deputy had had previous contacts with defendant in their official capacity. The defendant himself testified that he recognized the sheriff when he advanced to within 10 feet of him before the retreat to the house.

Defendant contends that the trial court erred in not instructing that intent is an essential element of the crime charged. Intent is not an essential element and there was no error in failure to so instruct.

Defendant contends that the trial court erred in failing to instruct that the sheriff was a trespasser, citing Gilbert v. Rothe, 106 Neb. 549, 184 N. W. 119, and therefore was not in the performance of his official duties. The cited case was a civil case against a sheriff for damages for wrongful levy on personal property and clearly is not applicable. In this case the sheriff was in the performance of his official duties and was not a trespasser as a matter of law. An extensive instruction on the mandatory statutory duties of a sheriff in collecting delinquent personal property taxes was given.

There was conflicting testimony as to when and how the defendant was appraised of the fact that the officers were there to serve the distress warrant and levy on personal property. However, the defendant's own testimony to the effect that he recognized the sheriff before the retreat to the house clearly constituted a continuing assault even though the initial assault might have been found to be lawful.

Defendant also contends that the portion of an instruction based on section 28-838 (1) (a), R. S. Supp., 1972, was erroneous in that the instruction was not verbatim with the language of the section. The section reads: "*(1) Subject to the provisions of this section and of section 28-841,* the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary: (a) To prevent or terminate *an unlawful entry or other trespass upon land or a trespass against or* the unlawful carrying away of tangible, movable property; provided, that such *land or* movable property is, or is believed by the actor to be, in his possession or in the possession of another person for whose protection he acts; * * *." The italicized por-

tions were omitted from the instruction given. Since the sheriff was not a trespasser there was no error.

Finally, defendant complains that the instruction "The intentional pointing of a loaded gun at another person is ordinarily an unlawful assault" was erroneous. The instruction is a correct statement of the law and when considered with all the other instructions there was no error.

The defendant did not tender any instructions.

The defendant's trial was without error and we affirm the conviction.

AFFIRMED.

LOIS M. WESTERDALE, A WIDOW, BY IRMA L. HERFORDT, HER SISTER AND NEXT FRIEND, APPELLEE AND CROSS-APPELLANT, V. CARL W. JOHNSON ET AL., APPELLANTS AND CROSS-APPELLEES.

215 N. W. 2d 102

Filed February 28, 1974. No. 39189.

1. **Insane Persons.** It is within the discretion of the trial court to permit an action to be maintained by the next friend of a person who has not been adjudged incompetent but is incapable of managing his affairs and has no appointed guardian.
2. **Insane Persons: Deeds.** To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he could not understand and comprehend the purport and effect of what he was then doing.

Appeal from the District Court for York County: HOWARD V. KANOUFF, Judge. Affirmed.

Mills & Mills and Mattson, Ricketts, Gourlay & Lewis, for appellants.

Herman Ginsburg and Gordon B. Fillman, for appellee.

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

BOSLAUGH, J.

This is an action by Irma L. Herfordt as next friend to set aside a deed from Lois M. Westerdale to the defendants, Carl W. Johnson and his wife. For convenience, the grantor, Mrs. Westerdale, will be referred to as the plaintiff. The petition alleged the plaintiff was incompetent at the time the conveyance was made and that it was procured by fraud and misrepresentation. The trial court found the deed should be set aside and ordered the defendants to reconvey the property. The defendants appeal.

The first question presented is whether the action could be maintained by a next friend. Irma L. Herfordt, the next friend, was a sister of the plaintiff and was her closest living relative. The plaintiff was past 82 years of age at the time the suit was brought and had been a resident of a nursing home since February 23, 1968. At the time of trial, the plaintiff was hospitalized and fully incompetent. A conservator had been appointed for the plaintiff on August 19, 1969, but he declined to bring the action.

It is within the discretion of the trial court to permit an action to be maintained by the next friend of a person who has not been adjudged incompetent but is incapable of managing his affairs and has no appointed guardian. Fiala v. Tomek, 164 Neb. 20, 81 N. W. 2d 691. See, also, Wager v. Wagoner, 53 Neb. 511, 73 N. W. 937; Stephan v. Prairie Life Ins. Co., 113 Neb. 469, 203 N. W. 626.

The provisions of law for the managing of estates by guardians are generally applicable to conservators, but a conservator is not the equivalent of a guardian for all purposes. § 38-903, R. R. S. 1943. Even where a guardian has been appointed, there is statutory author-

ity for the ward to be represented by another person appointed for that purpose as guardian or next friend. § 38-502, R. R. S. 1943.

In this case the conservator had declined to bring the action. By the time the case was ready for trial the plaintiff had become fully incompetent. Under these circumstances it was within the discretion of the trial court to permit the action to proceed with the plaintiff represented by a next friend.

The land involved in this case was a quarter-section of farmland in York County, Nebraska. It had a value of between $60,000 and $80,000. The defendant Carl W. Johnson was a tenant of the plaintiff. His wife's grandmother was a first cousin of the plaintiff. The defendants had entertained the plaintiff in their home on a number of occasions.

In December 1968, Johnson inquired concerning the possibility of purchasing a tract of land owned by the plaintiff that Johnson had been farming. The plaintiff replied she had only a life interest in the land Johnson had been farming but said her York County land could be sold. On January 2, 1969, the plaintiff executed a listing agreement for the sale of the York County land for $40,000. The agreement called for a 5 percent commission. The plaintiff instructed the agent, James A. Rosenquist, to offer the land first to Johnson. If Johnson did not wish to buy it, it was to be offered next to Dennis Hanson, another tenant of the plaintiff.

After the listing agreement had been signed, Rosenquist contacted Johnson and he agreed to purchase the land for $40,000. Johnson had some difficulty in arranging financing so an installment contract was entered into. The balance of the consideration was paid on June 14, 1969, and the deed was recorded on June 17, 1969.

The evidence as to the mental competency of the plaintiff is conflicting. To set aside a deed on the

ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that she could not understand and comprehend the purport and effect of what she was then doing. Conry v. Langdon, 181 Neb. 53, 146 N. W. 2d 782.

Defendants called a number of witnesses who testified they believed the plaintiff was mentally competent in January 1969. Some of these witnesses were interested in the transaction to varying degrees. Others were not familiar with all the circumstances or had not had much contact with the plaintiff.

The plaintiff's witnesses testified the plaintiff was mentally incompetent. Dr. W. S. Kilgore, who had been the personal physician of the plaintiff for 25 years, testified she suffered from hypertension and general cerebral arteriosclerosis. In 1967, he found cerebral deterioration had become progressively more severe and the plaintiff was entirely disoriented as to time and place. At that time the plaintiff was moved from her farm home into the home of Mr. and Mrs. Larry Christenson where the plaintiff resided until she was admitted to the nursing home. Dr. Kilgore was of the opinion the plaintiff was entirely incompetent in January 1969.

Other witnesses described incidents which indicated the plaintiff was disoriented and confused much of the time after she entered the nursing home. There was evidence of bizarre conduct in the nursing home in regard to the personal habits and clothing of the plaintiff. She appeared to be careless in handling checks and other valuable business papers, some of which cannot be found. A month after the York County land had been sold, she signed up for the farm program on the same land. On March 17, 1969, she signed a written lease of a farm in Polk County to Dennis Hanson. On December 18, 1968, she had signed a written lease of

the same property to Johnson for 2 years.

The circumstances of the transaction itself tend to support the contentions of the plaintiff. The sale amounted to a gift to the defendants of from one-third to one-half of the value of the property, yet the plaintiff employed a real estate agent and paid him $2,000 to accomplish the gift.

There was some evidence which tended to support the contentions of the defendants, but we believe the record sustains a finding that the plaintiff was not competent at the time of the sale of the York County land to the defendants. It is unnecessary to consider the allegations and proof in regard to the claim of fraud and misrepresentation.

The judgment required the defendants to reconvey the property to the plaintiff; required the plaintiff to refund the consideration for the property to the defendants; and ordered an accounting between the parties. By cross-appeal the plaintiff asserts she should be entitled to credit for any part of the purchase price given to the defendants at or about the time of the conveyance.

The trial court retained jurisdiction for the purpose of the accounting. The matter of credits is an issue which was reserved by the trial court and will be considered and determined as a part of the accounting between the parties. There is no merit to the cross-appeal.

The judgment of the District Court is affirmed.

AFFIRMED.

IN RE ESTATE OF CLARA GLOE, DECEASED.
ROBERT SPINAR, APPELLANT, V. VIOLA WALL ET AL., APPELLEES.
215 N. W. 2d 98

Filed February 28, 1974. No. 39196.

1. **Wills: Undue Influence.** In a will contest upon the ground of

undue influence, the burden is upon the contestants to prove by a preponderance of the evidence: That the testatrix was susceptible to undue influence; that opportunity to exercise it existed; that there was a disposition to exercise it; and that the result clearly appears to be the effect of such influence.

2. **Wills: Trial: Undue Influence.** In a will contest where undue influence is alleged, that issue should be submitted to the jury when the facts and circumstances proved, together with inferences fairly deducible therefrom, are such that reasonable minds might conclude that the will was not the free and voluntary act of testatrix but the result of undue influence exercised upon her.
3. **Wills: Undue Influence.** Where a will contains a bequest due to undue influence, the will may stand as to other bequests not so procured.
4. ———: ———. Undue influence exercised by anyone, whether he or another gains by its exercise, renders the will or part thereof thus procured worthless.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Herman Ginsburg and Jack L. Craven, for appellant.

Steinacher & Vosoba, for appellees.

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

MCCOWN, J.

This is an action to contest the admission of a will to probate. Nephews and nieces alleged a lack of testamentary capacity, and undue influence exerted upon the testatrix. The will was admitted to probate in county court. The contestants appealed to the District Court. On trial in the District Court, the issues of testamentary capacity and undue influence were submitted to the jury. The jury found Item V, the residual provition, invalid because of undue influence and found the rest of the will to be valid. The District Court entered judgment on the verdict and the proponent of the will has appealed.

Clara Gloe died July 9, 1970, at the age of 85, leaving a probate estate of $432,659.89. She was a widow who had no children or grandchildren. She had 10 brothers and sisters, 7 of whom predeceased her. Four sisters, however, were living on the date of execution of the will and are the four individuals named in the critical Item V of the will. She also had 19 nephews and nieces.

The testatrix lived on a farm near Crete, in Saline County, Nebraska. She had lived in extremely frugal fashion during her lifetime. She did not spend money on clothing, furniture, or household goods. She slept on a cot in the kitchen near a wood and cob burning stove which she used for heat. Her quarters were smoked and dirty. She worked hard, but spent little. Visits from her family were infrequent prior to 1967. Louise Davis, a sister of the testatrix, and Mary Vasak, an old friend of the testatrix, began taking care of her business affairs in the spring of 1967 under a power of attorney.

In July 1967, testatrix was hospitalized with an infection, and arteriosclerosis with possible cerebrovascular insufficiency was diagnosed. When the testatrix was released from the hospital, her sister, Emma Gloe, who had lived in Lincoln, Nebraska, came to live with her. From that time on testatrix' sisters, Helen Hall and Louise Davis, and testatrix' longtime friend, Mary Vasak, who lived in Crete, Nebraska, were frequent visitors. The fourth living sister, Matilda Mennenga, lived in California. Between September 4, 1967, and August 12, 1968, the testatrix made gifts by checks to her four living sisters and the descendants and spouses of two of them in the total sum of $119,500. She also made two gifts to Mary Vasak which totaled $9,000.

The record does not indicate that Clara Gloe had made a will before 1968. From March 9, 1968, to January 14, 1969, Clara Gloe made four separate wills, drafted by three different attorneys. In each of the

four wills the testatrix left all the residue of her property one-fourth to each of her sisters, Emma Gloe, Louise Davis, Helen Hall, and Matilda Mennenga. The four wills were executed in March of 1968, June of 1968, August of 1968, and January of 1969, respectively. The will of January 14, 1969, was the one admitted to probate, and the residual provision to the four sisters was the paragraph which was found by the jury to be invalid because of undue influence. Other provisions of the will bequeathed $5,000 each to two nephews and one niece; $10,000 to the Crete Memorial Hospital; and $10,000 in trust for a longtime employee for his lifetime with the balance to the same hospital. The final paragraph of the will appointed Robert Spinar as executor. Spinar had been appointed as conservator for the testatrix in November of 1968.

The overall pattern of the four wills, as well as the residual clause, was essentially similar. Major differences were that 12 nephews and nieces were left $10 each and 7 nephews and nieces were left $5,000 each in the first will of March 1968. Subsequent wills omitted all legacies to nieces and nephews except the three $5,000 bequests, and made changes in executors and trustees. Under the January 14, 1969, will, after the payment of the $35,000 of specific bequests, the remainder of the estate was left one-fourth to each of the four sisters under Item V of the will.

The four wills were apparently executed in each instance at the instigation of either Emma Gloe and Helen Hall, on the one hand, or Louise Davis and Mary Vasak, on the other, and the record indicates the activities of both factions in dealing with the affairs of the testatrix. There is evidence that on various occasions Emma Gloe had hid the testatrix' canceled checks, bonds, bank book, and purse, and that the actions upset the testatrix. Mary Vasak, a longtime friend of the testatrix, kept a diary of her contacts with the tes-

tatrix and her family. That diary and Mary Vasak's testimony were the primary sources of evidence of undue influence. There was also evidence from Emma Gloe's son, Alvin, that Louise Davis thought she was going to get all the testatrix' property when the testatrix died. There is evidence that both physical and mental pressures were used on the testatrix. Emma Gloe threatened to leave when the testatrix needed someone with her and was rude to friends who came to call. She shook her fist at the testatrix in the yard on one occasion, telling her that she had better go downtown and sign some paper as Helen Hall had directed. There is evidence that Emma Gloe pushed the testatrix to the floor on one occasion and hit her with a shovel on another, although both incidents were denied. Numerous occasions are recorded in the "diary" of specific expressions of frustration and helplessness on the part of the testatrix. She stated on one occasion: "I have to do just what they want all the time." On another: "I have to do as they say. There is nothing else I can do." And on another: "One tells me this and the next that. I don't know what to do any more."

The issues of testamentary capacity and undue influence were both submitted to the jury under instructions that it might find and determine that all or only a portion of the will was invalid because of undue influence. The jury determined that Item V was invalid because of undue influence and found the rest of the will to be valid. Item V provided:

"I give, bequeath and devise all of the rest, residue and remainder of my property, both real, personal or mixed, and wheresoever situate, as follows:

One-Fourth (¼) to my sister, Emma Gloe;

One-Fourth (¼) to my sister, Louise Davis;

One-Fourth (¼) to my sister, Helen Hall, and

One-Fourth (¼) to my sister, Matilda Mennenga, to be theirs absolutely."

The proponent's assignments of error are based primarily on the contention that the evidence of undue influence was insufficient to meet the burden of proof placed upon the contestants, and that the issue of undue influence should not have been submitted to the jury. It is asserted that the trial court should have sustained the motion for a directed verdict in favor of the proponent.

In a will contest upon the ground of undue influence, the burden is upon the contestants to prove by a preponderance of the evidence: That the testatrix was susceptible to undue influence; that opportunity to exercise it existed; that there was a disposition to exercise it; and that the result clearly appears to be the effect of such influence. In re Estate of Bainbridge, 151 Neb. 142, 36 N. W. 2d 625. Undue influence is largely a matter of inferences from facts and circumstances surrounding the testatrix, her life, character, and mental condition, and the opportunity existing for the exercise of improper control. See In re Estate of Bainbridge, *supra*. In a will contest where undue influence is alleged, that issue should be submitted to the jury when the facts and circumstances proved, together with inferences fairly deducible therefrom, are such that reasonable minds might conclude that the will was not the free and voluntary act of testatrix but the result of undue influence exercised upon her. See Cook v. Ketchmark, 174 Neb. 222, 117 N. W. 2d 375. Here there was evidence, together with the inferences fairly deducible from it, tending to prove each of the four essential elements of undue influence and the issue was properly submitted to the jury.

Other assignments of error challenge some of the instructions because they authorize the jury to find that a provision beneficial to several individuals, one of whom is innocent of personal misconduct, may be invalidated as to the innocent individual because of un-

due influence exerted upon the testatrix by other persons. The basic contention is that Matilda Mennenga was not present in Nebraska and there is no evidence that she took part in the activities of any of the other persons charged with undue influence. Therefore it is argued that the part of Item V which benefits her should be retained as though it were contained in some other paragraph or provision of the will which was untainted by undue influence.

To support this position, the proponent relies upon In re Estate of Kajewski, 134 Neb. 485, 279 N. W. 185. That case held that where a will contains a bequest due to undue influence, the will may stand as to other bequests not so procured. The case also lends support to the general rule that where a part of a will is valid and part is invalid, the valid bequests should be sustained unless that would do injustice to the beneficiaries under the will or defeat the general intent of the testatrix. See Estate of Koller, 116 Neb. 764, 219 N. W. 4. Neither of those cases offer much comfort to the proponent here.

The portion of Item V which benefits Matilda Mennenga is an inseparable and integral part of Item V and under the evidence it was as much the result of undue influence as the rest of the paragraph. The contention that a benefit received by an individual as a result of undue influence ought to be sustained simply because she did not personally participate in bringing the undue influence to bear on the testatrix must be rejected. Item V benefited the four sisters equally. It cannot be said to be invalid as to the three sisters who actively exerted undue influence upon the testatrix but valid as to Matilda Mennenga who benefited equally by their actions.

The jury verdict found all of Item V to be invalid by virtue of undue influence and it is essentially immaterial which individual or individuals were guilty of

exercising the undue influence which produced Item V. Undue influence exercised by anyone, whether he or another gains by its exercise, renders the will or part thereof thus procured worthless. See Scholting v. Scholting, 183 Neb. 850, 164 N. W. 2d 918. Item V of the will here was wholly invalid and the instructions properly presented the issues to the jury.

The other assignments of error are without merit. The judgment of the District Court is affirmed.

AFFIRMED.

JOHN J. SOPHER, APPELLEE, V. NEBRASKA PUBLIC POWER DISTRICT, A CORPORATION, APPELLANT.

215 N. W. 2d 92

Filed February 28, 1974. No. 39202.

1. **Workmen's Compensation: Appeal and Error: Evidence.** On appeal of a workmen's compensation case to this court if there is reasonably 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.** In a claim for compensation under section 48-121 (3), R. S. Supp., 1969, it is immaterial whether an industrial disability is present or not.

