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REPORTS OF CASES

DECIDED BETWEEN

MAY 23, 1974 and JANUARY 15, 1975

IN THE

Supreme Court of Nebraska

JANUARY TERM 1974, SEPTEMBER TERM 1974, and
JANUARY TERM 1975

VOLUME CXCII

H. EMERSON KOKJER

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1975

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By H. Emerson Kokjer, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1974

WILLIAM WELSH, APPELLEE, V. LEONARD ZUCK, APPELLANT, IMPLEADED WITH BETTY L. ZUCK ET AL., APPELLEES, REVIVED IN THE NAME OF HERBERT ZUCK, SPECIAL ADMINISTRATOR OF THE ESTATE OF LEONARD ZUCK, DECEASED, APPELLANT.

218 N. W. 2d 236

Filed May 23, 1974. No. 39279.

1. **Trial: Negligence.** When the evidence viewed in the light most favorable to plaintiff fails to establish actionable negligence, it is the duty of the trial court to direct a verdict for defendant or render a judgment notwithstanding the verdict if motions therefore are timely and appropriately made.
2. **Negligence: Innkeepers.** The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentional harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of third persons or by giving a warning adequate to enable them to avoid harm.
3. **Negligence.** A person is not legally responsible for an injury if it would not have resulted but for the interposition of an efficient intervening cause, which he should not have reasonably anticipated. An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury.
4. ———. A party is only answerable for the natural, probable,

reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Reversed and remanded with directions.

Russell, Colfer, Lyons & Wood, for appellant.

Terry E. Savage and Frederick E. Wanek, for appellee Welsh.

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

BRODKEY, J.

This is an action brought by William Welsh, plaintiff and appellee, to recover damages sustained as a result of being shot in the thigh by one of the defendants, Chester Rima, during a scuffle over a gun which occurred in a tavern owned and operated by the defendant, Leonard Zuck. Made additional defendants in the original action were Betty L. Zuck, wife of the defendant Leonard Zuck, who was later dismissed from the lawsuit by the court, and the defendant Mike Jones, the bartender on duty at the time of the shooting.

Trial was subsequently had to the jury, which found for the plaintiff William Welsh against the defendants Chester Rima and Leonard Zuck, and also found in favor of the defendant Mike Jones. The barowner, Leonard Zuck, is now deceased. The special administrator of his estate, Herbert Zuck, is the only appellant in this court. The basis for the appeal is that the evidence was insufficient against defendant Zuck and the matter should not have been submitted to the

jury with regard to his liability. At the close of plaintiff's case-in-chief, and again at the close of all the evidence, motions were made by defendant Zuck for a directed verdict or a dismissal as to him. These motions were overruled and the cause was submitted to the jury with the result above indicated. Defendant Zuck then moved for judgment notwithstanding the verdict and likewise moved for a new trial. These motions were overruled. The rule is well established in this jurisdiction that when the evidence viewed in the light most favorable to plaintiff fails to establish actionable negligence, it is the duty of the trial court to direct a verdict for defendant or render a judgment notwithstanding the verdict, if motions therefore are timely and appropriately made. Crane v. Whitcomb, 160 Neb. 527, 70 N. W. 2d 496 (1955); Hughes v. Coniglio, 147 Neb. 829, 25 N. W. 2d 405 (1946). We shall therefore review the facts of this case, as disclosed by the evidence in the record, "in the light most favorable to plaintiff."

Generally, the incident with which this case is concerned involved the accidental shooting of the plaintiff while he was a customer in appellant's tavern, known as Sarge's Tavern in McCook, Nebraska. The actual shooting occurred in the early morning of March 8, 1972, a few minutes after midnight, although the events which led up to the shooting occurred on March 7, and possibly on March 6. There is some conflict in the evidence as to whether a certain conversation between the tavern owner, Zuck, and the defendant, Rima, occurred on March 6 or during the morning or early afternoon of March 7. This conversation dealt with the request on the part of either Rima or Zuck for the "targeting in" of a certain pistol owned by Rima. Defendant Zuck was an expert in the use and handling of firearms, having gained experience in that field while serving in the armed forces of the United States.

In any event, it is clear from the evidence that on March 7, 1972, defendant Rima brought his pistol into Sarge's Tavern, and that defendants Zuck and Rima took the pistol to the basement of the establishment, where was located a former police firing range. Zuck fired the pistol two or three times, loading the gun one shell at a time. After finishing the "targeting in" of the pistol, Zuck checked the pistol to make certain it was unloaded and handed it back to Rima in an unloaded condition, whereupon they went back upstairs. Rima testified that he then asked the bartender on duty at that time to put the gun behind the bar for him until he returned for it later. The bartender obliged. According to Rima, Zuck saw him give the pistol to the bartender at that time. This was denied by Zuck. However, we shall consider it as true on the theory that we must consider the evidence in the light most favorable to the plaintiff. Rima remained in the tavern for a short time thereafter and then left. Zuck also left the establishment and was not in Sarge's again on the afternoon or night of March 7. Rima, however, did return to Sarge's on the evening of March 7; and at approximately 9 p.m. asked the night bartender, the defendant Mike Jones, to give him the pistol. The evidence is undisputed that Jones had not known about the gun being in the cabinet, the day bartender not having informed him of that fact. Before returning the pistol to Rima, Jones checked it to ascertain whether it was loaded and found that it was not. He thereupon gave the gun to Rima, who left the premises taking the gun with him. He returned to the tavern approximately 45 minutes later, and in the meantime had reloaded the pistol with 4 shells. Rima at that time carried the gun under his coat, and it was not visible. There was no conversation at that time between the bartender Jones and Rima about the gun. Rima showed the pistol to the plain-

tiff, William Welsh, on this occasion, but did not show it to anyone else. A short time thereafter Rima became incensed when he thought he heard something derogatory being said about his wife, and took the gun from his belt and pointed it in the air. At that time, another patron in the tavern, Don Matson, grabbed him from behind. In the struggle that followed, Rima and Matson fell to the floor and the gun discharged, the bullet striking the plaintiff, a bystander, causing the injuries complained of. The evidence is undisputed that Rima was a regular customer of the tavern; and while he had consumed a number of glasses of beer during the times involved herein, the evidence was also undisputed to the effect that he was at no time intoxicated. Also the evidence clearly demonstrated that Rima had never been troublesome or violent while a patron of Sarge's Tavern or otherwise, but on the contrary was a quiet and retiring individual.