Appeal from the District Court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Knapp, Tarrell, State & Yeagley and Michael T. Varn, for appellant.

Krause, Inserra, Petersen & Burkhard by Joseph P. Inserra, for appellee.

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

NEWTON, J.

This is an appeal from the District Court which af-

firmed the Workmen's Compensation Court finding that plaintiff had sustained injury to both wrists constituting a two-member injury with permanent partial disability. Defendant raises questions relative to the sufficiency of the evidence and the absence of any industrial disability. We affirm the judgment.

Plaintiff was employed by defendant as a lineman. In a fall from a platform he sustained fractures of both wrists. Although the medical evidence was conflicting, it was sufficient to sustain a finding that plaintiff sustained a permanent partial disability of his left wrist to the extent of 3 to 5 percent and to his right wrist of 18 percent. That he sustained a permanent partial disability of his right wrist appears to be conceded. It is the rule that on appeal of a workmen's compensation case to this court if there is reasonably 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. Smith v. Ruan Transport, Inc., 190 Neb. 509, 209 N. W. 2d 146. See, also, Barbaglia v. General Motors Acceptance Corp., 190 Neb. 529, 209 N. W. 2d 353.

In the present instance the plaintiff has returned to work. Is an impairment of his earning capacity and employability essential to sustain the award? Section 48-121 (3), R. S. Supp., 1969, which sets out the so-called schedule injuries and recovery therefor, provides: "In all cases involving a permanent partial loss of the use or function of any of the members mentioned in this subdivision, the compensation shall bear such relation to the amounts named in said subdivision as the disabilities bear to those produced by the injuries named therein."

We have long held that in a claim for compensation under section 48-121 (3), R. S. Supp., 1969, it is immaterial whether an industrial disability is present or not. See, Bronson v. City of Fremont, 143 Neb. 281, 9 N. W.

2d 218; Paulsen v. Martin-Nebraska Co., 147 Neb. 1012, 26 N. W. 2d 11.

No error appearing, the judgment of the District Court is affirmed.

AFFIRMED.

ELAINE HOCKENBERGER ET AL., APPELLANTS, V. WILLIAM A. CURRY, ALSO KNOWN AS W. A. CURRY, ET AL., APPELLEES.
215 N. W. 2d 627

Filed February 28, 1974. No. 39219.

1. **Corporations: Fraud: Receivers.** The District Court shall have full power to liquidate the assets and business of a corporation: "(1) In an action by a shareholder when it is established: * * * (b) That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent."
2. ———: ———: ———. The Nebraska Business Corporation Act has given to the courts the power to relieve minority shareholders from oppressive acts of the majority, but the remedy of liquidation is so drastic that it must be invoked with extreme caution. The ends of justice would not be served by too broad an application of the statute, for that would merely eliminate one evil by substituting a greater one—oppression of the majority by the minority.

Appeal from the District Court for Platte County: JAMES A. BUCKLEY, Judge. Affirmed.

White, Lipp, Simon & Powers and Melvin R. Katskee, for appellants.

Monen, Seidler, McGill & Festerson, for appellees.

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

NEWTON, J.

This is an action by minority stockholders to compel dissolution of a corporation. The District Court refused to decree dissolution. We affirm that judgment.

Plaintiffs, the minority stockholders, assert oppression by the majority. The parent corporation is engaged in the abstracting, real estate, and insurance businesses under the name Becher, Hockenberger & Chambers. It was the owner of all the stock of Community Housing, Inc., a subsidiary, which held a 50 percent interest in a partnership called Al-Fa Meal. The stock of Community Housing, Inc., the organization here in question, was spun-off in 1965 to the shareholders of the parent corporation. Community Housing, Inc., then qualified as a Sub-Chapter S corporation for federal income tax purposes. At the same time its bylaws were amended to remove the requirement that the directors be stockholders or that the officers be directors or stockholders; to reduce directors from four to three; and transferred exclusive power to amend the bylaws from the stockholders to the directors. Thereafter the majority stockholders assumed full control of Community Housing, Inc., and W. A. Curry became president.

Plaintiffs contend that they no longer have a voice in corporate affairs; that in 1968 the directors retroactively awarded the president $3,600 which was above the fixed compensation of $2,100; that a similar sum was awarded in 1969 and for 1971 and 1972 increased to $9,600; that the Al-Fa Meal business was sold; that there has been a failure to pay dividends; and that as minority stockholders the value of their stock has been unduly depressed by the hostility of the majority and a disregard of minority interests.

The trial court found that there had not been any misappropriation or misapplication of corporate funds; that since the parent corporation became deadlocked, there was no obligation to disburse as dividends 75 percent of net profits; and that the dividend policy for the years 1970, 1971, and 1972 does not evidence an abuse of discretion. The court retained jurisdiction to review future dividends upon request.

The record sustains the findings of the trial court. It appears that plaintiffs have not, in recent years, cooperated in the best interests of the corporation, have opposed its business expansion, created competition, and removed from its control one item of remunerative business. There has not been any misappropriation of funds or wrongful payment of salaries or bonuses. The sale of the Al-Fa Meal business was advantageous in that the equal partner insisted on a sale and there was a serious prospect of losing or having to move its principal plant. In compliance with a stockholders' agreement, the necessity of paying out 75 percent of earnings in dividends was dispensed with and reasonable dividends have been declared and distributed reasonably consistently. The business appears to be a well-operated and growing one. To insure fair treatment of the minority stockholders, the court has retained jurisdiction to review the earnings-dividend record of the corporation as may be requested from time to time.

Section 21-2096, R. R. S. 1943, provides: "The district courts shall have full power to liquidate the assets and business of a corporation: (1) In an action by a shareholder when it is established: * * *

"(b) That the acts of the directors or those in control of the corporation are illegal, *oppressive* or fraudulent; * * *." (Emphasis supplied.)

We agree with the following statement found in Polikoff v. Dole & Clark Bldg. Corp., 37 Ill. App. 2d 29, 184 N. E. 2d 792: "The Business Corporation Act has given to the courts the power to relieve minority shareholders from oppressive acts of the majority, but the remedy of liquidation is so drastic that it must be invoked with extreme caution. The ends of justice would not be served by too broad an application of the statute, for that would merely eliminate one evil by substituting a greater one—oppression of the majority by the minority."

We find plaintiffs have failed to sustain their burden of proof or to establish a wrongful oppression of minority stockholders. As a consequence, their plea for dissolution of the corporation must be rejected.

The judgment of the District Court is affirmed.

AFFIRMED.

HOWARD F. ACH ET AL., APPELLANTS AND CROSS-APPELLEES, v. FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, APPELLEE AND CROSS-APPELLANT.

215 N. W. 2d 518

Filed February 28, 1974. No. 39242.

1. **Insurance.** The second sentence of section 44-358, R. R. S. 1943, means that a breach of a warranty or a condition which exists at the time of a loss and contributes to a loss may avoid the policy or enable the insurer to avoid liability. It has no application to a breach which could only arise after a loss has occurred.
2. ———. The statute relates to the question of a recoverable loss and not to the question of procedure to be followed in collecting for the loss after it has occurred.
3. ———. The statute does not deny an insurer the right to rely upon conditions of a policy which the insured is required, as a condition of recovery, to perform after the loss has occurred.
4. **Insurance: Words and Phrases: Time: Notice.** The terms "immediate" or "as soon as practicable" in referring to the notice required in an insurance policy mean with reasonable celerity, with reasonable and proper diligence, and what is a reasonable time depends upon all the facts and circumstances of each particular case.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Ach & Ach, for appellants.

Barlow, Watson & Johnson and James J. DeMars, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH,

McCOWN, NEWTON, and CLINTON, JJ., and CHADDERDON, District Judge.

CLINTON, J.

This is an action on a homeowner's insurance policy to recover for the loss of a diamond ring by theft. Pursuant to stipulation the cause was tried to the court without a jury. The court found the ring had been lost by theft, but that the plaintiffs had not given timely notice of loss to the defendant insurance company as required by the terms of the policy and denied recovery. We affirm.

It is uncertain as to which of two policies was in effect at the time of the loss, but the slightly differing policy provisions pertaining to the giving of notice to the insurer are not determinative on this appeal. One provides for "immediate" notice and the other for notice "as soon as practicable." Both policies also provide for the reporting of the theft to the police.

The only issues we need to notice are those related to the plaintiffs' contention that the delay in giving notice was excusable. The loss was discovered by the plaintiff wife in July 1971 within a couple of days after the theft took place. She was afraid to report the matter to her husband, the other plaintiff herein. As a consequence no report to the insurance company or the police was made until December 1971. The plaintiffs assert that in the absence of a showing of prejudice to the insurer, the delay in giving notice cannot defeat the right to recovery. The plaintiffs rely primarily upon our opinion in George v. Aetna Casualty & Surety Co., 121 Neb. 647, 238 N. W. 36, and the provisions of section 44-358, R. R. S. 1943.

It is clear that the provisions of section 44-358, R. R. S. 1943, have no application to policy provisions requiring the giving of notice of loss. The provision of the statute on which the plaintiffs rely is: "The breach

of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, *unless such breach shall exist at the time of the loss* and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." (Emphasis supplied.) This provision was considered by this court in Clark v. State Farmers Ins. Co., 142 Neb. 483, 7 N. W. 2d 71. We there said: "The second sentence means that a breach of a warranty or condition which exists at the time of a loss and contributes to the loss may avoid the policy or enable the insurer to avoid liability. The sentence relates to those breaches which exist 'at the time of the loss.' It does not relate to a breach of the terms of a policy which could only arise after the loss has occurred. It does not deny the insurer the right to rely upon the conditions of its policy which the insurer is required to perform as a condition of recovery after the loss has occurred. It relates to the question of a recoverable loss and not to the question of procedure to be followed in collecting for the loss after it has occurred. Clearly a notice of loss and proofs of loss can only be given after the loss has occurred."

It is true that in the earlier case of George v. Aetna Casualty & Surety Co., *supra,* this court used the statute in question as a makeweight argument supporting its opinion, but we did not there really analyze or consider the meaning of the statute. George v. Aetna Casualty & Surety Co., *supra,* is disapproved insofar as it relied on the statute.

That case and other subsequent decisions of this court do set forth the proper rule of law applicable in this case. In Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co., 177 Neb. 287, 128 N. W. 2d 773, we said: "The word 'immediate' in referring to the notice required in an insurance policy means with reasonable celerity, with reasonable and proper dili-

gence, and what is a reasonable time depends upon all the facts and circumstances of each particular case. George v. Aetna Casualty & Surety Co., 121 Neb. 647, 238 N. W. 36." Most courts which have considered provisions requiring "immediate" notice or notice "as soon as practicable" have similarly construed these provisions. 24 A. L. R. 3d 1017; 44 Am. Jur. 2d, Insurance, § 1460, p. 325; 5A Appleman, Insurance Law and Practice, § 3613, p. 649; 13 Couch on Insurance 2d, §§ 49:365 to 49:367, p. 823 et seq.

Clearly nothing in the circumstances shown by the evidence excused the long delay. The factual determination by the trial court was not clearly wrong.

AFFIRMED.

BARBARA ANDERSON, APPELLANT, V. FARMER BROWN'S STEAK HOUSE, INC., APPELLEE.

216 N. W. 2d 174

Filed March 7, 1974. No. 39070.

Trial: Instructions. The trial court may and ordinarily should hold a conference before or during the trial with reference to the preparation of proposed instructions. At the conference on instructions each counsel should aid the trial court by stating any specific objection that he has on any instruction proposed to be given.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded.

Warren C. Schrempp and Richard J. Dinsmore of Schrempp, Bruckner & Dinsmore, and Robert H. Hollingworth, for appellant.

Pilcher, Howard & Dustin, for appellee.

Heard before SPENCER, SMITH, and CLINTON, JJ., and KUNS and FLORY, District Judges.

SMITH, J.

In a personal injury action arising out of an asserted slip and fall a jury returned a verdict for defendant. Plaintiff appeals. She contends the court erred in instructing the jury that her status as an invitee or business visitor was an issue, inasmuch as she was entitled to a peremptory instruction under the evidence. Defendant argues the absence of prejudicial error and the waiver of any error by the failure of plaintiff to object.

From instructions Nos. 2 and 3 the jurors learned that plaintiff claimed to have been an invitee and that defendant denied the claim. They also learned from instruction No. 6 that the burden was on plaintiff to prove that defendant was "negligent in one or more of the particulars claimed against it . . . ." The instruction, which also covered the effect of findings on the claim, omitted the subject of invitee. Instruction No. 9 included common definitions of negligence and ordinary care, and tracked the definition of business visitor in NJI No. 8.21. The duty of a possessor of premises to a business visitor was treated at length in instructions Nos. 11 and 12. Instruction No. 10 read:

"If you find that plaintiff was a business visitor on the defendant's land, the rule in paragraph 2 applies:

2. If you find all the following conditions true:
   A. There was a condition on Farmer Brown's Steak House land involving an unreasonable risk of harm to Barbara Anderson, which Farmer Brown's Steak House knew of, or in the exercise of reasonable care could have discovered;
   B. Farmer Brown's Steak House had no reasonable ground to believe that Barbara Anderson would discover that condition or realize the risk involved; and
   C. Barbara Anderson did not know, or from facts known to her could not reasonably have been

expected to know, of the condition and the risk involved, then Farmer Brown's Steak House was under a duty to use reasonable care:

1. To make its premises safe for Barbara Anderson or
2. To give her adequate warning to enable her to avoid harm."

Plaintiff was entitled to a peremptory instruction that she had been a business visitor of defendant. In context instructions Nos. 6 and 10 must have perplexed the jury. Absence of the peremptory instruction was prejudicial error.

The remaining question is whether counsel for plaintiff waived the error by failure to object. No contemporaneous record of the court holding a conference on instructions exists. By agreement the parties were heard by the court on the matter almost 11 months later. The court stated:

". . . (I)t has always been my practice . . . not (to) record . . . (objections to instructions proposed by the court). I just tell the attorneys that obviously if there is . . . clear-cut error, you might just as well tell me now rather than having a new trial . . ., but I don't feel that I should bind counsel right at the end of the trial when they don't have time to propose instructions, so I never bound them to it. I didn't want to bind their clients really."

"The trial court may and ordinarily should hold a conference before or during the trial with reference to the preparation of proposed instructions . . . . At the conference on instructions each counsel should aid the trial court by stating any specific objection that he has on any instruction proposed to be given." NJI, p. IX. See, also, Haumont v. Alexander, 190 Neb. 637, 211 N. W. 2d 119 (1973). The finding of the trial court that it had held no conference within the meaning of

the above rule was correct. Plaintiff did not waive the instructional error.

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

REVERSED AND REMANDED.

Note: This opinion adopted before Judge SMITH's retirement from the court.

WHITE, C. J., took no part in the hearing or decision of this case.

JAMES EPPERSON, JR., APPELLANT, V. JOSEPH UTLEY, APPELLEE.

215 N. W. 2d 864

Filed March 7, 1974. No. 39071.

1. **Trial: Evidence: Witnesses.** Discretion is vested in the District Court in the admission of lay opinion testimony when it is rationally based upon the perception of the witness, and could be helpful for a clear understanding by the jury of the facts.
2. **Motor Vehicles: Negligence: Statutes: Forfeitures.** The statutory provision providing for forfeiture of right-of-way because of unlawful speed was expressly repealed by the 1969 Legislature.
3. ———: ———: ———: ———. The previous statutory provision providing for forfeiture of right-of-way by unlawful speed was limited by the statute and by case law interpretation to forfeiture of directional right-of-way.
4. **Motor Vehicles: Negligence: Forfeitures.** The inference found in dicta in Hacker v. Perez, 187 Neb. 485, 192 N. W. 2d 166, to the effect that forfeiture of right-of-way by unlawful speed is inherent in other regulations covering right-of-way is disapproved.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Warren C. Schrempp and Richard J. Dinsmore of Schrempp, Bruckner & Dinsmore, for appellant.

James W. Knowles of Knowles & Edmunds, for appellee.

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

WHITE, C. J.

This action arises out of a collision occurring at an open intersection. On issues of negligence raised by the plaintiff's petition and contributory negligence raised in the counterclaim of the defendant, the jury returned a verdict denying relief to both parties. The plaintiff appeals. We affirm the judgment of the District Court.

The plaintiff assigns as error: (1) The admission of the defendant's testimony that he had entered the intersection first; (2) the submission of the issue of the plaintiff's contributory negligence; (3) the submission of the defendant's counterclaim; and (4) failure to grant a requested instruction on forfeiture of right-of-way by unlawful speed.

The plaintiff, James Epperson, Jr., was westbound on an east-west street and the defendant, Joseph Utley, was northbound on a north-south street prior to the collision. The investigating officer testified that the lawful rate of speed was 25 miles per hour and that the defendant admitted going approximately 30 miles per hour at the time of the accident. However, the officer testified on cross-examination that the defendant stated he was traveling 20 miles per hour. The plaintiff's vehicle was damaged on the left front side while the defendant's vehicle was damaged on the right front side. The investigating officer observed debris near the northeast quarter of the intersection. The officer's diagram of the accident showed that the defendant's automobile had crossed the centerline of the east-west street; that the plaintiff's vehicle had entered the intersection to a lesser extent; and that the plaintiff's vehicle was east of the centerline of the north-south street. The officer also testified that the de-

fendant's vehicle turned to the west after the impact, traveled 70 feet, and ended up facing southwest.

An eyewitness testified that he was parked ¼ block south of the intersection when he saw the defendant's vehicle coming from the south. He testified it was moving fast, estimating the defendant's speed at 40 to 45 miles per hour at point of impact. The eyewitness testified several times that the point of impact was in the middle of the intersection. On cross-examination, however, he admitted his deposition testimony indicated that the point of impact was in the northeast quadrant of the intersection. The eyewitness stated that after the accident the defendant admitted he was kind of wrong.

The plaintiff testified that his speed as he approached the intersection was 15 to 20 miles per hour and decreasing. The plaintiff stated he made a short stop at the intersection, looked both ways, saw no vehicle coming, proceeded into the intersection, and then looked again. It was at this time that he first observed the defendant's vehicle. He contends both automobiles were in the middle of the intersection. He also stated the defendant admitted he was wrong.

On the southeast corner of the intersection there is an embankment which the defendant contends obstructed the view. This embankment was shown through exhibits. The investigating officer testified that it was part of his duty to make observations as to visibility defects and he observed none.

The defendant testified he had stopped to let several passengers out 1½ blocks south of the collision. He estimated his speed between 25 to 30 miles per hour as he approached the intersection. He looked to the right as he approached the intersection. He first saw the plaintiff's vehicle when it was 5 or 6 feet away. The collision occurred a split second thereafter. The defendant did not apply his brakes. The defendant

testified, over objection, that he had entered the intersection first. At the time of impact, the defendant testified, the front of his vehicle had crossed the centerline of the east-west street, while the front of the plaintiff's vehicle was only about 5 feet west of the east curb of the north-south street.

The plaintiff claims the lower court erred in admitting the defendant's statement regarding who first entered the intersection. Counsel of the defendant asked him:

"Q. Of your knowledge and without any explanation do you know which of these two cars entered the intersection first?

"A. It's a difficult question to answer, but I would say I entered the intersection first."

An objection to the statement as conclusionary was overruled. There was no objection to lack of foundation. We will assume that this is opinion testimony. Discretion is vested in the District Court in the admitting of lay opinion testimony. Foundation for the testimony was ample and it is clear it was rationally based upon the perception of the witness, and could be helpful for a clear understanding by the jury of the facts. Shamburg v. Folkers, 187 Neb. 169, 188 N. W. 2d 723 (1971); Proposed Nebraska Rules of Evidence, Rule 701 (1973). It is true there are previous decisions of this court which indicate that such testimony could be excluded by the trial court without error. Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367 (1950); Shamburg v. Folkers, *supra*. Subtle distinctions between testimony of perceived facts and conclusions are extremely troublesome in this area, and the trial judge's ruling should not be disturbed unless it appears from all the facts that there was an abuse of the discretion and the jury was misled. See 32 C. J. S., Evidence, § 546 (1), p. 111.

The substance of this testimony was clearly not prej-

udicial. The defendant had testified that he saw the plaintiff's vehicle only a fraction of a second prior to impact, and the front of his car had crossed the centerline of the east-west street, while the plaintiff's vehicle was only about 5 or 6 feet into the intersection. The defendant's expression of his conclusion added no weight to the inescapable inference from, and the purpose of, the testimony as to what he observed. There could be no prejudicial error in the admission of this testimony under the circumstances of this case. This contention is without merit.

The plaintiff complains that the trial court erred by (1) submitting the issue of plaintiff's contributory negligence, and (2) submitting the defendant's counterclaim to the jury. Both issues present questions of the plaintiff's negligence. The defendant alleged that the plaintiff was negligent by (1) failing to yield the right-of-way, (2) failing to exercise reasonable control, and (3) failing to keep a proper lookout. The main issue in the case centered around which party had the right-of-way, the plaintiff claiming the directional right-of-way, and the defendant claiming possession of the intersection prior to the rule of "approximately at the same time." Both parties, as we have pointed out, testified to facts which support their respective contentions and there was clearly enough evidence for submission of these issues to the jury. Neither party was undisputedly in the favored position. Kremlacek v. Sedlacek, 190 Neb. 460, 209 N. W. 2d 149 (1973). On the issue of failure to keep a proper lookout, the plaintiff's own testimony showed that he came to a stop prior to entering the intersection, looked both ways, saw nothing, and then proceeded into the intersection. He did not see the defendant's vehicle until just prior to the impact. This testimony was sufficient to establish a jury question as to when he should have seen the defendant's vehicle and whether he failed to see the

defendant's vehicle when it was in plain sight.

The main thrust of the plaintiff's appeal is the contention that the trial court failed to give a requested instruction on forfeiture of right-of-way by unlawful speed. The evidence, as previously summarized, provides conflicting testimony on speed. Historical development of the common law, statutes, and cases relating to the rules of the road in Nebraska and forfeiture of right-of-way by unlawful speed is extremely important to a full consideration of this contention.

The Nebraska common law regulating the right-of-way, in the absence of regulations to the contrary, provided the first to enter upon a crossing had the right-of-way with respect to vehicles approaching a street crossing at intersecting points. Barrett v. Alamito Dairy Co., 105 Neb. 658, 181 N. W. 550 (1921).

In 1927, the Legislature adopted a statute providing: "* * * motor vehicles traveling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left when said vehicles shall reach the intersection at approximately the same time and in all other cases the vehicle reaching said intersection first shall have the right of way." Laws 1927, c. 154, § 1, p. 412. This provision remained in effect, without major changes, until 1969. § 39-728, R. S. Supp., 1969. In 1971, following the accident in this case, section 39-728, R. S. Supp., 1969, was repealed. Laws 1971, L.B. 265, § 11.

In 1931, the Legislature adopted another statute regulating the right-of-way at intersections. Thus, Nebraska had two separate statutory sections regulating right-of-way at intersections from 1931 to 1971. The 1931 statute contained the provision upon which the plaintiff requested an instruction here. The 1931 provision reads: "When two vehicles approach or enter an intersection at approximately the same time, the

driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right except as otherwise provided in Section 18. The driver of any vehicle traveling at an unlawful speed shall forfeit any right-of-way which he might otherwise have hereunder * * *." Laws 1931, c. 110, § 17, p. 311. This provision also remained in effect, without significant changes, until 1969. § 39-751, R. S. Supp., 1969. Note that the provision regarding forfeiture is modified by the word "hereunder." Nebraska case law interpreting the restriction limits the forfeiture provision to cases involving directional right-of-way. Doan v. Hoppe, 133 Neb. 767, 277 N. W. 64 (1938); Middle v. Mount, 184 Neb. 710, 171 N. W. 2d 641 (1969). Therefore, even if the Nebraska statutes presently retained the forfeiture of right-of-way by unlawful speed provision, which they do not, that provision would be limited to forfeiture of directional right-of-way. Since only the plaintiff, being on the right, could have had the *directional* right-of-way, and he does not claim or argue his own forfeiture, the provision even if unrepealed could have no application to the present case.

The statute adopted in 1931 was derived from the "Uniform Vehicle Code" proposed by the Commissioners on Uniform State Laws in 1926. Uniform Vehicle Code Annotated, § 11-401 (b), Historical Note at pp. 272, 273 (1967). The provision regarding forfeiture of right-of-way by unlawful speed was eliminated from the Uniform Vehicle Code in 1930. Uniform Vehicle Code Annotated, § 11-401 (b), Historical Note at pp. 272, 273 (1967). The Nebraska statute of 1931, however, contained the forfeiture provision. Only 10 states retained such a provision in 1967. Uniform Vehicle Code Annotated, § 11-401 (b), Statutory Annotation at p. 275 (1967).

In 1969, amendments were enacted changing both section 39-728 and section 39-751. The purpose of the 1969

amendment to section 39-751 was to conform the state law relating to vehicle right-of-way with the Uniform Vehicle Code which, as previously noted, had not contained a forfeiture provision since 1930. Hearings by the Public Works Committee, Statement on L.B. 994 (March 7, 1969). The bill originally introduced in 1969 to amend section 39-751, however, retained the forfeiture provision. On the floor of the Legislature an amendment was offered and adopted which eliminated the forfeiture provision. Eightieth Legislative Session, Nebraska State Legislature, General Debate at p. 957 (April 14, 1969). The purpose of the amendment was to conform section 39-751 to the Uniform Vehicle Code and to section 39-728. Thus, Nebraska statutes since 1969 have contained no forfeiture of right-of-way by unlawful speed provision.

The plaintiff argues that the "rule of reason" announced by the cases under the prior forfeiture provision should be retained and even extended to nondirectional right-of-way forfeitures. But, as we have shown, the forfeiture rule is completely derivative from statute and not from decisional law. Even under the statute it was limited to directional right-of-way cases. It is beyond doubt that the Legislature in 1969 expressly excluded the forfeiture provision from the applicable statutes. The intent was clear. The trial court properly refused to instruct on forfeiture of right-of-way by unlawful speed. The inference to the contrary, found in dicta, in Hacker v. Perez, 187 Neb. 485, 192 N. W. 2d 166 (1971), that forfeiture of right-of-way by unlawful speed is "inherent" in other regulations covering right-of-way is expressly disapproved.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDALL A. WARD, APPELLANT.

216 N. W. 2d 163

Filed March 7, 1974. No. 39086.

Criminal Law: Probation and Parole. The determination of whether to grant probation to one convicted of a crime is a matter within the sound discretion of the trial court; and the denial of probation will not be disturbed on appeal in the absence of a showing of abuse of judicial discretion.

Appeal from the District Court for Hamilton County: HOWARD V. KANOUFF, Judge. Affirmed.

Adams & Christensen and Craig D. Martinson, 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 defendant, Randall A. Ward, pleaded guilty to the crime of robbery and was given the minimum sentence by the District Court of 3 years in the Nebraska Penal and Correctional Complex. The sole contention on this appeal is that the sentence was excessive and that the defendant should have received probation. We affirm the judgment and sentence of the District Court.

The thrust of the contention of the defendant is that he should be granted probation because of his age (19), because he is a first-offender (felony), and because he and his partner Genelle Ward, returned the fruits of the robbery after its commission. The undisputed and admitted facts before the trial judge at the time of the sentencing are as follows: The crime in which the defendant participated was robbery at gun point. It was perpetrated against a lone filling station operator after midnight. Something around $600 was procured. The

robbery had been planned for approximately a week. A 22-caliber pistol was bought for the purpose of committing the robbery. The scene of the robbery was surveyed and the robbery planned in detail, according to the handwritten admissions of the defendant and his partner, Genelle. The record reveals that in accomplishing the armed robbery they committed the offense of kidnapping, section 28-417, R. S. Supp., 1972. After using the gun and completing the robbery they forced the filling station attendant to drive them to a waiting automobile some distance from the scene of the crime.

The record shows that the trial court carefully and conscientiously held a full hearing and considered the possibility of probation very carefully. The record reveals that the defendant himself wanted probation but felt he would not receive it. The trial court determined from the evidence before him that it would be improvident to grant probation to accomplish the rehabilitation of the defendant and his partner, Genelle. Defendant is 19 years of age. He quit school after the tenth grade. Although only 19 years of age, it is inferable that he has considerable adult and mature experience beyond the normal 19-year-old youth. He has worked on a ranch near Broken Bow, Nebraska, for 3 years for $275 per month plus board and room. He has worked for 6 months for the Malcolm Larsen Construction Company, in York, Nebraska, for $2.95 an hour. He has worked in restaurants and in other different types of jobs, all away from his home. He comes from a broken home, from which there is no possibility of his receiving any help, discipline, or care in connection with a possible rehabilitative program on probation. He has used all kinds of drugs and admits that 2 months after the robbery he was picked up in possession of marijuana. At the age of 17 he pled guilty to petit larceny and received a fine. Further review of the record is unnecessary except to state that it leads to an inference of continuing instability and the

necessity for much stricter discipline than available under the probation system.

The record reveals that the trial court considered the nature of the offense, and after examining all the relevant evidence found that correctional treatment in this defendant's case can best be provided by commitment to a correctional facility. We come to the conclusion that the denial of probation to this defendant did not constitute an abuse of judicial discretion and it therefore follows that the 3-year minimum sentence was not excessive. We observe that in the recent case of State v. Williams, 187 Neb. 708, 193 N. W. 2d 570, this court affirmed a sentence of 3 to 10 years on a robbery charge for a 19-year-old first offender.

The judgment and sentence of the District Court are correct and are affirmed.

AFFIRMED.

SMITH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. GENELLE L. WARD, APPELLANT.

216 N. W. 2d 165

Filed March 7, 1974. No. 39082.

Appeal from the District Court for Hamilton County: HOWARD V. KANOUFF, Judge. Affirmed.

Adams & Christensen and Craig D. Martinson, 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.

This is a companion case to State v. Randall A. Ward,

ante p. 421, 216 N. W. 2d 163. The opinion in that case controls the disposition of this case. The defendant is now 17 years of age. She is a school dropout. She has had a variable employment record at different clubs, restaurants, and lounges in Broken Bow and York, Nebraska. Her family background and parental situation are unsatisfactory and unstable. The record reveals that she was placed on probation with the York County juvenile department for shoplifting in 1968. The record also shows that Genelle participated fully in the planning of the robbery and states they had been planning it for about a week before it occurred. For example, she states that at one time they were going to dress in different clothes and disguise themeselves with nylon stockings pulled over their heads. They waited between 3 and 4 hours until the station was closing.

We come to the conclusion that the trial court did not abuse its discretion in refusing to grant the defendant probation.

The judgment and sentence of the District Court are correct and are affirmed.

AFFIRMED.

SMITH, J., not participating.

DALE COOK, DOING BUSINESS AS COOK CONSTRUCTION COMPANY, APPELLEE, V. KENNETH NORDAHL, APPELLANT.

215 N. W. 2d 643

Filed March 7, 1974. No. 39185.

1. **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.
2. **Evidence: Appeal and Error.** In determining the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and he must

have the benefit of every inference that can reasonably be drawn from the evidence.

3. **Evidence: Verdicts.** The verdict of a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong.

Appeal from the District Court for Saunders County: JOHN D. ZEILINGER, Judge. Affirmed.

S. J. Albracht of Lathrop, Albracht & Dolan, for appellant.

Grady, Caskey & Thor, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and COLWELL and WARREN, District Judges.

NEWTON, J.

This is an action for damages for breach of a contract pertaining to the sale and erection of a metal building. The jury found for plaintiff seller. We affirm that judgment.

The plaintiff sold to defendant a metal covered building and agreed to construct it, all for a specified sum. A written contract was entered into which failed to provide for a downpayment, but required defendant to carry insurance against wind damage during construction. Plaintiff demanded but did not receive a downpayment and refused to proceed without it. Subsequently defendant paid the downpayment demanded and claims a new oral contract was entered into on the same terms but with the addition of an insulated partition and a second overhead door. This was disputed and reference to the original contract discloses a reference to the second, as well as the first, overhead door. It also refers to the use of insulation. When the building was partially completed it collapsed. Defendant says this resulted from inadequate and unworkmanlike bracing. Plaintiff claims it resulted from a windstorm. It is undisputed that the

collapse occurred during a blizzard accompanied by wind. Defendant's assignments of error are directed generally at the sufficiency of the evidence to support a finding that the written contract was in effect and that the damage was due to wind.

The rule is that: "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." Midwest Lumber Co. v. Dwight E. Nelson Constr. Co., 188 Neb. 308, 196 N. W. 2d 377.

Whether or not there was such a contractual provision depends on the validity of the written contract; this, under the evidence and the instructions of the court, was a jury issue resolved in favor of plaintiff.

"In determining the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and he must have the benefit of every inference that can reasonably be drawn from the evidence." Ridenour v. Kuker, 185 Neb. 321, 175 N. W. 2d 287.

"The verdict of a jury based upon conflicting evidence will not be set aside unless it is clearly wrong." Department of Banking v. Colburn, 188 Neb. 500, 198 N. W. 2d 69. A review of the record reveals evidence sufficient to support the finding of the jury that the parties relied upon the written contract and that the damage was occasioned by a windstorm.

No error appearing, the judgment of the District Court is affirmed.

AFFIRMED.

IN RE NEBRASKA STATE BANK OF VALENTINE, VALENTINE, NEBRASKA, INSOLVENT. FRANK L. COLBURN ET AL., APPELLEES AND CROSS-APPELLANTS, V. HENRY E. LEY, DIRECTOR OF BANKING AS RECEIVER AND LIQUIDATING AGENT OF NEBRASKA STATE BANK OF VALENTINE, VALENTINE, NEBRASKA, INSOLVENT, APPELLANT AND CROSS-APPELLEE.

215 N. W. 2d 869

Filed March 7, 1974. No. 39186.

Interest: Receivers. When payment of a dividend is deferred by reason of an unsuccessful contest of an alleged setoff, the creditor so delayed should be allowed interest on the dividend to put that creditor on an equality with the other creditors in his class.

Appeal from the District Court for Cherry County: WILLIAM C. SMITH, JR., Judge. Affirmed as modified.

Bernard B. Smith, for appellant.

W. Jerry O'Kief, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, and CLINTON, JJ., and RONIN and HASTINGS, District Judges.

SPENCER, J.

This appeal involves the allowance of interest on the plaintiffs' deposit in the Nebraska State Bank of Valentine. The claim was classified as a valid preferred claim but was not paid at the time other depositors in the same class were paid. The trial court allowed interest. We affirm as modified.

The Nebraska State Bank of Valentine was placed into receivership for liquidation in the fall of 1964. Frank L. Colburn, who was an officer, director, and stockholder of the bank, with his wife filed a claim for money on deposit in the bank. On October 14, 1965, the defendant filed an order with the Department of Banking approving the claim, and directed that it be allowed. The final claims of depositors in plaintiffs'

class were paid on December 9 and 10, 1965. However, the receiver withheld payment to plaintiffs pending a determination of any personal liability of Mr. Colburn.

The receiver subsequently instituted legal proceedings against Mr. Colburn for neglect and dereliction of duty. A jury found against the receiver but the trial judge set aside the verdict. On appeal to this court the jury verdict was reinstated, absolving Mr. Colburn from any liability relating to the bank's failure. Department of Banking v. Colburn (1972), 188 Neb. 500, 198 N. W. 2d 69. The mandate thereon was filed in the District Court for Cherry County on May 30, 1972.

Plaintiffs thereafter made further application for payment of their claim, together with interest thereon from the date the claim had been allowed by the receiver.

On February 13, 1973, it was stipulated by the parties that the receiver would pay the principal amount of said claim into court, together with a separate check for interest in the amount of $1,430.10, and plaintiffs would have the right to withdraw the principal amount so paid without prejudice to the claim for interest on the principal sum.

The trial court found plaintiffs should be allowed interest at the rate of 6 percent per annum from October 14, 1965, the date of the allowance of the claim, to May 30, 1972, and 7 percent thereafter unless it is shown that the Department of Banking made less interest thereon than 6 percent, and then upon such showing the Department of Banking should pay interest at the rate the receiver earned on the $30,813.87. Plaintiffs cross-appealed from the allowance of less than the legal rate. The issue herein is whether plaintiffs are entitled to interest and if so, at what rate or rates.

It is undisputed that depositors and holders of exchange have priority over all other claims except those for taxes. § 8-1,110, R. R. S. 1943. On the question of interest, defendant cites the case of Thomas v.