We now turn to a consideration of the standard of care imposed upon owners of business establishments, particularly taverns, as revealed by the reported decisions in this state. The applicable rule is well stated in Hughes v. Coniglio, *supra,* in which the court stated: "The modern general rule, summarized in its simplest terms, is that the proprietor of a place of business who holds it out to the public for entry for his business purposes, is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of third persons or by giving a warning adequate to enable them to avoid harm. Restatement of the Law, Torts, § 348, p. 953." The above rule was again enunciated and ap-

plied in Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680 (1949), and also in Crane v. Whitcomb, *supra,* which latter case also involved a shooting at a tavern, and an ensuing lawsuit by the victim against the proprietor. The court in that case applied the same rule of law cited above.

After examining the evidence in the light most favorable to plaintiff, and considering such evidence in the light of the standard of care set forth above, we conclude that such evidence was not sufficient to establish the existence of actionable negligence on the part of defendant Zuck, and we reverse the judgment of the lower court.

In his petition, plaintiff alleges separate grounds of negligence against each of the defendants in the lawsuit. It is his allegation and claim that both the defendant Zuck and the defendant Jones were negligent in failing to take any steps to insure the safety of the patrons of the tavern, and particularly the safety of the plaintiff herein under the circumstances, and specifically that they knew or should have known that Rima had a gun in his possession in the tavern on the date and times in question and that the defendant Rima had been served intoxicating liquors on those occasions. Before discussing these allegations, it might be well to point out that the defendant Jones was exonerated from the charge or charges of negligence on his part by verdict of the jury in his favor; and therefore any possible negligence attributable to him could not be imputed to his employer Zuck under the doctrine of respondeat superior. However, Zuck can be held responsible for his own independent negligent acts or omissions. We shall therefore examine the evidence in this regard. Assuming for the purposes of this discussion that Zuck did have knowledge that Rima had a revolver in the tavern on the dates involved herein and also that he had left the gun with

his bartender after the "targeting in" was completed, would the fact that he had knowledge of a gun, particularly an unloaded gun, upon the premises amount to negligence on his part under the facts of this case? We conclude it would not. It must be remembered that there was a perfectly legal and legitimate reason for the gun being on the premises in the first place. It was brought to the premises for the express purpose of having defendant Zuck "target in" the gun. There was no reason at all, as we see it, for Zuck in any way to be perturbed about the presence of the gun on the premises or any reason for him to suspect that Rima would at some subsequent time engage in an altercation in the tavern in which the gun in question might be involved. This is particularly true in view of the undisputed evidence that Rima had never been quarrelsome or in any way obnoxious or obstreperous at prior occasions as a regular patron of the bar. In this connection see Lewis v. Bendinelli, 26 Ohio Misc. 189, 270 N. E. 2d 375 (1970), in which case the court found that the defendant's barmaid in that case could not have reasonably foreseen any danger to the plaintiff from the mere examination of the .22 caliber pistol by customers in the establishment. That case clearly indicates that the mere presence of a gun on the premises of a tavern is not in itself negligence. Nor does the fact that defendant Rima had been drinking beer in the premises on the day in question necessarily indicate negligence. Obviously one of the avowed purposes of a tavern is to sell drinks to its customers. In view of the undisputed evidence that defendant Rima was not intoxicated, we do not feel that the mere fact he was drinking in any way supports a charge of negligence against defendant Zuck, particularly in the absence of a showing that Zuck personally, as distinguished from his bartender, had knowledge of the amount that Rima might have consumed.

There is, however, an even more important reason for reversing the judgment of the lower court. Even assuming that defendant Zuck might have been guilty of negligent acts and omissions in this case, which is a mere assumption for the purpose of the following discussion, we believe it is clear from the evidence that any such negligence could not have been the proximate cause of the shooting involved herein and the resulting injuries to the plaintiff. We think it is clear that any chain of causation which might have otherwise existed was broken by the intervening acts of defendant Rima. The law is well established that a person is not legally responsible for an injury if it would not have resulted but for the interposition of an efficient intervening cause, which he should not have reasonably anticipated. An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury. The rule in this regard is set out in Colvin v. John Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900 (1956), in which this court held that a party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause. Under the undisputed facts of this case, the defendant Jones, the bartender, returned the pistol to the defendant Rima after first checking to make sure that the gun was unloaded. Rima then left the tavern and returned sometime thereafter. However before he returned he reloaded the gun with four shells. He subsequently became engaged in the altercation referred to during which altercation the gun accidently discharged and

the plaintiff was injured. It seems clear that the primary or proximate cause of the accident in this case was not the knowledge of the tavern owner that Rima prior thereto had a gun on the premises, but the acts of the defendant Rima in reloading the gun after leaving the tavern, returning to the tavern, and engaging in the fight which has been described. There was no possible way that defendant Zuck could have foreseen that the above events would transpire; nor was there any possible or reasonable way for him to have prevented what eventually happened. See, for example, Polando v. Vizzini, 58 Ohio Law Abs. 466, 97 N. E. 2d 59 (1949).

In view of the foregoing discussion, we deem it unnecessary to discuss other assignments of error. We conclude that the trial court erred in overruling the motions of defendant Zuck for a directed verdict and for judgment notwithstanding the verdict. Pursuant to the authority of section 25-1315.03, R. R. S. 1943, the judgment of the District Court is reversed and the cause is remanded with directions to enter judgment for the defendant Zuck.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., dissenting.

I respectfully dissent. It seems to me that reasonable minds might differ on both the question of Zuck's negligence and whether his conduct was the proximate cause of the plaintiff's injury. A jury question was therefore presented and in the absence of error it should stand.

The record would support the conclusion that Zuck not only permitted Rima to bring a hand gun (a .38 Smith & Wesson revolver) and ammunition for it into the tavern, but tacitly encouraged him to do so by agreeing to target the weapon for him in the basement of the establishment.

The courts of this country have uniformly recognized

that a gun is a dangerous instrumentality. 56 Am. Jur., Weapons and Firearms, § 3, p. 992; 57 Am. Jur. 2d, Negligence, § 108, p. 459; Naegele v. Dollen, 158 Neb. 373, 63 N. W. 2d 165, 42 A. L. R. 2d 1099. Zuck was an expert and experienced with weapons because of his military service. Anyone who has had experience in the combat arms of the military knows that a hand gun is, from the viewpoint of inflicting accidental injury, considerably more dangerous than many other weapons.

The presence of such a weapon and ammunition on the person of a patron of a drinking establishment enhances the likelihood of an accidental injury while showing or demonstrating the weapon.

The opinion recites that Rima was not intoxicated. This may be true, but the record supports the conclusion that previous to the accident Rima had spent a large portion of the earlier part of the day in the tavern drinking and that he had, between the hours of 9:45 p.m. and about 12:30 a.m. when the accident occurred, consumed as many as five or six beers. It is naive to assume that the amount consumed had no effect upon Rima's judgments or actions. The likelihood of accident is enhanced by the effect of alcohol upon the mind and hand of one who has been drinking most of the day even if he is technically sober.