Western Car Co. (1893), 149 U. S. 95, 13 S. Ct. 824, 37 L. Ed. 663, for the following proposition: "As a general rule, after property of an involvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate." Defendant states: "* * * although the broad statements in Thomas, supra, would indicate that interest would in no event run after the appointment of a receiver, it seems to have been limited in its application to cases where the assets were less than the liabilities. So, as a matter of fact, interest runs on claims of equal rank against the debtor after the appointment of a receiver but for convenience it will not be computed where the assets are not sufficient to pay the principal of the obligations."

Defendant, however, fails to recognize the clear distinction between payment of interest on claims filed with the receiver and payment of interest on delayed dividends or distributions to which the creditor was entitled but which were delayed pending litigation. See, 10 Am. Jur. 2d, Banks, § 779, p. 745; Ticonic National Bank v. Sprague (1938), 303 U. S. 406, 58 S. Ct. 612, 82 L. Ed. 926.

Plaintiffs rely on the landmark case of Armstrong v. American Exchange National Bank of Chicago (1890), 133 U. S. 433, 10 S. Ct. 450, 33 L. Ed. 747. In that case a creditor's claim was contested and not decided until after a dividend had been paid to other creditors. The court recognized the general proposition that creditor's claims do not ordinarily draw interest, beyond the date on which the bank failed, but created an exception which has become the general rule in cases like the instant one. The Supreme Court said: "Interest upon the dividend which it (the creditor) ought to have received on the 31st of October, 1887, is a different mat-

ter. The allowance of that interest is necessary to put the plaintiff on an equality with the other creditors."

Armstrong has been favorably commented upon and followed in other cases by the United States Supreme Court and various state and federal courts. Republic Realty Co. v. Phoenix Savings & Loan Assn., Inc. (1968), 254 Md. 532, 255 A. 2d 39, summarizes the key precedents relying on the Armstrong rule. The following quotation from Bryant v. B. & L. Farms Co. (5th Cir., 1965), 343 F. 2d 581, is pertinent herein: "* * * Chemical Nat. Bank of City of New York v. Armstrong, as Receiver, 6 Cir., 59 F. 372, 384, 28 L. R. A. 231, where the court * * * held that: 'It is equitable and just, therefore, that the share of the other creditors in the assets of the bank should be reduced by enough to pay the interest on the delayed dividends on the $100,000 from the date of the rejection of the claim until such dividends are paid. This conclusion is fully sustained by the decision of the supreme court in the case of Armstrong v. Bank, 133 U. S. 433, 10 Sup. Ct. 450 (33 L. Ed. 747).' It is well to observe that we are not here dealing with interest on claims in bankruptcy, but interest on dividends withheld after creditors of the same class had been paid the dividends due them." See, also, 9 C. J. S., Banks and Banking, § 758, p. 1324; 10 Am. Jur. 2d, Banks, § 779, p. 745.

Paraphrasing Bryant v. B. & L. Farms Co., *supra,* it is equitable and just, and in line with the better reasoned authorities, that interest at the legal rate be paid on dividends withheld from plaintiffs after the time dividends were paid to the other depositors in their class. In no other way can plaintiffs be put upon a footing with those depositors. When payment of a dividend is deferred by reason of an unsuccessful contest of an alleged setoff, the creditor so delayed should be allowed interest on the dividend to put that creditor on an equality with the other creditors in his class.

Defendant in his brief argues: "Where the assets are insufficient to pay the principal of all the claims against the estate, an award of interest to a particular claimant flies in the face of the equities of the situation and deprives other claimants of the same class from acquiring an equitable adjustment of their claims." Actually, the equities here are with the plaintiffs. All other claimants in their class were paid in full. Payment of plaintiffs' claim was delayed for 7 years thereafter pending litigation of other possible liability of Frank L. Colburn. The receiver has had possession of the $30,813.87 for that period. Undoubtedly it has been earning interest for some portion of that period. The plaintiffs' claim was never questioned. It was allowed in full. The only question was whether it could be applied on a possible liability as an officer or director, which liability was determined adversely to the defendant. The authorities clearly sustain the plaintiffs' position.

Against plaintiffs' argument for interest predicated upon concepts of equality among depositors, defendant interposes a very imaginative hypothesis concerning subrogation. The Federal Deposit Insurance Corporation and the correspondent banks furnished the additional funds necessary for all depositors of the State Bank of Valentine to be paid in full. The amount furnished by the correspondent banks is not disclosed. It represented, however, a portion of the funds of the Nebraska State Bank of Valentine on deposit with the correspondent banks. Certain of the correspondent banks claimed some of those funds on the theory that the former president of the insolvent bank had discounted spurious commercial paper with them. Defendant's argument is premised on the theory that the other depositors in plaintiffs' class had not been paid in full because the FDIC and the correspondent banks furnished the funds to pay off those depositors and

therefore they are subrogated to their claims.

There are two problems with this ingenious analysis. First, even if true, it must fail for lack of proof. Second, subrogation appears to have been waived and surrendered in this case by mutual agreement of the purported subrogees.

While the bank was insolvent, it was not without funds. Insofar as the bank possessed funds for distribution to depositors it ought to treat all the depositors in plaintiffs' class equally. If the FDIC and the correspondent banks are subrogated to the extent of the funds they furnished, could the subrogation agreement have relevance to the funds the bank had available for payment from its own resources?

Further, the FDIC is compelled by the terms of its insurance to pay all the depositors of plaintiffs' class, including the plaintiffs. If it were subrogated to the claims of all depositors but the plaintiffs after payment, is it meeting the terms of its contract?

In any event, there is no authority or proof of any sort presented by defendant herein which intimates that the FDIC can use its subrogation rights from the other depositors of plaintiffs' class to the detriment of plaintiffs. Finally, the correspondent banks if subrogated could only be subrogated to the extent they furnished funds necessary to pay depositors. In this connection, we must note that they would furnish such funds only in those instances when the bank's assets plus the FDIC insurance were inadequate for this purpose. The amount of funds so furnished is not disclosed.

What has been said heretofore demonstrates the problem with defendant's argument. Clearly, the correspondent banks cannot interpose their subrogation claim to defeat the payments which plaintiffs should have received from FDIC or plaintiffs' claim to a ratable share of the bank's funds. To accept defendant's argument would permit the correspondent banks to utilize a

subrogation theory to impair plaintiffs' preexisting legal rights.

While not necessary to a decision herein, we believe the subrogation claim has been waived and abandoned by the purported subrogees. The receiver made an application to compromise and settle claims and filed therewith a settlement agreement executed by the Department of Banking, FDIC, and the various correspondent banks. Both the application and the settlement agreement were approved by the court.

The trial court conditioned the allowance of interest to permit the receiver to show that less than 6 percent was earned on the $30,813.87, if such was a fact. We find no authority for this procedure and none has been called to our attention.

Section 45-103, R. R. S. 1943, before the 1972 amendment, provided: "Interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof at the rate of six dollars upon each one hundred dollars annually until the same shall be paid; * * *." The 1972 amendment, which became effective July 6, 1972, increased the rate to eight dollars per one hundred dollars.

From what date should interest accrue? Plaintiffs' contend their claim should draw interest from the time allowed, which in this case would be October 14, 1965. Under section 8-1,108, R. R. S. 1943, a claimant may object to the director's classification and order within a period of 30 days. Consequently, the amount of the claim is not finally allowed or determined until the expiration of that period. Until that time, dividends should not be paid. Thereafter, dividends should be paid within a reasonable time if the funds are available to do so. In this case, the parties concede that the other depositors in plaintiffs' class were paid by December 9 and 10, 1965. Inasmuch as we are trying to maintain plaintiffs' equality with others in their class, we

determine that the interest herein started to accrue on December 10, 1965. Interest is therefore payable at the rate of 6 percent from December 10, 1965, to July 6, 1972, and thereafter at the rate of 8 percent to January 29, 1973.

For the reasons given, the judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. MILLARD WALDROP, APPELLANT.

215 N. W. 2d 633

Filed March 7, 1974. No. 39187.

1. **Criminal Law: Statutes: Sentences: Time.** 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.
2. ———: ———: ———: ———. When a legislative act, adopted after one has been convicted and sentenced for a crime but while the cause is still pending on a motion for new trial or on appeal, serves to mitigate the sentence imposed, this court will either amend the sentence to conform to the legislative intent or will remand the cause to the District Court for resentencing in conformity with the statute.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed in part, and in part reversed and remanded with directions.

T. Clement Gaughan, Dennis R. Keefe, and Richard L. Goos, for appellant.

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

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and COLWELL and WARREN, District Judges.

McCOWN, J.

The defendant, Millard Waldrop, pleaded guilty to a count of knowingly delivering a controlled substance in violation of section 28-4,125(2)(a), R. S. Supp., 1972. He was sentenced to imprisonment for a term of 5 years. On appeal the defendant contends the sentence was improper and excessive.

The defendant's plea of guilty was entered on May 14, 1973, and he was sentenced on June 5, 1973. The statute which was in effect on those dates provided that a convicted defendant "shall be punished by imprisonment * * * for not less than five years nor more than twenty years and shall not be eligible for probation; * * *." Meanwhile, the Legislature adopted L. B. 261, which was approved by the Governor on May 25, 1973, but did not become effective until September 2, 1973. That bill amended the penalty provisions of section 28-4,125(2)(a) to provide that a convicted defendant "shall be punished by imprisonment * * * for a minimum of one year and not more than ten years upon the first felony conviction * * *."

There was no specific provision in the amending statute indicating legislative intent as to its prospective or retroactive operation. It is also apparent that the amending statute mitigated the punishment as to first offenders. In State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225, 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."

As we said there: " 'It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to

acts committed before its passage provided the judgment convicting the defendant of the act is not final. * * *.'" See, also, In re Estrada, 63 Cal. 2d 740, 48 Cal. Rptr. 172, 408 P. 2d 948.

In State v. Rubek, 189 Neb. 141, 201 N. W. 2d 255, we held: "When a legislative act, adopted after one has been convicted and sentenced for a crime but while the cause is still pending on a motion for new trial or on appeal, serves to mitigate the sentence imposed, this court will either amend the sentence to conform to the legislative intent or will remand the cause to the district court for resentencing in conformity with the statute."

The State urges that the rule in Rubek be overruled and applied only to mitigating amendatory acts which become effective before sentencing. We decline to do so.

The conviction of the defendant is affirmed. The sentence is vacated and the cause remanded to the District Court for resentencing in conformity with the provisions of section 28-4,125, R. S. Supp., 1973.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

PATRICK W. O'CONNOR, DOING BUSINESS AS "THE PLACE," APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

215 N. W. 2d 635

Filed March 7, 1974. No. 39188.

Intoxicating Liquors: Licenses and Permits: Administrative Law. Where there is substantial evidence supporting the Nebraska Liquor Control Commission's decision of suspension, and the trial court has applied the proper statutory criteria, the decision of the commission should be affirmed.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

William H. Young, for appellant.

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

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

WHITE, C. J.

The only question involved in this case is the sufficiency of the evidence to sustain the finding of the District Court that the licensee O'Connor stored alcoholic beverages in an unauthorized area without prior permission from the Nebraska Liquor Control Commission; that he permitted part of the licensed premises of his establishment to be used for gambling; and that he gave false information to law enforcement officers. The District Court dismissed two other charges against the licensee, and reduced the Commission's suspension period from 90 to 45 days. The licensee O'Connor appeals. We affirm the judgment and order of the District Court.

O'Connor personally signed the application for license, which affirmatively stated there was no basement. A diagram was attached to the application showing the dimensions and location of the premises with no basement area shown. The evidence is conclusive that there was a basement, and that liquor was found stored in the basement on inspection by the officers of the Commission after a fire on the premises. O'Connor's only answer is that this failure to show the basement in the application was mere inadvertent error. It is not necessary for us to determine whether the error was by design or inadvertence. Nothing in the statutes or in the rules and regulations of the Commission requires or permits such a distinction. It is beyond argument that it is implicit in the Commission's statutory authority and power to require and place the duty upon the applicant to

submit a truthful application and to conduct his business accordingly. The extent, dimensions, and nature of the premises used in the liquor business is fundamental to the Commission's power to inspect and control the sale of alcoholic liquors. The Commission is entitled to rely upon the written application and is not, as the licensee argues, under a duty to inspect the premises and require the licensee to conform with his application for a license, and correct the diagram accompanying his application for a license.

As to the gambling charge on the licensed premises, the diagram on O'Connor's application indicated that the entire ground floor was part of the licensed premises. It appears without dispute that there was an opening between the front and rear rooms, but after the license had been granted this opening had been walled over and the back room closed off. When the officers went to "The Place" at 5:30 a.m., entrance to this separate room was gained through the rear door, gambling was taking place, money was confiscated, and hard liquor, beer, and an icebox-type cooler were discovered. The building had only one burglar alarm which served the whole premises. The only answer to this complaint is O'Connor's statement that he never intended for this room to be included in his licensed premises. His written application, the walling or the cementing of the opening between the two rooms, and the undisputed facts as to the gambling and the liquor, at a minimum, support the finding of the Commission and of the District Court as to this alleged violation.

With respect to the false information charge, O'Connor told a law enforcement officer that there was no alcohol left after the fire. This is false as a large amount was found in the basement as heretofore noted.

The licensee also argues that the District Court erred in affirming the Commission's order directing that the licensee should make the basement area and the rear por-

tion an addition to his premises, with complete access between the premises known as "The Place" and the rear portion. This order was a reasonable exercise of its regulatory powers and the facts of this case by themselves indicate the mischief sought to be prevented by the proper exercise of its powers in the inspection and policing of the premises described in the application for a license. See, § 53-116, R. R. S. 1943; § 53-129, R. R. S. 1943.

The licensee's license was not revoked. He was disciplined by a suspension of 45 days and was required to conform his premises to his application. It is apparent this judgment was reasonable and within the court's discretion.

The judgment and order of the District Court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MERRELL J. GARRETT, APPELLANT.

216 N. W. 2d 170

Filed March 7, 1974. No. 39190.

1. **Criminal Law: Trial: Evidence: Confessions.** Where voluntary statements or confessions are not offered or received in evidence, the foundational requirements for such are not relevant and, on objection or motion, should be excluded or stricken if they are not otherwise relevant to the issues.
2. **Criminal Law: Confessions.** After Miranda warnings have been given and the suspect requests counsel and indicates he wishes to remain silent, interrogation must cease.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded.

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

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

Heard before BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and COLWELL and WARREN, District Judges.

BOSLAUGH, J.

The defendant appeals from a conviction for robbery and use of a firearm in the commission of a felony.

The record shows three men entered the Gamble Store on North 16th Street in Omaha, Nebraska, on March 3, 1973. At gunpoint, they took the money from the cash registers. The defendant was identified as one of the participants through a fingerprint and a palm print found on a parts list card in the store after the robbery. He was also identified by the manager and a clerk who were present at the time of the robbery.

The defendant testified he was employed as a furniture refinisher and was at home caring for his daughter at the time of the robbery. On cross-examination the State established the defendant and his wife together earned about $150 per week. Over objection the State was allowed to cross-examine the defendant as to his refusal to make a statement after being advised of his rights. The State was also allowed to cross-examine the defendant, over objection, concerning a statement that he was a heavy heroin addict with a hundred-dollar-a-day habit.

In rebuttal the State called a police officer who had interviewed the defendant at the police station after he was arrested. This officer testified, over objection, that after he had advised the defendant of his rights, the defendant stated he did not want to make a statement and wanted to talk to a lawyer. A lineup was then had and the defendant was booked for robbery. Over objection, this officer was further allowed to testify that after observing needle marks on both arms, he asked the defendant "how much a habit he was on a day," and the defendant answered: "About a hundred dollars a day."

The fact the defendant refused to make a statement

after being advised of his rights was inadmissible and prejudicial. This matter has been discussed at some length in three recent opinions of this court: State v. Brown, 185 Neb. 389, 176 N. W. 2d 16; State v. Young, 183 Neb. 458, 161 N. W. 2d 503; and State v. Whited, 182 Neb. 282, 154 N. W. 2d 508. Foundational evidence is not admissible unless statements are to be introduced and ordinarily should be excluded.

In State v. Whited, *supra,* foundational evidence had been received without objection. We pointed out that such evidence should be excluded or stricken from the record unless a statement or confession is offered or received in evidence. In State v. Young, *supra,* the foundational evidence was admissible because a confession was offered and received in evidence. In State v. Brown, *supra,* the State proved the defendant had refused to answer any questions in regard to the incident without counsel. A motion to strike was overruled and on appeal the judgment was reversed.

In this case the error was compounded by allowing the State to introduce the same evidence again in rebuttal. The defendant's objections, motions to strike, and motions to declare a mistrial were all overruled. The error was of constitutional dimensions and the judgment must be reversed. State v. Brown, *supra.*

The evidence in regard to the defendant's narcotic addiction might be admissible under other circumstances as proof of motive. Evidence as to motive is generally relevant where intent is an element of the crime or the proof is circumstantial in nature. See, State v. Rice, 188 Neb. 728, 199 N. W. 2d 480; Trobough v. State, 119 Neb. 128, 227 N. W. 443, 65 A. L. R. 1051. The admissibility of such evidence is usually a matter within the discretion of the trial court. However, such evidence must be received with caution where it is highly prejudicial in nature and amounts to proof of another crime.

The statement involved here resulted from a question

by a police officer to the defendant after he had refused to make any statement and had requested the assistance of counsel. There was no further explanation of his rights and no evidence of an express waiver. See State v. Moore, 189 Neb. 354, 202 N. W. 2d 740. Under the circumstances of this case the evidence was not admissible.

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

REVERSED AND REMANDED.

FRANK B. LIENEMANN, TRUSTEE, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

215 N. W. 2d 893

Filed March 7, 1974. No. 39201.

1. **Taxation: Evidence: Eminent Domain.** The assessed value of property for tax purposes, in and of itself, is generally not admissible as direct evidence of value for purposes other than taxation.
2. **Trial: Evidence: Eminent Domain.** Where error is established in the admission of evidence of value in a condemnation case, and there is no contention in brief or argument that the error was not prejudicial, the error will be presumed to be prejudicial unless it clearly appears from the record that it did not affect unfavorably the party against whom it was admitted.

Appeal from the District Court for Sarpy County: BETTY PETERSON SHARP, Judge. Reversed and remanded for further proceedings.

Dixon G. Adams, for appellant.

No appearance for appellee.

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

MCCOWN, J.

This is a condemnation action in which the City of Omaha sought to acquire an easement across plaintiff's

property for the purpose of constructing and maintaining an out-fall sewer line to a sewage treatment plant. Plaintiff's tract of land contains about 560 acres. The easement cuts across the tract diagonally. The 50-foot wide permanent easement contained 6.62 acres, and the 200 foot temporary construction easement extended over an additional 19.87 acres. The original appraiser's award in the county court was $40,640. On appeal to the District Court, the jury assessed the amount of plaintiff's recovery at $33,468.20. Judgment was entered on the verdict and the plaintiff appeals.

The sole issue on appeal is whether or not it was error to permit a witness, over objection, to state what the assessed valuation of the land was. In argument to the trial court on the pending objection of plaintiff's counsel, counsel for the City contended that the evidence was admissible because the assessed value "is supposed to be the actual value." The District Court overruled plaintiff's objections and the witness testified that plaintiff's property was assessed for tax purposes at $74,890. Six expert witnesses testified as to the actual value of the property. The lowest valuation testified to by any witness was $405,750, and the highest valuation was $668,400.

The issue is one of first impression in Nebraska. On a somewhat analogous issue, this court has held that evidence of the appraised value of state school lands, required by statute in fixing rentals, was not admissible in a condemnation action where the issue was to determine the present actual market value of the land. See State v. Platte Valley P. P. & Irr. Dist., 147 Neb. 289, 23 N. W. 2d 300. The basis for the holding was that the appraised value of school lands for rental purposes was ordinarily much less than their actual value. The same basis supports the majority rule as to assessed valuation for tax purposes. See, Annotation, 39 A. L. R. 2d 209, and cases there cited; 5 Nichols on Eminent Domain, § 22.1.

The weight of authority clearly supports the view that the assessed value of property for tax purposes, in and of itself, is generally not admissible as direct evidence of value for purposes other than taxation. We adopt that rule for this state. See, Jackson v. Pressnell, 19 Ariz. App. 221, 506 P. 2d 261; Hetherington Letter Co. v. City of Cedar Rapids, 207 N. W. 2d 800 (Iowa, 1973).

Even within the ambit of a broad treatment of relevancy, there was no preliminary or foundation evidence which might have justified the introduction of the evidence here even for limited purposes. The comments of counsel established the intent to have the evidence accepted by the jury as evidence of actual value. The admission of the testimony as to the assessed valuation of the property was erroneous.

The City of Omaha, the appellee here, neither filed a brief nor argued the case on appeal. In various circumstances we have held that error in the admission of evidence is presumed to be prejudicial where the evidence admitted may have influenced the verdict or affected unfavorably the party against whom it was admitted. See, First Baptist Church of Maxwell v. State, 178 Neb. 831, 135 N. W. 2d 756; Witte v. Lisle, 184 Neb. 742, 171 N. W. 2d 781. Where error is established in the admission of evidence of value in a condemnation case, and there is no contention in brief or argument that the error was not prejudicial, the error will be presumed to be prejudicial unless it clearly appears from the record that it did not affect unfavorably the party against whom it was admitted. See First Baptist Church of Maxwell v. State, *supra*. The record here supports the presumption of prejudice.

The judgment of the District Court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. EARL E. DEBERRY, APPELLANT.

215 N. W. 2d 73

Filed March 7, 1974. No. 39232.

Appeal and Error: Evidence. In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Earl E. DeBerry, pro se.

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

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and COLWELL and WARREN, District Judges.

WHITE, C. J.

In this post conviction action the defendant alleges by way of conclusions that he was denied "right to representation by competent counsel. * * * The unconstitutional suppression of evidence by the state. * * * The use by the state of testimony known to it to be perjured." While there are allegations of fact to support these statements of conclusions in the pleadings and, although the record shows that a hearing was held, there is no bill of exceptions in this post conviction case. The pleadings do not afford a basis for granting relief and there is no evidence before the court by which any factual issue could be reviewed. In the absence of a proper bill of exceptions, any assignment of error requiring an examination of evidence cannot prevail on appeal.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, v. HUBERT W. FINCHER, APPELLANT.

216 N. W. 2d 172

Filed March 7, 1974. No. 39277.

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: SAMUEL P. CANIGLIA, Judge. Affirmed.

Hubert W. Fincher, pro se.

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

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and COLWELL and WARREN, District Judges.

WARREN, District Judge.

The defendant was convicted by a jury and sentenced to a term of 15 to 20 years for the crime of assault with intent to commit great bodily injury, occurring on September 29, 1970. On direct appeal, the conviction was affirmed. State v. Fincher, 188 Neb. 376, 196 N. W. 2d 909 (1972). Defendant then appealed from denial of post conviction relief alleging two grounds for relief: (1) The propriety of jury instructions on an insanity defense; and (2) claimed ineffectiveness of counsel. This court affirmed the trial court's action in overruling defendant's motion to vacate the conviction. State v. Fincher, 189 Neb. 746, 204 N. W. 2d 927 (1973).

The defendant then filed a petition for a writ of habeas corpus in the United States District Court for the District of Nebraska alleging the two grounds above

enumerated, together with an additional third ground involving alleged failure of the trial court to hold a hearing on defendant's competency to stand trial pursuant to Pate v. Robinson, 383 U. S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). The federal district court then refused to exercise its power until defendant had complied with the exhaustion requirements of 28 U. S. C., § 2254 (b), as to the third ground, and dismissed defendant's habeas corpus petition without prejudice to later refiling. Fincher v. Wolff, 73-L-155 (U. S. D. C. Neb., 1973).

Defendant then filed another motion to vacate and set aside his conviction and sentence, which was summarily overruled by the trial court, and defendant now returns to this court with his second post conviction appeal.

Most appropriate to this fact situation are the statements of this court in State v. Reichel, 187 Neb. 464, 191 N. W. 2d 826 (1971): "There ought to be some final end to litigation in a criminal case. * * * There is no justification for allowing a prisoner to continue litigation endlessly by piecemeal post conviction attacks on his conviction and sentence. * * *

"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." See, also, State v. Smith, 188 Neb. 388, 196 N. W. 2d 918 (1972).

The additional ground for relief now urged by defendant was clearly available at the time of his first post conviction proceeding.

Defendant seeks on his third appearance in this court to exhaust his state remedies. He now has.

The action of the District Court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LITTLE ART CORPORATION, A CORPORATION, APPELLANT.
215 N. W. 2d 853

Filed March 14, 1974. No. 38542.

Criminal Law: Obscenity: Statutes. The Nebraska obscenity statutes are in full compliance with the criteria and standards required by recent United States Supreme Court decisions including Miller v. California.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Walter J. Matejka, Arthur Schwartz, and Frank Slaninger, for appellant.

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

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and RONIN and HASTINGS, District Judges.

NEWTON, J.

This matter requires a construction of the Nebraska obscenity statutes. In the case of State v. Little Art Corp., 189 Neb. 681, 204 N. W. 2d 574, we sustained the conviction of defendant on a charge of publicly showing obscene moving picture films. On appeal to the United States Supreme Court the cause was remanded for a construction of the Nebraska statutes in the light of Miller v. California, 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419, and other recent decisions. See Little Art Corp. v. State of Nebraska, 414 U. S. 992, 94 S. Ct. 345, 38 L. Ed. 2d 231. The United States Supreme Court has required a similar construction of statutes in sev-

eral other states by the state courts concerned.

In Roth v. United States, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, the court sustained a conviction under a federal statute punishing the mailing of "obscene, lewd, lascivious, or filthy * * *" materials. The court stated: "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '* * * (T)he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * *.' United States v. Petrillo, 332 U. S. 1, 7-8. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '* * * boundaries sufficiently distinct for judges and juries fairly to administer the law * * *. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense * * *.'"

In United States v. 12 200-Ft. Reels of Film, 413 U. S. 123, 93 S. Ct. 2665, 37 L. Ed. 2d 500 (1973), the court, in footnote 7, refers to the language of the federal statute and states: "We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes where 'a serious doubt of constitutionality is raised' and 'a construction of the statute is fairly possible by which the question may be avoided.' United States v. Thirty-seven Photographs, 402 U. S. 363, 369 (1971) (opinion of White, J.), quoting from Crowell v. Benson, 285 U. S. 22, 62 (1932). If and when such a 'serious doubt' is raised as to the vague-

ness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material in 19 U. S. C. § 1305 (a) and 18 U. S. C. § 1462, see United States v. Orito, post, at 140 n. 1, we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in Miller v. California, ante, at 25. See United States v. Thirty-seven-Photographs, supra, at 369-374 (opinion of White, J.). Of course, Congress could always define other specific 'hard-core' conduct."

In Miller v. California, *supra,* it was held in relation to obscene materials: "* * * we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or *authoritatively construed.*" (Emphasis supplied.) It further states: "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, at 230, quoting Roth v. United States, supra, at 489, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. * * *

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

In United States v. One Reel of Film, 481 F. 2d 206 (1st Cir., 1973), and United States v. Thevis, 484 F. 2d 1149 (5th Cir., 1973), the courts construed federal statutes in the light of footnote 7 of United States v. 12 200-Ft. Reels of Film, *supra,* and held the language used to be sufficiently specific.

The Nebraska statute, section 28-921, R. S. Supp., 1972, forbids the circulation or publication of "any obscene, lewd, indecent, or lascivious" material. Defendant asserts that this language is overbroad and not sufficiently specific to comply with the requirements of Miller and other recent cases. In so doing, footnote 7 of United States v. 12 200-Ft. Reels of Film, *supra,* is ignored by defendant. He likewise ignores section 28-926.07, R. R. S. 1943, which provides that in criminal proceedings brought under section 28-921, "the standard for judging obscenity to be applied as a guide by finders of fact in considering the evidence is whether to the average person the dominant theme of said material or conduct which is at issue in such civil action or criminal proceedings, taken as a whole, appeals to the prurient interest, which is to excite lustful thoughts, or a shameful or morbid interest in nudity, sex, or excretion which goes substantially beyond the customary limits of candor."

Section 28-926.07, R. R. S. 1943, effectively narrows the standard of obscenity contained in section 28-921, R. S. Supp., 1972. The word prurient in its application to obscenity means "tending to excite lasciviousness" and lasciviousness means the presence or arousal of sexual desire. Similarly applied to obscenity the word lustful refers to sexual desire. Insofar as the phrase "a shameful or morbid interest in nudity, sex, or excretion which goes substantially beyond the customary

limits of candor" is concerned, it will be noted that Miller v. California, *supra,* uses substantially the same language in defining permissible statutory standards in the examples therein set forth.

We find that the Nebraska statutes fully comply with the requirements of Miller v. California, *supra,* and other related cases. We further find that in once more affirming the conviction of defendant, no retroactive application of the law is involved. At the time of the violation by defendant our statutes were in full force and effect. Their meaning and purport were clear. We have not given them a new or different construction but have simply affirmed and called attention to their clear meaning and intent.

We reaffirm our holding in the former opinion rendered in this case.

AFFIRMED.

McCOWN, J., dissenting.

The majority opinion treats Miller v. California, 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419, as though it authorized state courts to construe state statutes designed to regulate obscenity by simply rewriting them to comply with the state court's interpretation of the requirements of Miller. That view not only transforms the court into a legislature, but also ignores the emphasis on specificity so frequently reiterated in Miller.

The Supreme Court stated in Miller: "State *statutes* designed to regulate obscene materials must be carefully limited. * * * As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be *specifically defined by the applicable state law,* as written or authoritatively construed."

In laying down the constitutional tests, the court specified: "(b) whether the work depicts or describes, in a patently offensive way, sexual conduct *specifically defined by the applicable state law,* and * * *. We

emphasize that it is not our function to propose regulatory schemes for the States. That must await their *concrete legislative efforts.* * * * Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard-core' sexual conduct *specifically defined by the regulating state law,* as written or construed." (Emphasis ours.)

It must be obvious that the Nebraska statutes do not meet the guidelines and standards set forth in Miller v. California, *supra.* It is equally obvious that the majority opinion does not construe the Nebraska statute when it says the words of the Nebraska statute are now rewritten to say what Miller requires it to say. I respectfully dissent and suggest that the recent action of the Supreme Courts in Iowa and Louisiana upon the identical issues ought to point the course for this court also.

In State v. Wedelstedt, 213 N. W. 2d 652 (Iowa, Dec. 19, 1973), the Iowa court said: "It is urged we construe the statute to include perhaps the suggested specific examples stated in Miller to eliminate vagueness and to somehow adopt the average-person criterion.

"This would require adding to and striking legislative provisions of the statute. Well-established rules of statutory construction prohibit our doing so. No court under the guise of construction may extend, enlarge, or otherwise change the terms and meaning of a statute. * * *

"It is not our function to rewrite the statute. * * * If changes in the law are desirable from a policy, administrative, or practical standpoint, it is for the legislature to enact them, not for the court to incorporate them by interpretation."

In State v. Shreveport News Agency, Inc., 287 So. 2d 464 (La., Dec. 3, 1973), the Louisiana Supreme Court

said: "We are not of the opinion that we are endowed with the constitutional authority to re-draft Louisiana's obscenity statute. Our Court may interpret a statute, but it cannot re-write a statute in order to hold it constitutional. * * * Our statute is totally lacking in specificity which would comply with the requirements of Miller v. California. * * * We reject any theory that we can authoritatively construe our criminal statute regulating obscenity so as to make it constitutional under the United States Supreme Court holding in Miller v. California. It is for the legislature to design a statute or statutes which meet the tests and formulations set forth by that court."

It seems clear to me that the Nebraska statutes on obscenity, in the light of Miller v. California, *supra,* are vague and general, as well as overbroad, and lack the required specificity to withstand constitutional attack under the First and Fourteenth Amendments. It is an added source of difficulty that the "construction" of the Nebraska statutes now made by this court is simply applied retroactively to this case, where the challenged offense occurred long before the current "construction." The fact that the films here might well have been obscene under virtually any valid statute cannot breathe constitutional life into an otherwise invalid statute. That fact only emphasizes the difficulties inherent in the judicial assumption of legislative responsibility in the difficult field of obscenity. In my opinion, section 28-921, R. S. Supp., 1972, is clearly unconstitutional in the light of Miller v. California, 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419.

CLINTON, J., dissenting.

I cannot agree with the majority opinion for reasons wholly unrelated to the issue of the First Amendment and obscenity. The judgment of conviction in this case was vacated and the cause remanded for further consideration in the light of Miller v. California, 413 U.

S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419, and other recent decisions of the United States Supreme Court.

Among other requirements, Miller holds that in order to be immune from constitutional infirmity the prohibited material must depict or describe "sexual conduct *specifically defined* by the applicable state law." (Emphasis supplied.) The court then gives the following examples of such specific definition:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

Our present statute is without question inclusive of the specific descriptions and is broad enough to include the exhibition of the thoroughly foul films on which this prosecution was founded. I cannot agree with Judge McCown's conclusion that the present statute is vague. No contention can reasonably be made that the defendant did not have notice that the films it displayed were prohibited by existing Nebraska law.

The problem presented by the vacation by the Supreme Court of the United States of our decision affirming the judgment of conviction in this case arises because if we are to comply with the Miller standards requiring specificity or description in the statute, we cannot, as Judge McCown correctly notes, merely construe our statute, we must rewrite it. If we are to do that then we violate the principle of separation of powers of our own Constitution by a completely unwarranted intrusion into the legislative domain. We have said many times in somewhat varying language that: "A court cannot, under the guise of its powers of construction, rewrite a statute, supply omissions, or make other changes." Bessey v. Board of Educational Lands & Funds, 185 Neb. 801, 178 N. W. 2d 794.

It is far more important that we adhere to our own salutary principles of statutory construction, which are a recognition of the fundamental constitutional doctrine of separation of powers, than that we defend the police power of the state by arbitrarily restricting the operation of the general words of our present statute. The preservation of the principle is far more important than whether the defendant pays a fine, the deterrent effect of which will be slight. The remedy, of course, is legislation, state and municipal, which describes with the specificity required by Miller the matters which the Legislature wishes to prohibit. That is for the legislative branch to determine and not for us.

Let not my position be misunderstood. I deplore what I believe to be the unwise intrusion by the Supreme Court of the United States into the areas historically within the police powers of the state. The protection of constitutional rights and the police power of the state are opposite sides of the same legal coin. The problem of the courts in matters such as this always has been and always will be the balancing of interests protected by the Constitution and the necessities of protecting the common good through the exercise of the police power. In the matter of obscenity, which as the United States Supreme Court has always said is not protected by the First Amendment, that court has, in my judgment, gotten the tension out of balance. But in this particular case we must live with that maladjustment because under the supremacy clause of the Constitution of the United States we are bound to observe the mandate of the Supreme Court which vacated the judgment herein.

The statute is unconstitutional under Miller for overbreadth. We cannot remedy that overbreadth short of rewriting it. That we cannot do if we are to keep faith with the doctrine of separation of powers and our own long-followed principles of statutory construction. The

majority opinion seems to believe that we have received an apparent invitation from the Supreme Court of the United States to "authoritatively construe" the statute to make it constitutional. Such an "invitation" if that is what it is, cannot and ought not extend our admitted power to construe statutes to the point of rewriting them.

I would add a caveat to those who read the majority opinion. Do not rely on it as a general precedent in the matter of statutory construction.

ROBERT J. BLUM, APPELLANT, V. WILDA I. BRICHACEK ET AL., APPELLEES.

215 N. W. 2d 888

Filed March 14, 1974. No. 39048.

1. **Assumption of Risk: Damages.** Where one, knowing and comprehending the danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom.
2. **Negligence: Motor Vehicles.** When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery.

Appeal from the District Court for Colfax County: C. THOMAS WHITE, Judge. Affirmed.

Bauer, Galter & Scott, for appellant.

Ray C. Simmons, for appellees.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and COLWELL and WARREN, District Judges.

NEWTON, J.

This is an action to recover damages for personal injuries received by plaintiff while walking in the street when struck by defendants' automobile. The verdict of the jury was for plaintiff. A motion of the defendants' for judgment non obstante veredicto was sustained by the court on the theory that plaintiff entered the street for the purpose of stopping the defendants' car and was thereby guilty of negligence sufficient to bar recovery as a matter of law. We affirm the judgment of the District Court.