The jury could conclude: (1) That the gun and ammunition would never have been in the tavern except for the proprietor's tacit encouragement and express permission. (2) That the weapon was a dangerous instrumentality which a patron should not under any circumstances be permitted to bring into a tavern, much less be encouraged to do so. (3) That the proprietor should have anticipated the probability of accidental injury from the presence of the dangerous instrumentality in the hands of a patron even though he may have been technically sober. (4) That Zuck's

acts were negligent and that the accident would not have occurred except for that negligence. (5) That the brief departure of Rima from the tavern is not such an intervening cause as breaks the chain of causation starting with Zuck's initial encouragement.

The majority opinion relies upon cases involving assault by a patron of a business establishment upon another patron. This is not a case of a deliberate shooting but an accidental one. Zuck may not have been required to anticipate an assault by Rima, but the possibility of an accidental injury even while showing the weapon could have been found by the jury to be reasonably foreseeable.

This case should not be decided as a matter of law. It is similar to Naegel v. Dollen, *supra,* where the proprietor of a hardware store permitted the manipulation of a shotgun in his place of business and a patron was injured. We there held that the proprietor was charged with the knowledge that a loaded gun is a dangerous instrumentality and that he is required to exercise the highest degree of care to prevent injury to others.

DEAN R. ARMSTRONG, APPELLANT, V. RICHARD C. ARMSTRONG, ET AL., APPELLEES.

218 N. W. 2d 541

Filed May 23, 1974. No. 39289.

1. **Contracts.** The defense of illegality of a contract cannot as a rule be invoked by a third party.
2. **Contracts: Estoppel.** The defense of equitable estoppel may be claimed by a party or privy but not by a stranger.
3. **Trial: Witnesses.** Fact issues not fully explored and which may rest on the determination of the credibility of witnesses must be resolved by trial on the merits.

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

Mattson, Ricketts, Davies, Stewart & Calkins, for appellant.

Lyle E. Strom and C. L. Robinson of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, Kenneth H. Elson, and Young, Holm, McEachen, Pedersen, Hamann & Haggart, for appellees.

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

CLINTON, J.

The question involved on this appeal is the propriety of the action of the trial court in granting the motion of defendant Howard County Land and Cattle Company for summary judgment and dismissing it from the action. This action was brought by the plaintiff Dean R. Armstrong against the defendants Richard C. Armstrong and the Howard County Land and Cattle Company to enforce an alleged oral agreement in the form of a joint venture between Dean and Richard to acquire the controlling interest in the stock of the Citizen's National Bank, St. Paul, Nebraska. The petition alleged that Richard in violation of the agreement acquired the controlling stock on his own account, then caused the Howard County Land and Cattle Company to be formed, and transferred the stock to it. The prayer of the petition asks that the shares be declared to be held in trust for the purposes of the agreement between Dean and Richard.

The answer of Richard consisted of a general denial and certain affirmative defenses. The answer of Cattle Company alleged an agreement between Richard and one Carl Brasee to acquire a majority interest in the shares of the same bank and the formation by them of Cattle Company for the purpose of holding the shares; that pursuant to the agreement Richard and Brasee

did cause such shares to be acquired by Cattle Company; that Brasee borrowed money for the purpose and paid for his one-half share of stock in Cattle Company and is the owner of 50 percent of the shares of Cattle Company; that Brasee had no knowledge of the alleged agreement between Dean and Richard; that Brasee on behalf of Cattle Company thereafter voted the bank shares held by Cattle Company at all shareholders' meetings; and that Dean was a shareholder of the bank and since March 22, 1968, has known of Brasee's interest and is by reason of laches and estoppel foreclosed from asserting an interest contrary to that of Brasee. Cattle Company's answer also denied the allegation of Dean's petition for the reason that it does not have information sufficient to form a belief of the truth or falsity of the allegations therein. Brasee is not a party to the litigation.

Cattle Company filed a motion for summary judgment alleging that there was no genuine issue of material fact so far as Cattle Company is concerned and that it was entitled to judgment as a matter of law.

The trial court granted the motion of Cattle Company and dismissed it from the action. The plaintiff appealed. We reverse. The question before us on appeal is whether, so far as the interest of that defendant is concerned, the record discloses that there is no genuine issue of fact requiring trial and whether under the facts so established Cattle Company was entitled to judgment as a matter of law.

The evidence considered by the trial court is contained in a bill of exceptions which consists of the deposition of the plaintiff Dean Armstrong, the deposition of the defendant Richard Armstrong, an affidavit of Carl Brasee, and certain documentary evidence received in connection with the depositions.

Cattle Company's position is that the undisputed facts: First, show that the alleged contract between Dean and Richard is illegal because its fulfillments would require

a breach of a previous contract between Richard and Brasee, and second, establish an estoppel against Dean to claim against the interest of Brasee, an innocent third party. On the issue of illegality, Cattle Company cites Restatement, Contracts 2d, § 576, p. 1081. See, also, Restatement in the Courts, 1967 Supp., Contracts, § 576, p. 283.

For the purposes of determining the issues before us it is not necessary to make a detailed summary of the evidence. The deposition testimony of Dean supports the allegations of his petition. The deposition of Richard denies such an agreement but claims a similar agreement made between him and Brasee at about the same time and an offer by the latter two as a part of the agreement between them to purchase bank shares which Dean already owned. Brasee was never present at any of the numerous conversations between Dean and Richard. Dean testified his agreement with Richard was made on March 19, 1968. Richard testified his agreement with Brasee was made on March 19, 1968. Dean testified that he was told by Richard that Brasee was merely a front man and had no monetary interest in the stock, but would have to be paid for his services as a broker in acquiring the bank shares and that the payment might have to be five percent of the shares acquired; that there were income tax reasons for having the shares held by Cattle Company; and that he was not advised until January 1969, that Richard did not intend to perform his agreement. Dean admitted that by October 1968, he was told by Richard that Brasee was the owner of 50 percent of Cattle Company, but that he never discussed the matter with Brasee or made inquiry of him as to what his actual interest was. Continuing into 1972 there were numerous equivocal conversations with Richard and it did not become clear until then that Richard would absolutely not perform.

It is evident that there are material questions of fact

as to whether there was an agreement between Dean and Richard. It is equally patent that if Dean's version is correct, Richard's claim of an agreement between him and Brasee is either not true, or Richard knowingly made similar and conflicting agreements with both Dean and Brasee.