Under the circumstances we must regard the evidence in the light most favorable to plaintiff. The accident occurred near the intersection of 7th and D Streets in Schuyler, Nebraska. Seventh Street runs east and west, and D Street north and south. On the south side of 7th Street, west of the intersection, is a streetlight, and east of the intersection, a fireplug. It is 56 feet 3 inches from the light to the fireplug. Plaintiff appears to have been struck approximately 10 feet 8 inches east of the fireplug where his hat lay after the accident. The sidewalk was west of the fireplug. Seventh Street, from curb back to curb back, measures 31 feet 9 inches. Allowing for the curbs, it would have a driving surface approximately 30 feet in width with 15-foot lanes.

All parties concerned, except Wilda Brichacek, were employees of Spencer Foods. Plaintiff, Donald Kinzer, and Kenneth Chapik were out on strike. Defendant LaVern Brichacek was a nonstriking employee. There was ill feeling between the two groups. Plaintiff, his family, and Chapik were visiting at the Kinzer home on D Street south of the intersection on July 9, 1971. The accident occurred about 10:25 p.m. on that evening. Defendants' car, driven by defendant Wilda Brichacek, in which her husband and another couple were passengers, passed the Kinzer residence. A short time later the car passed again and the occupants yelled insults and

profanities. Kinzer got an ax, followed the car to the intersection where it had stopped, and asked the occupants to desist. The car drove by a third time with a repetition of the insults. Kinzer, without the ax, followed by Chapik and plaintiff, went to the intersection with the avowed intention of stopping the car when it came by again. Plaintiff and Chapik stopped just east of the fireplug and Chapik stayed there on the sidewalk or parking. They saw the car turn into 7th Street, a block to the west. It was traveling slowly, about 10 to 15 miles per hour. Kinzer attempted to intercept it at a point 40 to 50 feet west of the streetlight, or a quarter block west of the intersection. As he stepped out from the curb, the car accelerated and was going 35 to 40 miles per hour when it struck plaintiff. From the point where Kinzer attempted to stop the car to where plaintiff was struck was approximately 115 feet.

Plaintiff said that as the car turned into 7th Street he started to cross the street with the idea of intercepting it as it turned left and north into D Street. As plaintiff got to the center of the street, he saw Kinzer step out and plaintiff started back south across the eastbound lane. He states he started "to walk a little faster" as the car approached at an accelerated speed but was struck at a point 3 to 5 feet from the curb. There was some testimony that from Kinzer to plaintiff the car veered 2 or 3 feet to the right. The defendant driver said that she failed to see plaintiff until she struck him. Plaintiff being in the vicinity of the fireplug was near but not in the crosswalk.

The evidence would sustain a finding of negligence on the part of defendants in that an adequate lookout was not maintained, there was a sudden acceleration of speed, and the car was permitted to veer to the right. The evidence of contributory negligence indicates that plaintiff entered the street with the avowed purpose of stopping the defendants' car and in so doing

left a place of safety; he knew the car was approaching and was aware it had accelerated; he turned back, after reaching a place of safety in the middle of the street, across the path of the car; and he had ample time to cross back ahead of the car but did not do so. The car had to travel a distance of approximately 115 feet from where Kinzer attempted to intercept it. At that time plaintiff had reached the center of the street and turned back. The car accelerated from 10 to 15 miles per hour to 35 to 40 miles per hour and its average speed could not have exceeded 30 miles per hour. A car traveling at that speed covers 44 feet per second. At that speed over a distance of 115 feet plaintiff had 3 seconds to walk across the 15 foot south lane to safety. Human beings have run a distance of 100 yards or 300 feet in 9.1 seconds. Certainly any ablebodied man could cover one-twentieth of that distance in 3 seconds, yet the plaintiff did not. Under all the circumstances, was plaintiff's negligence more than slight when compared with the defendants'?

It may be said that as a pedestrian, in the vicinity of a crosswalk, plaintiff had the right-of-way and was entitled to assume it would be respected. The difficulty here is that he was not a simple pedestrian. He admits he intended to talk to the occupants of the car which necessarily entailed stopping it. He had also observed Kinzer's attempt to stop it was in vain so he knew it was not likely to stop as a result of his own efforts. Notwithstanding these circumstances, he placed himself in a precarious and dangerous position. The case is analogous to that of Benedict v. Andersen, 162 Neb. 735, 77 N. W. 2d 320, where the plaintiff stepped onto the highway to stop a car and to Van Ornum v. Moran, 186 Neb. 418, 183 N. W. 2d 759, where the plaintiff stepped into the street to direct the movement of a bus into the street and to direct and stop traffic.

"Where one, knowing and comprehending the danger,

voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom." Hollamon v. Eagle Raceway, Inc., 187 Neb. 221, 188 N. W. 2d 710.

"When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery." Lileikis v. Kudirka, 180 Neb. 742, 145 N. W. 2d 441.

The latter rule is also applicable to a pedestrian at a crosswalk. See Farag v. Weldon, 163 Neb. 544, 80 N. W. 2d 568.

We conclude that the judgment of the District Court should be affirmed.

AFFIRMED.

BOSLAUGH, J., dissenting.

If the evidence is considered in the light most favorable to the plaintiff, and all conflicts are resolved in his favor, the jury could have found the plaintiff was 3 to 5 feet from the south curb when he was struck by the Brichacek automobile which had been accelerated to 35 to 40 miles per hour and had swerved to the right. It is clear that the accident would not have happened if the speed of the Brichacek automobile had not increased and it had not swerved toward the south curb.

In my opinion the evidence presented questions of negligence and contributory negligence which under the comparative negligence statute were required to be submitted to the jury.

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

STATE OF NEBRASKA, APPELLEE, V. ONE 1970 2-DOOR SEDAN RAMBLER (GREMLIN), APPELLANT.

215 N. W. 2d 849

Filed March 14, 1974. No. 39119.

1. **Constitutional Law.** Due process tolerates variances in the form of a hearing appropriate to the nature of the case, depending upon the importance of the interests involved and the nature of any subsequent proceedings.
2. **Criminal Law: Motor Vehicles.** The use of a vehicle in criminal activities ordinarily creates an emergent situation.
3. **Constitutional Law: Notice: Forfeitures: Time.** The absolute requirement of section 28-4,135, R. S. Supp., 1972, that a forfeiture complaint be filed within 5 days after seizure with provision for notice and hearing meets the test of due process.
4. **Statutes.** Courts should give statutory language its plain and ordinary meaning.
5. **Words and Phrases.** "Transport" means to carry or convey from one place or station to another.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Stanley D. Cohen, for appellant.

Ronald D. Sutter, for appellee.

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

SPENCER, J.

This action involves a forfeiture of the automobile described in the title for transportation of a controlled substance. The action was brought pursuant to section 28-4,135, R. S. Supp., 1972. Donald D. Ruyle, the owner of the car, appeals from the judgment of forfeiture. He contends: (1) The statute is in violation of the due process clauses of the Nebraska and the United States Constitutions; and (2) the court erred in holding that the car was being used to transport a controlled substance within the meaning of the statute. We affirm.

On February 14, 1972, members of the Beatrice police

department, who had the residence of Roger Allen Buss under surveillance, observed the automobile in question being driven up and parked on the public street in front of that house. They also observed Donald D. Ruyle alight from the vehicle and enter the residence under surveillance. Approximately an hour later he was arrested for possession of marijuana and taken into custody. The car remained locked and parked on the public street until approximately 10:50 a.m. the next day, February 15, when it was searched and seized. The search was made pursuant to Ruyle's written consent, and with keys supplied by him. Ruyle was in custody at the time of the search. On February 15, Ruyle pleaded guilty to possession of marijuana, was fined $350, and sentenced to 7 days in jail.

The search of the vehicle revealed manicured marijuana, unmanicured marijuana, and two marijuana cigarette butts. The testimony of Ruyle indicated he was the owner of the vehicle and had been driving it prior to entering the Buss residence shortly before his arrest. The condemnation complaint was filed February 18, 1972, the third day after the seizure of the vehicle.

Section 28-4,135, R. S. Supp., 1972, so far as material herein, provides: "(4) When any conveyance, * * * is seized under subdivision (1) (d) of this section, the person seizing the same shall within five days thereafter cause to be filed in the district court of the county in which seizure was made a complaint for condemnation of the conveyance seized. The proceedings shall be brought in the name of the state by the county attorney of the county in which the conveyance was seized. The complaint shall describe the conveyance, state the name of the owner if known, allege the essential elements of the violation which is claimed to exist, and shall conclude with a prayer of due process to enforce the forfeiture. Upon the filing of such a complaint, the court

shall promptly cause process to issue to the sheriff, commanding him to take possession of the conveyance described in the complaint and to hold the same for further order of the court. The sheriff shall at the time of taking possession serve a copy of the process upon the owner of the conveyance in person or by registered or certified mail at his last-known address; * * *."

Ruyle challenges the constitutionality of this statute on the ground that it authorizes seizure of property prior to any notice being given to the owner, and before a hearing is afforded on the legality of the seizure. He contends this lack of notice and hearing is contrary to the concept of procedural due process recently enunciated by the United States Supreme Court. He refers to Fuentes v. Shevin (1972), 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, and Sniadach v. Family Finance Corp. (1969), 395 U. S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349. Those cases are not controlling herein. Shevin involved a prejudgment replevin statute and Sniadach a summary prejudgment garnishment process.

Due process tolerates variances in the form of a hearing appropriate to the nature of the case, depending upon the importance of the interests involved and the nature of any subsequent proceedings. The present situation is one where a valid governmental interest justifies the seizure upon the discovery of contraband. The statute does not deprive the owner of his property without due notice and hearing. The Supreme Court in Fuentes observed: "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." The notice and hearing required by section 28-4,135, R. S. Supp., 1972, adequately meets this test.

The vehicle was seized legally. It was being used to transport contraband. The police removed the illegal substances. They seized the car to impound it and to

keep it until forfeiture proceedings were initiated, as they were required to do. Within the time limited, this action was brought for its condemnation. Notice was promptly served on Ruyle, who appeared by counsel at all stages of the proceeding.

The use of a vehicle in criminal activities ordinarily creates an emergent situation. Unless a vehicle used to transport illegal substances is seized when such substances are discovered, it can be readily removed from the jurisdiction of the court, or utilized for further criminal activities of a similar nature. The inherent nature of these considerations requires summary seizure of the vehicle to protect the rights of the state. The same reasoning that allows warrantless searches of automobiles applies to the seizure of them. The absolute requirement of section 28-4,135, R. S. Supp., 1972, that a forfeiture complaint be filed within 5 days after seizure with provision for notice and hearing, meets the test of due process.

The word "transport" is not defined in the act. Ruyle contends it should be defined to mean trafficking in drugs. He argues it was the intent of the Legislature to penalize the drug pusher, those engaged in the sale and distribution of narcotics, and not to work a forfeiture as in the case at bar. Courts should give statutory language its plain and ordinary meaning. Foote v. County of Adams (1956), 163 Neb. 406, 80 N. W. 2d 179. To the average individual, "transport" means to carry or convey from one place or station to another. We have so defined it. McLaughlin v. State (1920), 104 Neb. 392, 177 N. W. 744.

The judgment is affirmed.

AFFIRMED.

SMITH, J., not participating.

McCOWN, J., dissenting.

The majority opinion summarily dismisses the contention of a lack of due process; states that Fuentes v.

Shevin, 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, is not controlling; and points to the mobility of an automobile as apparently justifying the extraordinary confiscation here. Here the unattended vehicle had been parked on the street for a period of many hours. It was locked and the keys were in the possession of police officers. The car was searched with the consent of the owner and was seized upon the discovery of approximately two ounces of marijuana. The owner denied knowledge of its presence. The record does not disclose any prosecution of anyone for an offense involving that marijuana except for this forfeiture proceeding.

In a very recent case involving almost identical statutes and also involving the seizure and forfeiture of an automobile in a drug case, the Supreme Court of Washington reached a directly opposite conclusion. See City of Everett v. Slade, 83 Wash. 2d 80, 515 P. 2d 1295 (Nov., 1973). The Washington statutes and the Nebraska statutes obviously stem from the same uniform source.

In the Washington case the State contended, as it did here, that the right to due process was not violated by the summary seizure because judicial review was provided for and the deprivation was only temporary because of the requirement of the prompt forfeiture action to follow. The Washington court disposed of those contentions by saying: "The contentions are not well taken. As the United States Supreme Court stated in Fuentes v. Shevin, supra, 'If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. * * * (I)t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a "deprivation" in the terms of the Fourteenth Amendment.' "

The Washington court held: "Due process requires that an individual be given an opportunity for hearing

before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake and justifies postponing the hearing until after the event; the opportunity for a hearing must be granted at a meaningful time and in a meaningful manner, and the hearing must be appropriate to the nature of the case."

It should be pointed out here also that although section 28-4,135, R. S. Supp., 1972, authorizes seizure of "all conveyances * * * which are used, or intended for use, to transport any property described in subdivisions (a) and (b) of this subsection," it also contains a provision that such conveyances are to be released upon a showing by the owner that he had no knowledge that such conveyance was being used in violation of the act. Nevertheless, section 28-4,136, R. S. Supp., 1972, provides that it shall not be necessary for the State to negate any exemption or exception under the provisions of the act and provides that "the burden of proof of any such exemption or exception shall be upon the person claiming its benefit." Such provisions in the case of the seizure and forfeiture of a vehicle place the burden of proof upon the owner to establish that the vehicle is not subject to forfeiture and relieves the State from proving that it is subject to forfeiture.

The majority opinion here would authorize the seizure without notice and hearing and the later forfeiture of any parked, unattended vehicle in which two ounces of marijuana was found, unless the owner of the "conveyance" could affirmatively establish to the satisfaction of a court at a later hearing that he had no knowledge that the substance was in the vehicle. That interpretation of the Nebraska statutes means that the mere presence of a small quantity of marijuana in an airplane, house trailer, automobile, camper, houseboat, or any other "conveyance" establishes the fact that the conveyance was used "to transport" a controlled sub-

stance, and authorizes the immediate seizure of the conveyance without notice or hearing, and its later forfeiture if a court does not believe the owner's testimony that he had no knowledge of the presence of contraband. The Washington statute by contrast requires that the "transportation" be "for the purpose of sale or receipt" of the contraband. It should be noted also that under Nebraska statutes the transportation of controlled substances in itself is not a crime. But it nevertheless becomes the foundation for the statutory forfeiture involved here.

Until the ultimate decision on forfeiture, the owner is deprived of his conveyance regardless of what the evidence may disclose at the hearing. Although "extraordinary situations" may justify the postponement of notice and hearing in respect to depriving an individual of a significant property interest, such situations must be totally unusual. There ought to be some showing that the seizure without notice and hearing was directly necessary to secure an important government or general public interest and that there was a need for very prompt action. See City of Everett v. Slade, *supra*. Those facts did not exist here. The judgment should be reversed.

CLINTON, J., dissenting.

I have grave doubt that the Legislature intended to adopt a definition of the term "to transport" which is so broad and all-inclusive as to justify a finding under the evidence here that the subject automobile was being used "to transport" the controlled substance. The statute in question was adopted from 21 U. S. C. A., section 881, subdivision (a) (4). This section of the federal statute describes one class of property subject to seizure and forfeiture and reads as follows: "(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale,

receipt, possession, or concealment of property described in paragraph (1) or (2), except that-- . . ." There is a significant difference between the quoted section and that same section as it was incorporated in the Nebraska statute. The following words are omitted from the Nebraska version: "or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of." The omission of the quoted words in section 28-4, 135, R. S. Supp., 1972, can only mean that the Legislature did not intend to equate possession in an automobile with the phrase used "to transport." It would appear that the legislative intent was to permit the forfeiture of motor vehicles, airplanes, etc., when they are an instrumentality of the crime. If, for example, the Legislature intended to include only those cases where the purpose of the substance being in the car was to move the substance from one point to another then a limited definition of transport is required. A homely illustration might make the point: If one takes several bags of groceries from the supermarket to one's home it can be readily stated that he is using the automobile "to transport" the groceries. On the other hand, if one keeps a box of kleenex in the glove compartment for use when needed, can it really be argued that the automobile is being used "to transport" the kleenex.

In short, I would accept the defendant's argument that the forfeiture provisions of the statute were aimed at trafficking in controlled substances. In this case the quantity of marijuana found in the car was very small. Certain other evidence, residue of smoked marijuana, and the packaging method indicate the substance was in the car for use. There was no evidence that the owner was dealing in drugs.

In this case the amount of marijuana was an ounce or two. Under the statute the penalty for possession of quantities less than a pound is a $500 fine and/or a

7-day sentence in the county jail. § 28-4,125(4), R. S. Supp., 1972. The owner paid a $350 fine and served the maximum sentence in jail on a charge of possession. The practical effect of this proceeding is the forfeiture by the defendant of a car worth several thousand dollars and that is an additional penalty which I do not believe the Legislature contemplated in this situation. See McConnell v. McKillip, 71 Neb. 712, 99 N. W. 505.

STATE OF NEBRASKA, APPELLEE, V. LEROY MONTGOMERY, APPELLANT.
215 N. W. 2d 881

Filed March 14, 1974. No. 39133.

1. **Criminal Law: Indictments and Informations: Instructions: Homicide.** An information charging defendant with homicide committed in the perpetration of a robbery under section 28-401, R. R. S. 1943, charges only murder in the first degree and the court should not ordinarily instruct the jury as to the lesser offenses of murder in the second degree and manslaughter.
2. **Criminal Law: Homicide: Intent: Time.** If the intention to rob is formed either antecedent to or contemporaneously with the acts which result in the death, the homicide is committed in the perpetration of the robbery.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Frank B. Morrison, Sr., and Bennett G. Hornstein, for appellant.

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

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

CLINTON, J.

The defendant was charged under the provisions of

section 28-401, R. R. S. 1943, with having killed John R. Wisotzkey while in the perpetration of a robbery. He was found guilty by a jury and punishment was fixed at life imprisonment. The court pronounced sentence in accordance with the verdict.

On this appeal the error assigned is that the court improperly refused to submit instructions which would have permitted the jury to find the defendant guilty of the lesser crimes of second degree murder or manslaughter.

The instruction given by the court properly defined the murder as a killing while in the perpetration of a robbery and appropriately defined robbery and all the elements thereof. The effect of the instructions was that the jury had two choices. It could find the defendant guilty as charged, or not guilty.

The defendant's position is that he intended only to "rough up" Wisotzkey, that when the assault began he had no intention to rob him, and that the robbery was the result of a spontaneous afterthought occurring after the fatal blows had been struck.

There is no important conflict as to what occurred. The defendant was a close associate of Teri Lynn Perkins who had on the night in question engaged in an act of prostitution with Wisotzkey. According to the testimony of Teri, Wisotzkey refused to pay her fee and attempted to choke her. When Teri came from the hotel where she and Wisotzkey had been, the defendant, two male companions, and one Patty Moore were waiting in the defendant's vehicle. She knew they were waiting for her. She told the defendant what had occurred and asked the defendant to get her money. He agreed. About this time the defendant and his companions removed an automobile jack handle and a bayonet from the trunk of the defendant's car and placed them inside the auto. When Wisotzkey came from the hotel he got into his own automobile and pulled away.

The defendant and his companions, together with Teri, followed. They forced the Wisotzkey car from the Interstate highway, stopped their own car, and got out, taking the jack handle and bayonet with them. One of the defendant's companions broke the window on the driver's side of the Wisotzkey automobile. The defendant, carrying the bayonet, went around to the other side of the Wisotzkey car and opened the door. Then an assault took place. The defendant acknowledges that he alone had the bayonet in his hands, but testified that the multiple, deep, serious stab wounds suffered by the victim were accidentally inflicted in the course of the beating administered to Wisotzkey by the defendant's companions. He stated he had no thought of robbing Wisotzkey until he saw the victim's billfold in the left rear pocket of the victim's trousers. While his companions continued to beat Wisotzkey the defendant removed the billfold. He admitted he received the money it contained. He testified that the stab wounds must have occurred before he removed the billfold. He stated that at no time had he intended to kill Wisotzkey.

Following the assault the defendant and his companions left. Wisotzkey, despite the serious wounds about his head and body, was able to get himself out of the car and summon help from a passing motorist. Wisotzkey died a short time later in a hospital. The cause of death was shock resulting from his various injuries which included not only the stab wounds, but injuries inflicted from other blows.

In the foregoing state of the evidence the court was not required even upon request to instruct the jury on second degree murder or manslaughter. Even accepting the defendant's testimony at face value, as we must on this appeal, the uncontradicted evidence establishes

a killing while in the "perpetration of a robbery."

No specific intention is required to constitute felony murder other than the intent to do the act which constitutes the felony in question. In this instance that was the robbery. There is no requirement in the statute that the intent to rob be formed at any particular time as long as the killing occurs as the result of acts committed while in the perpetration of the robbery.

In Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151, this court stated: "In MacAvoy v. State, 144 Neb. 847, 15 N. W. 2d 45, we said: '. . . If a killing is committed within the res gestae of the felony charged it is committed in the perpetration of, or attempt to perpetrate, the felony, within the meaning of the statute.' See, also, Francis v. State, 104 Neb. 5, 175 N. W. 675." We further said: "(W)e held in Thompson v. State, 106 Neb. 395, 184 N. W. 68: 'An information charging defendant with a homicide committed in the perpetration of or attempt to perpetrate a robbery, . . . charges only murder in the first degree, and it is error for the trial court to instruct the jury that they may find defendant guilty of murder in the first degree, guilty of murder in the second degree, or guilty of manslaughter.' See, also, Morgan v. State (51 Neb. 672, 71 N. W. 788); Davis v. State, 116 Neb. 90, 215 N. W. 785." We also said: "It is sufficient if death occurs unexpectedly and without design if it occurs while the party or parties charged are in the perpetration of, or an attempt to perpetrate, one of the acts set out in the statute."

This is not to say, of course, there might not occur a set of facts under which an instruction on the lesser offenses of second degree murder or manslaughter might not be appropriate. Such a situation might be under circumstances where there is a time lag between an assault clearly complete which results in death and the robbery, and where the evidence justifies the conclusion that robbery indeed was an afterthought and the

assault itself was not the direct means of perpetrating the robbery. In this case, however, we have an absolute coincidence of the assaults and the robbery. The assaults were clearly the means by which the robbery was accomplished.

The statutory language "in the perpetration" is significant. It seems clearly to connote a purpose to cover situations where the intention to commit the underlying felony is formed antecedent to or contemporaneously with acts which result in the killing. This has been recognized by other courts. In Commonwealth v. Butcher, 451 Pa. 359, 304 A. 2d 150, the court discussed its reasons for rejecting the proposition that the intent to rob must have preceded the assault. "As stated in Commonwealth v. Tomlinson (466 Pa. 241, 284 A. 2d 687 (1971)), 'This Court has several times decided that if a homicide occurs in the perpetration of or attempt to perpetrate a robbery or other statutorily-enumerated felonies, a conviction of murder in the first degree will be sustained regardless of when the design to commit the robbery or other felony was conceived or the felony committed.' 446 Pa. at 246-247, 284 A. 2d at 690.

"While this language is admittedly ambiguous, it is nevertheless based upon sound policy as it recognizes the difficulty in attempting to ascertain when the intent to rob was conceived in a given factual situation. This difficulty was emphasized in Commonwealth v. Hart, supra, when we noted that 'defendant would require a televised stop-watch in every robbery or felony-killing to prove that the felonious intent existed before the attack. It is rare, we repeat, that a criminal telephones or telegraphs his criminal intent and consequently such intent can be properly found by the jury from the facts and circumstances in a particular case.' 403 Pa. at 658, 170 A. 2d at 853-854. In all probability the rule would be better restated to indicate that if the killing

is used to effectuate the robbery then it is immaterial that the intent to kill preceded the intent to rob since the force resulting in death is the force used to accomplish the robbery."

Cases from other jurisdictions which on a factual basis are similar to what we have here are State v. Craig, 82 Wash. 2d 777, 514 P. 2d 151 (1973); and Durham v. Commonwealth, 214 Va. 166, 198 S. E. 2d 603 (1973).

We have been cited State v. Muskus, 158 Ohio St. 276, 109 N. E. 2d 15. There the Ohio court held that in a case of felony murder the lower court erred in not instructing on lesser offenses of second degree murder and manslaughter. It is not clear from the statement of the evidence in that opinion as to what extent the facts are different from this case. The assault in that case arose out of similar circumstances, but there is no detailed recital as to how and when the robbery occurred. We do not attempt to distinguish the case. If it stands for a different rule, we adhere to our own precedents.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LADDIE DITTRICH, APPELLANT.

215 N. W. 2d 637

Filed March 14, 1974. No. 39154.

1. **Trial: Evidence: Instructions.** Ordinarily, when an objection to, or motion to strike, improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice resulting.
2. **Trial: Evidence: Homicide: Intent: Criminal Law.** In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent.
3. **Aiders and Abettors: Intent.** Where a crime requires the

existence of a particular intent, an alleged aider or abettor cannot be held as a principal unless it is established that the aider knew that the perpetrator of the act had the required intent, or that the aider himself possessed the required felonious intent.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Bruce G. Mason and Thomas L. Moser of Zweiback & Laughlin, for appellant.

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

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

NEWTON, J.

Defendant was charged with committing murder in the first degree in that he killed John R. Wisotzkey during the perpetration of a robbery. He has appealed his conviction and assigns as error the reception of evidence of a prior conviction of defendant; the admission of two photographs of the body of the deceased; the refusal of the court to give defendant's requested instruction No. 9; and insufficiency of the evidence to support a charge of murder while perpetrating a robbery. We affirm the judgment of the District Court.

The evidence indicates that in the early morning hours of February 17, 1973, one Terry Perkins met and committed an act of prostitution with John R. Wisotzkey, hereinafter referred to as the deceased, at an Omaha, Nebraska, hotel. A quarrel ensued and she did not get paid. On leaving she met her paramour Leroy Montgomery, James Bland, another woman, and this defendant, who were waiting in Montgomery's car in front of the hotel. She complained of being roughed up and requested that deceased be asked about her money. A few

minutes later the deceased appeared and drove off in his car. Terry, the other woman, and the three men followed. They ran the deceased off the highway, stopped close by, and the three men assaulted him, using fists, a tire iron, and a bayonet knife. Deceased died several hours later from the injuries received. His billfold was taken, the contents removed, and it was discarded. The record does not disclose how much, if any, money was obtained.

During the direct examination of Terry Perkins she was asked: "How long have you known Mr. Dittrich?" and replied: "Ever since he got out of the penitentiary." A motion for a mistrial was made and denied but the court admonished the jury to disregard the statement of the witness. It also instructed the jury to disregard evidence stricken from the record. A similar response had been made by Terry when her deposition was taken in reply to the following question posed by defendant's attorney: "When did you first meet Laddie Dittrich?" It is contended that this should have alerted the prosecutor and enabled him to avoid the answer given. The contention is a doubtful one as the witness was a hostile witness who was under arrest on the same charge, was a friend of defendant's, and had consistently shown a lack of frankness in regard to the affair. It is apparent that were we to accede to defendant's theory that a mistrial should have been declared, such a witness could willfully and deliberately bring about a mistrial and render conviction difficult, if not impossible. There was no design on the part of the prosecution to bring out this type of evidence. The answer given was not relevant. She was not asked how, where, or when she met the defendant, but how long she had known him. The same type of inadvertent evidence was received in the case of State v. Kirby, 185 Neb. 240, 175 N. W. 2d 87. Ordinarily, when an objection to, or motion to strike, improper evidence is sustained and the jury

is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice resulting.

Evidence of a defendant's prior conviction of a felony presents one of the more serious situations and in a close case could perhaps be a determining factor in a jury's verdict. Such evidence, although inadvertently presented, could possibly have such an effect. We believe an adequate statement regarding such situations has been presented in State of Washington v. Johnson, 60 Wash. 2d 21, 371 P. 2d 611, wherein it is held: "'* * * It is not the rule that every inadvertent or irresponsive answer of a witness will work a new trial. The law presumes, and must presume, that the jury finds the facts from the evidence the court permits them to consider. Any other rule would render the administration of the law impractical. The state in criminal trials cannot choose its witnesses. It must call those who have knowledge of the facts, whether they be wilfully designing or stupidly ignorant, and if new trials were granted because of their irresponsive answers, the administration of the criminal laws would become so burdensome as to deny to the state the protection afforded by such laws. Again, as we have said on other occasions, to maintain a contrary rule is to impeach the intelligence of the jury; it is to say that they will return a verdict on evidence which the court tells them they must not consider —a verdict they would not have returned had the inadmissible evidence been kept entirely from their knowledge.'

"The test is this: Did the inadvertent remark, which the jury was instructed to disregard, when viewed against the backdrop of all the evidence, so taint the entire proceedings that the accused did not have a fair trial?" See, also, State v. Lillian, 180 Kan. 640, 305 P. 2d 828; Dale v. Commonwealth (Ky. App.), 397 S. W. 2d 168; Fisher v. State (Tex. Crim. App.), 493 S .W. 2d

841; People v. O'Farrell, 161 Cal. App. 2d 13, 325 P. 2d 1002.

In the present instance the evidence of defendant's guilt was conclusive and the objectionable statement could not have been a determinate factor in the verdict.

Two color photographs of the body of John R. Wisotzkey are in evidence, one of the head and face and the other of the partially covered upper half of his body. They tend to show the extent and seriousness of the injuries inflicted upon him. They were properly received. "In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent." State v. Robinson, 185 Neb. 64, 173 N. W. 2d 443.

The defendant's requested instruction No. 9 in regard to an aider or abettor provided: "* * * if you find that the intent of the defendant, Laddie Dittrich was different from that of the perpetrator, LeRoy Montgomery, the aider's guilt is measured by the intent that activated him.

"Therefore, you must find beyond a reasonable doubt that the defendant intended to rob John Wisotzkey before you can convict him of first degree murder."

The evidence shows that this defendant was not the one who inflicted the knife wounds. However, the undisputed medical evidence was that death resulted from multiple injuries including not only the knife wounds but also blows to the abdomen. The fact that this defendant used only his fists as weapons does not indicate he was innocent of having inflicted any of the wounds contributing to the death of deceased.

Defendant's argument is based on the assertion that he had no intent to rob the deceased and that without such intent he cannot be convicted of felony murder. The argument is rhetorical. The evidence sustains a

finding that he had the necessary intent and the instructions given clearly covered the point. Furthermore his proposed instruction does not correctly state the law on the subject. "Where a crime requires the existence of a particular intent, an alleged aider or abettor cannot be held as a principal unless it is established that the aider knew that the perpetrator of the act had the required intent, or that the aider himself possessed the required felonious intent." 21 Am. Jur. 2d, Criminal Law, § 123, p. 199. See, also, State v. Kneedy, 232 Iowa 21, 3 N. W. 2d 611. Denial of an erroneous requested instruction is not error.

In any event, the defendant's theory was properly submitted to the jury. The court instructed that an essential element of the offense was the killing of John R. Wisotzkey while the defendant was in the perpetration of a robbery from him and further instructed that to constitute robbery there had to be an intent to rob or steal. The assignment is without merit.

Examination of the record in this case demonstrates convincingly that defendant's contention of insufficiency of the evidence is not meritorious. Defendant was present when Terry Perkins requested that the deceased be asked about her money, throughout the ensuing pursuit that followed, and actively participated in the assault which culminated in the robbery and death of Wisotzkey.

The judgment of the District Court is affirmed.

AFFIRMED.

BEULAH M. SEYBOLD, APPELLANT, V. ERNEST E. SEYBOLD, APPELLEE.

216 N. W. 2d 179

Filed March 14, 1974. No. 39204.

1. **Divorce: Appeal and Error.** In a divorce action the case is

to be tried de novo in the Supreme Court on the issues presented on appeal.

2. **Trial: Appeal and Error.** In a trial de novo in the Supreme Court, it is settled law that this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite.
3. **Attorneys at Law: Fees.** A reasonable attorney's fee is to be determined by the nature of the case, the amount involved in the controversy, the results obtained and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorney.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Affirmed as modified.

John A. Wagoner, for appellant.

Owens & Owens, for appellee.

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

CHADDERON, District Judge.

This is a divorce action commenced in the District Court for Fillmore County, Nebraska, on April 24, 1969, by Beulah M. Seybold against Ernest E. Seybold. An amended petition was filed to conform to the dissolution of marriage statutes in effect at that time. A responsive pleading was filed by the respondent, Ernest E. Seybold, alleging that the marriage was irretrievably broken. A decree was entered by the trial court determining that the marriage was irretrievably broken, that it should be dissolved, and a division of the property was ordered.

Beulah M. Seybold, hereafter referred to as the petitioner, appeals on the grounds that the court erred in not giving her a larger part of the property and that the court should have allowed her a fee for her attorney to be paid by Ernest E. Seybold, hereafter known as the respondent.

We affirm the decision of the trial court as modified.

In Schuller v. Schuller, *ante* p. 266, 214 N. W. 2d 617, the court set forth the law in regard to appeals in such actions and said: "* * * in a divorce action the case is to be tried de novo in this court on the issues presented on appeal. Lienemann v. Lienemann, 189 Neb. 626, 204 N. W. 2d 170; Upah v. Upah, 175 Neb. 606, 122 N. W. 2d 507. We are required to make independent conclusions of fact without reference to the conclusion or judgment reached in the District Court. Our review on appeal is not restricted by the fact that there may be some evidence in support thereof. § 25-1925, R. R. S. 1943. In a trial de novo, it is settled law that this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Magill v. Magill, 114 Neb. 636, 209 N. W. 241; Jones v. Dooley, 107 Neb. 162, 185 N. W. 307; Dvorak v. Kucera, 130 Neb. 341, 264 N. W. 737; O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403."

The rule for determining alimony or the division of property in a dissolution action provides no mathematical formula by which such award can be determined. Generally speaking, awards of this court in cases of this kind vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case. Junker v. Junker, 188 Neb. 555, 198 N. W. 2d 189; Kula v. Kula, 181 Neb. 531, 149 N. W. 2d 430; Loukota v. Loukota, 177 Neb. 355, 128 N. W. 2d 809; Jablonski v. Jablonski, 173 Neb. 544, 114 N. W. 2d 1.

The parties were married on June 15, 1939, it being a second marriage for both parties. The petitioner brought nothing into the marriage, and the respondent brought very little into the marriage except an interest

in farm machinery and livestock which the trial court could have found was of the value of $4,260. They lived on a farm in Hitchcock County, Nebraska, and were the parents of three children who are now emancipated. They acquired livestock and machinery and purchased the farm from the respondent's father in 1944. The parties had separated on two previous occasions before the final separation.

The petitioner testified from notes which she started to prepare regarding her work and the matters involved in the divorce before 1969 because "I knew I wasn't going to stay there and I knew there was going to be a divorce and I wanted to remember some of this stuff."

The parties were 62 and 63 years of age at the time of the dissolution and were in relatively good health.

At the time of the dissolution the property owned by both of the parties was valued at $89,610, from which must be deducted the amount of the indebtedness of $4,900, and the amount of the property owned by the respondent at the time of the marriage of $4,260, leaving a net worth of $80,450. The court decreed that the petitioner should have property and cash valued at $31,650, and that the respondent should have net property of $48,800. This amounts to a little more than 39 percent awarded the petitioner and about 60 percent awarded the respondent. In view of the fact that the parties were of approximately the same age and in relatively good health, and that the petitioner had planned to leave the family home some years before the divorce action was started and started preparing notes to that effect, we cannot say that the trial court abused its discretion in the division of the property.

In regard to the allowance of a fee for the attorney for the petitioner, this court said in Junker v. Junker, *supra:* "The amount of an award of an attorney's fee

is largely within the discretion of the trial court." Inasmuch as the petitioner was granted only 39 percent of the property, we think that the trial court should have allowed the petitioner a fee for her attorney. A fee of $750 is allowed for services in the trial court and this court.

The judgment of the District Court is affirmed as modified by the allowance of the attorney's fee.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF LEROY TICHOTA, DECEASED. HENRY NIEMEYER, APPELLANT, V. ESTATE OF LEROY TICHOTA, DECEASED, AND WILLIAM TICHOTA, ADMINISTRATOR OF THE ESTATE OF LEROY TICHOTA, DECEASED, APPELLEES.

215 N. W. 2d 885

Filed March 14, 1974. No. 39216.

Insurance: Interest: Judgments: Contracts. Where an insurer agrees to pay all costs taxed against the insured in any suit and all interest accruing after the entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, the insurer is liable for interest on the total amount of the judgment until it complies with this provision.

Appeal from the District Court for Boone County: C. THOMAS WHITE, Judge. Reversed and remanded.