The affidavit of Brasee, submitted on behalf of Cattle Company, simply recites that Brasee is owner of 50 percent of the shares of Cattle Company; that he has read the answer of Cattle Company and that "of his own personal knowledge he believes that each of the facts contained in the Amended Answer" of Cattle Company is true. That answer contained allegations supporting Richard's contentions of an agreement between him and Brasee; the answer alleged that Dean: ". . . on March 22, 1968, and at all times subsequent thereto, has known, or had reason to know, that third persons, including Carl Brasee, have and claim an interest in the defendant Howard County Land & Cattle Co. and its assets. . . . If plaintiff is awarded any equitable relief as prayed, substantial prejudice to defendant Howard County Land & Cattle Co. and to an innocent third person, to-wit: Carl Brasee, will result. . . . Defendant specifically alleges that plaintiff has an adequate remedy at law and denies that the relief prayed by plaintiff affords a proper remedy allowable by law. . . . By reason of the above and foregoing, the purported cause of action of the plaintiff is barred by the statute of limitations, by estoppel, and by laches." Paragraph 16 of the answer denied the allegations of the plaintiff's petition "for the reason that it does not at this time have sufficient knowledge of said facts to either admit or deny them." One of the allegations of the answer is that Brasee "has made substantial periodic payments toward the purchase of the stock *through Howard County Land & Cattle Co.*" (Emphasis supplied.)

It appears from the arguments of Cattle Company

that it seeks to have advantage of an alleged illegality of a contract to which it is not a party and to which it is not clear that it is privy. It claims an estoppel on behalf of Brasee who is not a party to the litigation and who seemingly is merely a stockholder of Cattle Company. What equities may require consideration so far as Cattle Company is concerned is not clear on the record. Any determination of the possible illegality of the alleged contract between Dean and Richard and the effect thereof must await a complete development of the evidence. The same would appear to be true of the issue of estoppel. Fact issues not fully explored and which may rest on the determination of the credibility of witnesses must be resolved by trial on the merits. Cover v. Scott, 184 Neb. 585, 169 N. W. 2d 435.

The defense of illegality of a contract cannot as a rule be invoked by a third party. 17 C. J. S., Contracts, § 283, p. 1215. An exception to this rule exists where the illegality appears from the plaintiff's own showing. 17 C. J. S., op. cit., p. 1216. See, also, In re Estate of Lowe, 104 Neb. 147, 175 N. W. 1015.

The defense of equitable estoppel may be claimed by a party or privy but not by a stranger. 31 C. J. S., Estoppel, § 130, p. 661. See, also, Roll v. Martin, 164 Neb. 133, 82 N. W. 2d 34.

The general principles applicable to rulings on motions for summary judgment have been enumerated many times by this court and we will not here set them forth. We merely cite Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152; Cover v. Scott, *supra*.

REVERSED AND REMANDED.

JAMES LYNCH, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT, A CORPORATION, ET AL., APPELLEES.
218 N. W. 2d 546

Filed May 23, 1974. No. 39290.

1. **Municipal Corporations: Legislature.** Municipal corporations are creatures of the Legislature and the Legislature has plenary power over them.
2. **Municipal Corporations: Legislature: Public Lands.** The state may modify or withdraw the power to hold, manage, or convey property to be used for governmental purposes; may take such property without compensation; and hold it itself or vest it in other agencies.
3. **Municipal Corporations: Statutes: Public Lands.** Section 14-1115, R. S. Supp., 1972, effectively removed from a metropolitan city whatever right it may have had to sell and convey the utility property described in the statute; transferred that right to the metropolitan utilities district; and determined the manner and method of disposition of the proceeds of any such sale and conveyances.
4. **Statutes: Time.** Curative statutes, by reason of their remedial and retrospective nature, are applicable not only to past transactions generally, but also to cases pending in the trial court.

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

Richard J. Spethman and Renne Edmunds, for appellant.

Cecil S. Brubaker, W. L. Strong, Merlin E. Remmenga, Kutak, Rock, Cohen, Campbell, Garfinkle & Woodward, Herbert M. Fitle, Kent N. Whinnery, and Robert J. Hamer, for appellees.

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

MCCOWN, J.

This is an action by plaintiff, as representative of a class, against the Metropolitan Utilities District, Ne-

braska Methodist Hospital, and the City of Omaha, seeking to quiet title to certain real property in the City of Omaha, and to obtain for the city a portion of the proceeds of the sale of certain real estate similarly acquired. The District Court quieted the title to certain portions of the property in the defendant, Nebraska Methodist Hospital; quieted the title to the remaining property in the defendant, Metropolitan Utilities District; and dismissed plaintiff's petition and the City's cross-petition. Plaintiff has appealed.

All the facts are stipulated. Hereafter, Metropolitan Utilities District will be referred to as MUD; the Nebraska Methodist Hospital, as Hospital; and the City of Omaha, as City. The property in question here, a gas plant, was acquired by the City between 1918 and 1920, by eminent domain proceedings from the Omaha Gas Company, a private utility. The City issued $5 million in bonds to pay the condemnation award, and on July 1, 1920, the Omaha Gas Company executed and delivered a quit claim deed to the City covering the gas plant property.

Chapter 187, Laws 1919, provided that upon acquisition of the gas plant by the City, the Metropolitan Water District should immediately take over control and have "supreme and paramount authority" as to the possession and operation of such a gas plant. That act also provided that the funds arising from the operation of the gas plant, over and above certain operating expenses, were to be set apart as a sinking fund to be first applied in payment of interest and principal of any bonds issued for the acquisition of the gas plant. Upon its acquisition by the City, the gas plant was immediately taken over by the Metropolitan Water District.

In 1921, MUD was created by the Legislature and became the successor of the Metropolitan Water District. Chapter 111, Laws 1921, extended all the powers

which had been conferred upon a metropolitan water district to apply to gas plants and also vested all the powers, obligations, rights, and authority formerly exercised by the water district in MUD.

The interest and principal of the bonds issued by the City for the acquisition of the gas plant property were paid in full by MUD, entirely from funds from the operation of the gas plant. The bonds were liquidated on January 23, 1956.

Under MUD operation, various additions and extensions were made to the gas plant from time to time, some of which were constructed and located on adjoining land, which had been acquired and held by MUD in its own name.

Pursuant to resolution, the City executed a quit claim deed on September 4, 1968, conveying to MUD any interest of the City in all the parcels constituting any part of the gas plant, including the real estate originally acquired in the condemnation action of 1920, as well as all real estate adjoining it which had been later acquired and held by MUD in its own name. The quit claim deed reserved "any claim the City may have as against the proceeds of the sale of any of said property by reason of any interest said City may have in said properties * * *." In making the quit claim deed to MUD, the City did not comply with the provisions of its charter dealing with the sale and disposition of unneeded real property. The City has not received any payment from the sale of property to the Hospital to be referred to later. Proceeds of that sale have been retained and are held by MUD.