Erickson, Sederstrom & Johnson, for appellant.

Jewell, Otte, Gatz, Magnuson & Collins, for appellees.

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

SPENCER, J.

This case involves the question of whether a liability

insurer is liable for interest on that portion of a judgment recovered against its insured by a third party which is in excess of the principal amount limited by the policy where the policy requires the insurer to pay "all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon." The trial court held there was no liability for interest on the excess judgment. Plaintiff appeals. We reverse.

Plaintiff, who was seriously injured in an automobile accident on February 1, 1970, recovered a judgment against appellants on March 28, 1972, in the amount of $170,000. Dairyland Insurance Company had issued a $20,000 maximum liability policy to decedent and had previously paid out $12,450 for other claims arising out of the same accident. It was obligated to pay the balance of $7,550 towards plaintiff's judgment, but chose instead to appeal the award without posting a supersedeas bond. Plaintiff sought by garnishment to recover the amount due and owing under the terms of the policy and also interest on the entire amount of the judgment from the date of its entry until the balance of the policy limit was tendered or paid.

Plaintiff's claim for interest on the entire amount of the judgment against the garnishee's insured was based upon the following contractual provision appearing in the Dairyland policy in force on the day of the accident.

"2. Defense Settlement Supplementary Payment

"With respect to such insurance as is afforded by this policy for bodily injury liability and property damage liability, the company shall:

"(b) (2) pay all expenses incurred by the company, *all costs taxed against the insured in any suit and all interest accruing after the entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limits of*

the company's liability thereon. * * * and the amounts so incurred, except settlement of claims and suits, are payable by the Company in addition to the applicable limit of liability of this policy." (Emphasis supplied.)

Dairyland admitted liability for $7,550, plus interest at 8 percent from the day of judgment. The trial court entered judgment for this amount but denied plaintiff's claim for interest at 8 percent on the remaining $162,450.

For several years this legal issue has engendered a considerable amount of litigation, resulting in a split of authority. As of 1961, the positions adopted by the courts on either side are summarized in 76 A. L. R. 2d at pages 984 to 987. After suggesting that the jurisdictions were fairly evenly divided, the annotator at page 987 states: "However, there seems to be a trend in favor of holding the insurer liable for interest on the entire amount of the judgment, as illustrated by the two most recent cases in which prior opposite holdings were disapproved. (Illinois and Texas) Thus, if a prognostication may be made as to which view uncommitted jurisdictions are more likely to adopt, the choice would be in favor of extending the liability of the insurer to the entire amount of the judgment because of the seemingly greater appeal of the arguments advanced in support of this theory, as best exemplified in River Valley Cartage Co. v. Hawkeye-Security Ins. Co. (1959), 17 Ill. 2d 242, 161 N. E. 2d 101, 76 A. L. R. 2d 978."

Since that annotation, the Later Case Service to 76 A. L. R. 2d, pp. 983 to 996, indicates that 10 states have followed those permitting interest on the entire judgment and only 1 is contra, so at the present time the overwhelming weight of authority is that the insurer is liable for interest on the entire amount of the judgment.

In River Valley Cartage Co., Inc. v. Hawkeye-Security Ins. Co. (1959), 17 Ill. 2d 242, 161 N. E. 2d 101, 76

A. L. R. 2d 978, Justice Schaefer, after referring to the division of opinion on the point at that time, said: "It might be enough to say that the ambiguity evidenced by this division of opinion should be construed against the insurer. * * * But we believe that there are other and stronger reasons for holding that the phrase creates liability for interest on the entire judgment.

"In the first place, the insurer's language compels such a conclusion. The phrase referring to interest uses the term 'judgment' without qualification while in the same clause the phrase limiting the duration of the liability for interest refers to 'such part of the judgment as does not exceed the limit of the company's liability thereon.' Obviously the insurer knew how to qualify the term 'judgment' to achieve the result that it urges. It did not do so.

"In addition, the realities of the relationship between the insurer and the insured argue against the insurer's interpretation. Under the terms of the policy the insurer had complete control of any litigation from which it might incur liability. The insured can not settle with the plaintiff without releasing the insurer from its obligation. Any delay that may cause the accumulation of interest is thus the responsibility of the insurer. And until it has discharged its obligations under the policy it should bear the entire expense of this delay."

The majority interpretation of this clause takes cognizance of the realities suggested by Justice Schaefer. Further, it does not strain the wording of the clause to reach this conclusion. Rather, as Justice Schaefer holds, the language compels such a conclusion. It accords the words used their ordinary meaning and holds the insurer responsible for all the interest accruing after judgment, until such time as it has tendered into court the amount due on the policy, exactly as the clause dictates.

The insurance industry itself has adopted the majority view and in fact strongly urged its adoption by all called

upon to interpret the clause. See, Ramsey, "Interest on Judgments Under Liability Insurance Policies," Insurance Law Journal, No. 414 (July 1957), pp. 407, 411; Risjord and Austin, "Standard Family Automobile Policy," Insurance Law Journal, No. 411 (April 1957), p. 201; Gowan, "Provisions of Automobile and Liability Insurance Contracts," 30 Insurance Counsel Journal (1963), 96, 98.

We agree with the majority. The clause in question should be construed to require interest on the entire amount of the judgment until the company has paid, tendered, or deposited in court that part of the judgment which does not exceed the limit of the company's liability thereon. This would appear to be the only fair result and the only construction possible under our law.

Without question, if there is an ambiguity in the language used, as the earlier cases seemed to suggest, it should be construed most strictly against the insurance company which is responsible for that language.

The wording itself, "*all interest* accruing after the entry of the judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon" cannot reasonably be interpreted otherwise. The insurer was capable of employing apt words to differentiate between a judgment and the company's portion thereof.

As the majority cases suggest, the insurance company controls the litigation and the insured acts at his peril in settling without the company's approval or consent. If we were to follow the minority rule, the insurer could litigate the entire case on appeal merely in an effort to save the amount of its coverage and thereby cause interest on the excess of the judgment to accumulate against the insured. Any such delay that may cause the accumulation of interest thus ought

to be the responsibility of the insurer. Unlike the insured, the company may relieve itself of liability for excess interest by paying, tendering, or depositing in court such part of the judgment as does not exceed the limits of the company's liability.

For the reasons given, the judgment is reversed and the cause remanded to the trial court for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

DON ANSTINE, APPELLANT, V. REX BRIGGS ET AL., APPELLEES.
215 N. W. 2d 878

Filed March 14, 1974. No. 39224.

1. **Trial: Verdicts: Evidence.** In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in favor of the nonmoving party, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom.
2. **Employer and Employee: Negligence.** It is well settled that a duty rests on an employer to warn his employees of defects or dangers not apparent which may arise in the course of the employment, which the employer knows or ought to know about, and which he has reason to believe the employee does not know and will not discover in time to protect himself.
3. ———: ———. The master is not compelled to foresee and guard against an accident which reasonable and prudent men would not expect to happen, and where an injury to a servant could not reasonably have been anticipated, a failure to take precautionary measures is not negligence on the part of the master for which he is liable to the servant.
4. **Negligence.** One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid open and obvious dangers is contributorily negligent.

Appeal from the District Court for Seward County: JOHN D. ZEILINGER, Judge. Affirmed.

Blevens, Bartu & Blevens, for appellant.

Barlow, Watson & Johnson and Steven J. Flodman, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, McCOWN, NEWTON, and CLINTON, JJ., and HASTINGS, District Judge.

SPENCER, J.

Plaintiff appeals from the sustaining of motions for a directed verdict and the dismissal of his petition for damages incurred while employed by the defendants. We affirm.

In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in favor of the nonmoving party and he is entitled to the benefit of every reasonable inference that may be drawn therefrom. Hacker v. Perez (1971), 187 Neb. 485, 192 N. W. 2d 166. We briefly summarize the facts herein in accordance with those principles.

Defendants are members of a joint venture engaged in cattle feeding. Their operation is substantially mechanized. Plaintiff, who was a 17-year-old high school junior, commenced work as a farm hand on a part-time basis in May of 1969. When school adjourned he became a full-time employee. His primary duty consisted of loading and delivering feed to cattle. Plaintiff's previous work experience had been limited. He had never driven a tractor but was familiar with motorized vehicles. He had driven and repaired automobiles since the age of 15.

The process on defendant's premises utilized two-wheeled feed wagons which were coupled to tractors. Various ingredients were loaded into these wagons and then delivered to numerous pens of cattle. The feed wagons were equipped with warning devices consisting of beepers and flashing lights set off electronically when activated by a self-contained scale. These devices indicated to the operator when the proper amount of each

ingredient had been loaded. Forty to fifty loads of feed were distributed each day by plaintiff and other employees. Plaintiff had successfully completed approximately 600 such operations prior to the day he was injured.

The feed elevator was equipped with overhead bins, side bins, a pit, and mechanized devices for the movement of grain. It was open on both the north and south ends so as to allow the tractors to pull the feed wagons under the respective bins and through the elevator. The loading of the wagons was controlled by setting the electronic scale on the wagon.

The driver of a feed rig would stop in the elevator under the first overhead bin and load corn. This procedure required approximately 5 minutes. He would then move the wagon forward to the next bin where another product would be loaded. Plaintiff and other drivers were required to dismount from their tractors at each loading station in order to properly adjust the scale devices on their respective feed wagons. The drivers also operated the machinery necessary to load their wagons at each station. Whatever instruction plaintiff received in the operation was given orally. Thereafter it was a matter of learning through trial and error.

On June 24, 1969, at approximately 11 a.m., plaintiff had finished loading operations inside the elevator. He removed his tractor and wagon, parked them outside, and returned to the elevator to fill one of the overhead corn bins that had become empty while he was loading. As the bin was filling, another employee entered the elevator with his feed wagon and commenced loading corn.

While plaintiff and this other employee were visiting plaintiff heard certain sounds which indicated to him that corn being elevated by the mechanized leg might be backing up. Plaintiff and the other employee started off in different directions. Nothing was said but plaintiff assumed the other employee intended to turn off the corn

flowing into his wagon. Plaintiff had been instructed to watch out for the elevator leg plugging up but could recall no specific instructions concerning the proper method to investigate the difficulty. His customary method was to look down into a pit located approximately in the center of the elevator. If he detected a malfunction after this inspection he would then turn off the machinery.

Plaintiff went to the pit area, bent over, and looked down into the pit. He could have been on one knee. He was over the grate which covered the pit, with his body behind the tractor and 1 or 2 feet from the front of the tire on the west side of the feed wagon. While he was in this position the other employee moved the tractor and wagon forward. The wheel of the feed wagon passed over plaintiff's leg causing substantial injury.

The accident occurred within approximately 5 minutes after the other employee entered the elevator. Plaintiff knew from prior experience that the other employee would move his equipment forward after completing the loading operation, which would require approximately 5 minutes. He did not indicate to the other employee that he intended to position himself in front of the wheel of the wagon nor that he was examining the equipment. He did not hear the warning buzzer on the wagon but it was noisy in the elevator when the equipment was operating. He stated that in a noise situation he would rely on the warning lights more than the buzzer. When he moved to the pit area he did not check the lights nor the needle on the scale of the wagon. All he had on his mind was checking the equipment.

Although plaintiff's petition alleges 10 specific acts of negligence, the gist of his action is that the working environment was dangerous or unsafe and defendants failed to discharge their duties of supervision, inspection, and warning relating to that work environment. There was no allegation that the other employee was negligent. Plaintiff does not contend that either the occupation in-

volved or the instrumentalities employed were inherently dangerous.

The record is devoid of any proof of negligence and causation on the part of defendants sufficient to submit plaintiff's case to a jury. Viewing the evidence in a light most favorable to plaintiff, we conclude the trial court was correct in directing a verdict in favor of defendants. Plaintiff's age and experience was such that he should have understood and appreciated that as he bent down in front of a wheel he could be injured if the vehicle moved forward. This clearly was not something an employer would expect an employee to do. A failure to warn or instruct in such circumstances is not negligence. In Russo v. Swift & Co. (1939), 136 Neb. 406, 286 N. W. 291, we said: " 'It is well settled that a duty rests on an employer to warn his employees of defects or dangers not apparent which may arise in the course of the employment, which the employer knows or ought to know about, and which he has reason to believe the employee does not know and will not discover in time to protect himself.' * * * 'The master is not compelled to foresee and guard against an accident which reasonable and prudent men would not expect to happen, and where an injury to a servant could not have been anticipated, a failure to take precautionary measures is not negligence on the part of the master for which he is liable to the servant.' "

Assuming, however, that in some fashion defendants might be held negligent, plaintiff still could not recover in this action. Plaintiff knew that after the feed wagon had been filled at its first stop it would move forward to the next. He was aware that considerable of the time necessary to complete the loading process at that bin had elapsed. Yet, without saying anything to the other employee or checking as to what he might be doing, he placed himself between the tractor and the feed wagon in a position of extreme danger if the wagon

should be moved. Plaintiff at 17 had sufficient background and experience to appreciate the obvious danger.

We said in Runge v. Travis (1965), 178 Neb. 562, 134 N. W. 2d 291: "One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent."

There follows from the evidence the legal conclusion that contributory negligence in comparison with the negligence of defendants, if any, bars recovery.

The judgment should be and is affirmed.

AFFIRMED.

MARY KAY MILLER, APPELLANT, V. LAMOINE C. ARENDS ET AL., APPELLEES.

215 N. W. 2d 891

Filed March 14, 1974. No. 39229.

1. **Trial: Evidence: Waiver.** Ordinarily a failure to object waives any error in the admission of evidence.
2. **Trial: Evidence: Negligence.** Where the undisputed physical facts demonstrate the collision out of which the injuries arose was not caused by the negligence of the defendant, the evidence will not support a verdict for the plaintiff.

Appeal from the District Court for Howard County: DONALD H. WEAVER, Judge. Affirmed.

Philip T. Morgan, for appellant.

Luebs, Tracy, Huebner, Dowding & Beltzer and D. Steven Leininger, for appellee Arends.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and COLWELL and WARREN, District Judges.

BOSLAUGH, J.

This is an action for damages arising out of an auto-

mobile accident. The plaintiff, Mary Kay Miller, was a passenger in an automobile owned by Wilford Harris and operated by Lyle D. Harris. She was severely injured when the Harris automobile collided with an automobile operated by the defendant LaMoine C. Arends.

At the close of the plaintiff's evidence the action was dismissed by the plaintiff as to Wilford Harris and Lyle D. Harris. The trial court then sustained a motion to dismiss made by the defendant Arends. The plaintiff appeals.

The accident happened on U. S. Highway No. 281 at about 7:15 p.m., on January 2, 1971, approximately 3 miles north of St. Paul, Nebraska. It was dark, snowing hard, and blowing at the time of the accident. Visibility was very poor. The highway was icy and snow-packed. The blacktop surface of the highway at that point was approximately 22 feet wide. Lyle D. Harris testified there was enough snow on the road that the centerline was not distinct, but he could tell which lane he was in from the tracks left by other cars. The highway patrolman testified the centerline of the highway was not visible when he arrived at the scene of the accident.

The Harris automobile approached from the north and was starting up a slight incline when the collision occurred. The Arends automobile approached from the south. The impact was nearly head-on with damage to the left front of both automobiles. After the accident both automobiles came to rest on the east side of the highway in the northbound lane. The Harris automobile was headed in a southwesterly direction. The Arends automobile was headed to the northwest. The right rear of the Arends automobile was on the east shoulder of the highway.

The debris, consisting of small grill parts and glass, was all on the east side of the highway between the two

cars, along the left of the Arends vehicle and near the center of the Harris vehicle. There were two large oil and antifreeze spots on the highway after the accident. One was 1½ feet east of the centerline. The other was 2½ feet east of the centerline.

The second amended petition alleged Arends was negligent in driving on the left side of the road; in operating his motor vehicle with only one headlight; in driving at an excessive speed; and in failing to yield the right-of-way. The answer filed by Arends alleged in part the sole proximate cause of the collision was the negligence of Lyle D. Harris in driving across the centerline into the northbound lane of traffic.

The critical fact in this case is whether Arends was on the east side of the road at the time of the impact. The only evidence as to the speed of Arends was a statement in his deposition that he was going between 30 and 35 miles per hour just prior to the accident. If Arends was on his right side of the road at the time of impact, then the collision occurred because the Harris automobile crossed the centerline. In that event the plaintiff could not recover from Arends because his negligence, if any, was not the proximate cause of the accident.

Both Harris and the plaintiff testified the Harris automobile was on the west side of the centerline at the time of the impact. However, this testimony must be considered in context and in conjunction with the physical evidence plus the fact the centerline was obscured at the time of the accident.

The plaintiff testified she saw the headlights of the Arends automobile approaching from the south in the left-hand lane. She turned to look at Harris and when she turned back there was a big glare of lights "coming right at us." She said: "It seemed like that — it seemed that we were still in the righthand lane and it seemed like it was coming across at us." On cross-examination she was asked if she knew where the Harris automobile

was on the highway at the time of impact. She answered: "No, I don't. It seemed like it was, like we were still traveling, like we had always been, in the righthand lane."

Harris testified he saw a car come over the hill with its bright lights on. These headlights dimmed and immediately there was one headlight. This left a question in his mind as to exactly where the car was. He moved his car to the right somewhat and that is the last he remembers. He did not remember the actual moment of impact.

Exhibits 15 and 16 were photographs of the scene of the accident made the following day. They showed the oil and antifreeze spots that had been observed following the accident. The patrolman testified the stains appeared the same the next day as they had the night before. The plaintiff contends the photographs should not have been received in evidence but there was no objection by the plaintiff at the time they were offered. This was a waiver of any error. Kehr v. Kehr, 173 Neb. 532, 114 N. W. 2d 26.

The physical facts in this case demonstrate the collision occurred on the east side of the highway and the Arends automobile was on the east or right side of the centerline at the time of impact. Where the undisputed physical facts demonstrate the collision out of which the injuries arose was not caused by the negligence of the defendant, the evidence will not support a verdict for the plaintiff. Hessler v. Bellamy, 128 Neb. 571, 259 N. W. 514. See, also, Elwood v. Schlank, 126 Neb. 213, 252 N. W. 828; Southwell v. DeBoer, 163 Neb. 646, 80 N. W. 2d 877.

The defendant's motion to dismiss the action was properly sustained. The judgment of the District Court is affirmed.

AFFIRMED.