By resolution of the Board of Directors of MUD, dated November 5, 1969, a portion of the original gas plant property, together with real property adjoining it held by MUD in its own name, was declared surplus and offered for sale. MUD advertised for and received sealed bids on the property. Original bids ranging

from $145,000 to approximately $181,000 were rejected. A subsequent bid of $200,000 by the defendant, Hospital, was also rejected. Another offer of $275,000 was accepted by MUD and the surplus property was conveyed by MUD to the Hospital by warranty deed dated June 25, 1970. The parties have stipulated as to the proportionate values attributable to the original gas plant property.

In 1972, the Legislature enacted section 14-1115, R. S. Supp., 1972, effective on July 6, 1972. That statute provides: "Whenever any of the property of a utility under the control of a metropolitan utilities district, whether real property or personal property, shall no longer be required for the operation of such utility, the district may sell and convey such surplus property, whether such property was acquired directly by the district or as a part of the utility plant or system acquired by the metropolitan city or any municipality or other political subdivision constituting a part of the district. Proceeds of the sale of such surplus property shall be credited to the utility of which such property was a part, or, where funds of more than one utility have been invested in property involved in a consolidated operation of the district, proceeds of such sale shall be apportioned among the utilities involved in such consolidated operation upon some reasonable basis determined by the board of directors of the district."

The surplus property originally conveyed by MUD to the Hospital, by warranty deed in 1970, was again conveyed pursuant to resolution from MUD to the Hospital by warranty deed dated September 8, 1972.

Plaintiff commenced this action against the defendants, MUD and Hospital, on January 22, 1971. Thereafter, the City became a party defendant. On August 2, 1973, the trial court entered its judgment and decree dismissing plaintiff's petition and the cross-petition of the City, and quieting title in the Hospital as to the land conveyed to

it by MUD; and in the defendant, MUD, as to all other property.

Some relevant background history is of importance. MUD "is a municipal corporation created by statute to take over, control and operate the water-plant, formerly owned by the city of Omaha, and certain other public utilities." Keystone Investment Co. v. Metropolitan Utilities District, 113 Neb. 132, 202 N. W. 416. MUD's predecessor, a metropolitan water district, was a body corporate with all the usual powers of a corporation for public purposes, including the power to purchase, hold, and sell personal property and real estate. It had the sole management and control of its assets, including all waterworks property "real and personal, now or hereafter owned by said metropolitan city * * *." See § 14-1002, R. R. S. 1943.

In 1921, the Metropolitan Utilities District, as a separate and independent entity, became the successor of the Metropolitan Water District and succeeded to the property and powers and assumed the obligations of the water district. All the powers conferred upon metropolitan water districts were extended to gas plants and all such powers, obligations, rights, and authority became and were vested in MUD. See Laws 1921, chapter 111, sections 2 and 3, now §§ 14-1102 and 14-1103, R. R. S. 1943.

It is important to note also that the quit claim deed from the City to MUD in 1968 did not alter or affect the public purpose for which the properties were held. The transfer of bare legal title would have no effect upon the public for whom the property is held, whether they were in the class of taxpayers or of rate payers, so long as the property remained dedicated to the purposes of operating a gas plant.

Obviously, the statutory intermingling of rights, powers, and title as between MUD and the City created uncertainty and ambiguity as to the authority of MUD to sell and convey surplus property formerly acquired in the name of the City, but held and used by MUD in the opera-

tion of the gas plant. Section 14-1115, R. S. Supp., 1972, was adopted by the Legislature to remove any such uncertainty and ambiguity. The statement of purpose establishes the curative nature of the statute. The statute provides: "Whenever any of the property of a utility under the control of a metropolitan utilities district, whether real property or personal property, shall no longer be required for the operation of such utility, the district may sell and convey such surplus property, whether such property was acquired directly by the district or as a part of the utility plant or system acquired by the metropolitan city or any municipality or other political subdivision constituting a part of the district."

The statute also provides that the proceeds of such sale were to be credited to the utility of which such property was a part, and by that provision it effectively and practically preserved the purpose for which the property was held.

This court has on many occasions affirmed the principle that municipal corporations are creatures of the Legislature and that the Legislature has plenary power over them. In City of Millard v. City of Omaha, 185 Neb. 617, 177 N. W. 2d 576, we again confirmed that principle and quoted once more with approval from Hunter v. City of Pittsburgh, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151: "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or

exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States."

Section 14-1115, R. S. Supp., 1972, effectively removed from a metropolitan city whatever right it may have had to sell and convey the utility property described in the statute, and transferred that right to the metropolitan utilities district. That statute also effectively determined the manner and method of disposition of the proceeds of any such sale and conveyance.

The legislative history of the statute establishes beyond question its curative nature. "Curative statutes, by reason of their remedial and retrospective nature, are applicable not only to past transactions generally, but also to cases pending in the trial court." Hargleroad Bulk Carriers, Inc. v. Ruan Transp. Corp., 173 Neb. 151, 112 N. W. 2d 743. See, also, City of Fremont v. Dodge County, 130 Neb. 856, 266 N. W. 771.

Even if the statute were to be interpreted as prospective only, the result here would be the same. After the effective date of section 14-1115, R. S. Supp., 1972, MUD again conveyed the property to the Hospital and the proceeds of the sale are still held by MUD. Under such circumstances, whether the original 1968 quit claim deed from the City to MUD was valid or void is immaterial. Although there are reasonable grounds upon which to argue either result, the statute has removed the neces-

sity of making that decision. The passage of the statute also removes the other issues raised by the plaintiff.

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

AFFIRMED.

BOSLAUGH, J., concurring.

I concur in the result in this case upon the ground the transfer of the bare legal title had no effect upon the public for whose benefit the property is held.

Hunter v. City of Pittsburgh, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151, was concerned with property *used for governmental purposes* involved in the consolidation of two cities. The opinion distinguished between property held for governmental purposes and property held for proprietary use in this manner: "It will be observed that in describing the absolute power of the State over the property of municipal corporations we have not extended it beyond the property held and used for governmental purposes. Such corporations are sometimes authorized to hold and do hold property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts (1 Dillon, Municipal Corporations, 4th ed., sections 66 to 66a, inclusive, and cases cited in note to 48 L. R. A. 465), and it has been held that as to the latter class of property the legislature is not omnipotent."

A municipality, in the operation of a public utility, acts in its private and proprietary capacity, and such property is generally not subject to appropriation or complete control by the state except by the exercise of eminent domain. 2 McQuillin, Municipal Corporations (3d Ed.), § 4.132, p. 215.

CLINTON, J., joins in this concurrence.

LEE SHIRK, ET AL., APPELLEES AND CROSS-APPELLANTS, V. PETE SCHMUNK ET AL., APPELLANTS AND CROSS-APPELLEES.

218 N. W. 2d 433

Filed May 23, 1974. No. 39314.

1. **Boundaries: Quieting Title.** Section 34-301, R. R. S. 1943, authorizes actions in equity to determine boundaries of real estate, the ownership of which is in whole or in part in dispute.
2. **Boundaries: Quieting Title: Adverse Possession.** When properly pleaded, the theory of adverse possession, as well as the theory of mutual recognition and acquiescence, may be raised under section 34-301, R. R. S. 1943.
3. **Equity: Appeal and Error.** In actions in equity, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the District Court. Such independent conclusions of fact must be determined by the Supreme Court in accordance with the ordinary rules governing the burden of proof and the competency and materiality of the evidence.
4. **Property: Quieting Title: Adverse Possession.** A party, in order to establish title to real estate by adverse possession, must prove by a preponderance of the evidence that he has been in actual, continuous, notorious, and adverse possession of the property under claim of ownership for the full period required by the statute. § 25-202, R. R. S. 1943.
5. **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.
6. **Boundaries: Quieting Title: Adverse Possession.** When a fence is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own.
7. **Quieting Title: Adverse Possession.** In order to establish title by adverse possession, the possession is sufficient if the land is used continuously for purposes for which it may in its nature be adapted.
8. ———: ———. In order to establish title by adverse possession, the possession must not only have been actual, open, and continuous, but it must have been accompanied by an intention

to hold the land as the owner of it. It must have been under a claim of ownership.

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

C. Morris Gillespie, for appellants.

Van Steenberg, Brower & Chaloupka, for appellees.

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

BRODKEY, J.

This appeal concerns an action brought by the plaintiffs to quiet title to certain land located along the North Platte River in Morrill County, Nebraska. Plaintiffs brought this action under section 34-301, R. R. S. 1943, alleging title to the land in question under the theory of adverse possession and the theory of mutual recognition and acquiescence. See Hakanson v. Manders, 158 Neb. 392, 63 N. W. 2d 436 (1954). The answer filed by the defendants denied that the plaintiffs or their predecessors in title had acquired title to the land in question and separately alleged that the defendants had acquired such title through conveyance and/or through adverse possession. The District Court, after trial and an examination of the premises, found in favor of the plaintiffs on the theory of adverse possession and quieted title to the land in question in them. The defendants appeal alleging basically that the evidence was insufficient to establish the acquisition of title by adverse possession. The plaintiffs cross-appeal assigning as error the failure of the District Court to find that they had acquired title to the land in question through mutual recognition and acquiescence. We affirm the judgment of the trial court.

As has previously been indicated, this action was instituted under the authority of section 34-301, R. R. S. 1943. That statute provides: "When one or more owners of

land, the corners and boundaries of which are . . . in dispute, desire to have the same established, they may bring an action in the district court of the county where such . . . boundaries, or part thereof, are situated, against the owners of the other tracts which will be affected by the determination or establishment thereof, to have such corners or boundaries ascertained and permanently established. . . . Either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years, which issue shall be tried before the district court under its equity jurisdiction without the intervention of a jury, and appeals from such proceedings shall be had and taken in conformity with the equity rules." It is well established that section 34-301, R. R. S. 1943, authorizes actions in equity to determine boundaries of *real estate, the ownership of which is in whole or in part in dispute.* McGowan v. Neimann, 139 Neb. 639, 298 N. W. 411 (1941). It is also clear that, when properly pleaded, the theory of adverse possession, as well as the theory of mutual recognition and acquiescence, may be raised under section 34-301, R. R. S. 1943. McGowan v. Neimann, *supra.*

This being an action in equity, it is the duty of this court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the District Court. § 25-1925, R. R. S. 1943; Eirich v. Oswald, 154 Neb. 8, 46 N. W. 2d 686 (1951); Fitch v. Slama, 177 Neb. 96, 128 N. W. 2d 377 (1964). Such independent conclusions of fact must be determined by this court in accordance with the ordinary rules governing the burden of proof and the competency and materiality of the evidence. Beckman v. Lincoln & N. W. R.R. Co., 79 Neb. 89, 112 N. W. 348 (1907). A party, in order to establish title to real estate by adverse possession, must prove by a preponderance of the evidence that he has been in actual, continuous, notorious, and

adverse possession of the property under claim of ownership for the full period required by the statute. Fitch v. Slama, *supra*. The statutory period for the establishment of title to real estate by adverse possession is 10 years. § 25-202, R. R. S. 1943. We shall consider the evidence preserved in the record in this case in the light of these rules. However, in so doing, we shall also be cognizant of the rule that on 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 (1973); State v. Cheyenne County, 123 Neb. 1, 241 N. W. 747 (1932). We may also give consideration to the fact that in this case the trial court personally viewed the premises involved herein. Lackaff v. Bogue, 158 Neb. 174, 62 N. W. 2d 889 (1954).

The land involved in this case as shown in exhibits 3 and 5 received at the trial, consists basically of accretion land situated upon the flood plain of the North Platte River in the area of Chimney Rock in Morrill County, Nebraska. The land, located directly between land owned by the parties herein, lies on the north side of what is presently the main flowing channel of the river. The defendants are joint owners of the land (Lot 6) immediately to the north of the land in dispute, while the plaintiffs hold title to the land (Lot 7) to the immediate south and across the river. The plaintiffs obtained title to Lot 7 from one Bond Benton by warranty deed in 1973. They now contend that they by that conveyance also obtained title to the accretion land involved in this case, the theory being that Benton, their predecessor in title, had obtained title to that land through adverse possession and/or mutual recognition and acquiescence.

Bond Benton, the previous owner of Lot 7, testified on behalf of the plaintiffs. He stated that Lot 7 had

been owned by his mother in the 1920's, and that he first started using the land personally in 1930 or 1931. He indicated that he used the land in question in conjunction with Lot 7 for the purpose of grazing cattle and for hunting. He testified he usually grazed his cattle on that land from June to September of each year, and that between the time the cattle were removed from the land and the hunting season, he would go onto the land in question to build hunting blinds. During the hunting season itself, Benton went onto the land nearly every morning. Benton stated that in all probability he was not on the land at all during the winter months. According to Benton he continued to use the land personally until approximately 1950, at which time he leased it to Ivan Doll as a representative of Johnson-Cashway Company.

The testimony of Ivan Doll supported Benton's representation that in 1950 or 1951 Doll leased Benton's land for hunting and recreational purposes on behalf of Johnson-Cashway Company. Doll stated that Benton's land was used every week during duck hunting season and also that the land was used for picnics and fishing at other times. Such use of the land under the lease to Johnson-Cashway Company continued until 1965 or 1966.

The only persuasive testimony, other than that of Benton relating to the use of the land in dispute during the critical years of the 1930's and 1940's, was the testimony of the defendant, Pete Schmunk. According to his testimony, Schmunk's predecessor in title to Lot 6, located to the immediate north of the land in dispute, was one John Dieckmann. Schmunk testified that he was often on the land in question with Dieckmann between the years from 1939 to 1954. He further stated that he ran cattle on that land with Dieckmann in 1939, and that in order to round up the cattle he went personally to the bank of the main flowing channel of the river. It was not until 1954, however, that Schmunk leased Lot 6 from Dieckmann and occupied that property.

Schmunk actually obtained title to Dieckmann's property in January of 1958. He asserted that from 1939 he has never seen any of Benton's cattle upon the land in question.

A very important element of this case concerns evidence relating to the existence of a fence along the northern boundary of the land now claimed by the plaintiffs, that is, the land in dispute. Bond Benton testified that from the time he first became familiar with his land it was marked by fences and boundaries. Thus, Benton indicated in his testimony that from the time he first became familiar with the land in question, there was a three-strand barbed wire fence along the northern boundary of that land. He considered himself the owner of the land extending up to the point of that fence. Benton further stated that any person going across his property from north to south would necessarily run into that fence. Benton's testimony regarding the fence is supported by the testimony of other witnesses, including that of Ivan Doll, who stated that he regarded the fence as the boundary line of Benton's land and that he had hunted the land accordingly. Even the defendant Schmunk admits the existence of the fence, although he does not know who was responsible for putting it up originally. Schmunk made no representation as to whether or not he saw the fence during the years that Lot 6 was owned by Dieckmann.

The determination of this case necessarily resolves itself into a determination of the weight and persuasiveness of the evidence adduced by the respective parties. It is our conclusion there was sufficient evidence to establish that Bond Benton, the plaintiffs' predecessor in title, obtained title to the land in question through adverse possession in the 1930's and/or the 1940's. We reach this conclusion in spite of the conflict between the testimony of Schmunk and Benton in part because the relationship of Schmunk to the property during the

critical period of the 1930's and 1940's was somewhat more remote than was that of Benton. Furthermore, we are influenced by the strong probative effect of the evidence relating to the fence that extended along the northern boundary of the land in dispute. It is the established law of this state that when a fence is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. Konop v. Knobel, 167 Neb. 318, 92 N. W. 2d 714 (1958); Olson v. Fedde, 171 Neb. 704, 107 N. W. 2d 663 (1961). The evidence in this case indicates that the fence along the northern boundary of the land in dispute was in existence as late as 1969. The only evidence concerning the time of origin of the fence was the testimony of Bond Benton to the effect that the fence was already in existence when he first became familiar with the land in the early 1930's. Thus, it would appear that the fence was present for the full statutory period. Further, there is ample evidence that Benton claimed ownership of all the land up to that fence. The only evidence that Benton's possession of the land may have been interrupted during the 1930's and 1940's was Schmunk's testimony, contradicted by the testimony of Benton, that Dieckmann had cattle on the land in 1939 and thereafter. However, the fact, as indicated before, that Schmunk's apparent relationship to the land was more remote than that of Benton causes us to resolve the question of whether Benton's possession of the land was interrupted in favor of the plaintiffs. Such a result is particularly required when we consider the fact of the existence and location of the fence along the northern boundary of the land in dispute, since the cattle of Dieckmann would have had to cross that fence in order to graze upon the land in question in the manner de-

scribed by Schmunk. We believe that when all these factors are considered together, the plaintiffs must be held to have adverse possession.

The defendants have argued specifically the evidence was insufficient in that it failed to establish the possession of Benton was open and notorious. This is a contention that we cannot accept in light of the existence of the fence referred to above. "The importance of the inclosure in any case . . . is due to the fact that it renders the possession open and notorious and tends to show that it was exclusive." Brownfield v. Bleekman, 4 Neb. (Unoff.) 443, 94 N. W. 714 (1903). See, also, Hallowell v. Borchers, 150 Neb. 322, 34 N. W. 2d 404 (1948). We also consider in this connection the well-established rule that possession is sufficient if the land is used continuously for purposes for which it may in its nature be adapted. Mentzer v. Dolen, 178 Neb. 42, 131 N. W. 2d 671 (1964); Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57 (1958). The evidence necessarily leads to the conclusion that the possession in this case was sufficiently open and notorious. We conclude therefore, that Bond Benton's acts of dominion over the property were sufficiently open and notorious to put an ordinarily prudent person on notice of the fact that his lands were in the adverse possession of another. Mentzer v. Dolen, *supra,* Burket v. Krimlofski, *supra.*

The defendants have also argued the evidence was insufficient in that it failed to establish an intent on the part of Bond Benton to claim title to the land in dispute. It is, of course, true that the possession must not only have been actual, open, and continuous, but it must have been under a claim of ownership. Colvin v. Republican Valley Land Assn., 23 Neb. 75, 36 N. W. 361 (1888); Elsasser v. Szymanski, 163 Neb. 65, 77 N. W. 2d 815 (1956). We believe that there was sufficient evidence to establish such an intent on the part of Benton. Benton himself testified to such an intent, and also the plaintiff Juelfs testified that when Benton leased his

land to the plaintiffs, he described it as including the land in dispute.

Our ultimate determination in this case is that the evidence in the record is sufficient to establish Bond Benton, the plaintiffs' predecessor in title, obtained title to the land in dispute through adverse possession. Such being the case, we must affirm the judgment of the District Court to quiet title to the land in question in the plaintiffs. Having made such a determination, we regard it as unnecessary to consider the cross-appeal filed in this case.

AFFIRMED.

FRANK RENNA, APPELLANT, V. BISHOP'S CAFETERIA COMPANY OF OMAHA, A CORPORATION, APPELLEE.

218 N. W. 2d 246

Filed May 23, 1974. No. 39319.

1. **Foods: Sales: Innkeepers: Evidence.** A restaurateur engaged in serving food to paying guests for immediate consumption on the premises impliedly warrants that the food so served is wholesome and fit for human consumption and is liable for injuries to such person proximately caused by a breach thereof without proof of negligence. Before this rule becomes applicable, however, there must be proof that the food sold is unwholesome and not fit for human consumption.
2. **Trial: Evidence.** A motion for a directed verdict for the purpose of decision thereon must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
3. ———: ———. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Ralph R. Bremers, for appellant.

Jon S. Okun of Eisenstatt, Higgins, Kinnamon & Okun, for appellee.

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

SPENCER, J.

Plaintiff seeks to recover damages as a result of being served food which was allegedly unwholesome, adulterated, and not fit for human consumption. The trial court sustained defendant's motion for a directed verdict. Plaintiff perfected this appeal. We affirm.

Plaintiff had breakfast at Bishop's Cafeteria in Omaha at approximately 9:20 a.m., October 25, 1968. Plaintiff, who was 63 years of age, had eaten a light lunch and a light evening meal the previous day and had nothing else to eat until this breakfast which consisted of several grapefruit sections, two fried eggs, hash browns, a roll, and a cup of coffee. He had eaten lightly the day before pursuant to his physician's instructions, preparatory for a cholesterol test which was made approximately an hour before his breakfast at Bishop's. Plaintiff testified the eggs were on the cool side and didn't taste just right. He began to experience stomach pains about 12:30 p.m. that day. These pains were mild at first but shortly became more severe and he began to feel nauseated, vomited, and experienced diarrhea. He was admitted to the hospital at approximately 6 p.m. that day.

Doctor Maurice E. Stoner, who had been plaintiff's personal physician for a number of years, diagnosed plaintiff's affliction as acute pancreatitis, and stated his opinion that the precipitating cause was the food

purchased at Bishop's Cafeteria. He found no evidence of either food poisoning or food infection in treating plaintiff, but the hospital did not look for such evidence. Doctor Stoner stated in regard to acute pancreatitis there is an underlying cause which no one understands and a precipitating cause. The precipitating cause could be alcohol, gallstones, emotional upset, or a hearty meal. The doctor felt the meal which plaintiff consumed at Bishop's Cafeteria was a hearty meal. It was his testimony that a wholesome meal could be the precipitating cause and could bring on the symptoms of pancreatitis. He also testified that fasting followed by a hearty meal could bring on symptoms of pancreatitis, whether the food was wholesome or otherwise. Plaintiff's doctor was unable to state with reasonable medical certainty that plaintiff consumed infected or poisoned food on October 25, 1968. He had no opinion as to whether plaintiff was suffering from food poisoning or food infection when he examined plaintiff at the hospital. He further testified that it would be speculation to say plaintiff had food poisoning or food infection.

A restaurateur engaged in serving food to paying guests for immediate consumption on the premises impliedly warrants that the food so served is wholesome and fit for human consumption and is liable for injuries to such person proximately caused by a breach thereof without proof of negligence. Zorinsky v. American Legion (1956), 163 Neb. 212, 79 N. W. 2d 172. Before this rule becomes applicable, however, there must be proof that the food sold is unwholesome and not fit for human consumption. Plaintiff wholly failed to produce proof to sustain this issue.

True, plaintiff experienced difficulties approximately 3 hours after consuming his breakfast. His personal physician diagnosed his ailment as acute pancreatitis and testified the precipitating cause was the food consumed at Bishop's Cafeteria. However, he could not

say that this meant the food was unwholesome, or tainted in any way. He testified a wholesome meal could have had the same effect. Doctor Stoner had no opinion as to whether plaintiff was suffering food poisoning or food infection when he examined him at the hospital. He further testified it would be speculation to say that food poisoning or food infection was present. The most plaintiff proved is he became ill following the ingestion of his breakfast at Bishop's. This, however, does not prove that the food eaten was unwholesome. His medical evidence indicates his condition could have been brought on because he ate a hearty breakfast after fasting.

A motion for a directed verdict for the purpose of decision thereon must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence. Crane v. Whitcomb (1955), 160 Neb. 527, 70 N. W. 2d 496.

In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Moats v. Lienemann (1972), 188 Neb. 452, 197 N. W. 2d 377.

The above rules are controlling. On the record, we conclude plaintiff failed to meet his burden of proof and the trial court did not err in granting defendant's motion for a directed verdict.

The judgment of the District Court is affirmed.

AFFIRMED.

CHRISTIANSEN CONSTRUCTION CO., APPELLEE, V. A. J. HILLER ENTERPRISES, INC., APPELLANT.

218 N. W. 2d 439

Filed May 23, 1974. No. 39337.

Receipts: Evidence. It is well settled that a simple receipt is only prima facie evidence of the truth of the statements recited therein, and that oral evidence is admissible for the purpose of explaining, varying, or modifying its terms.

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

Michael Swanson, for appellant.

Moodie & Moodie, for appellee.

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

SPENCER, J.

The sole issue presented in this appeal is whether a lien waiver which acknowledges receipt of the unpaid balance may be explained or contradicted by parol evidence. The trial court permitted the introduction of such evidence. We affirm.

Christiansen Construction Company, plaintiff, entered into a written contract with A. J. Hiller Enterprises, Inc., to construct a building for defendant in Norfolk, Nebraska. The total cost of the building was $68,364.61. On October 29, 1968, plaintiff made application for final payment of $6,963.91, and on the same date Norman Christiansen executed a waiver of lien which included an acknowledgment of receipt of the final payment due on the contract. On January 3, 1969, the architect executed a certificate for final payment. On June 2, 1969, George H. Moyer, as trustee, forwarded a check in the amount of $4,700 to apply on the balance due. No other payments were made and this action resulted.

Defendant answered plaintiff's petition with a general denial, and subsequently was allowed to amend its answer by pleading additionally that the amounts prayed for by the plaintiff had been fully paid on approximately the 29th day of October 1968. There is no evidence in the record except the receipt embodied in the lien waiver that the total amount due has been paid. The plaintiff and the architect testified that only $4,700 of the amount due has been paid.

The testimony indicated that the lien waiver was requested by the architect and was submitted by plaintiff at the architect's request. The record would indicate this is often done to permit the owner of a project to complete the financing. All the correspondence shown in the record indicated that the money had not been paid. Several of these letters were written by agents of the defendant and there is absolutely no indication or suggestion in any of them that the obligation of the defendant had been satisfied.

Plaintiff cites Waters v. Phelps (1908), 81 Neb. 674, 116 N. W. 783, for the following: "It is well settled that a simple receipt is only prima facie evidence of the truth of the statements recited therein, and that oral evidence is admissible for the purpose of explaining, varying or modifying its terms * * *."

This court has held that when a receipt embodies a contract the terms of that contractual relationship cannot be varied by parol evidence. Morse v. Rice (1893), 36 Neb. 212, 54 N. W. 308. While a waiver of lien usually refers to the contract, it does not embody the contract. It merely waives mechanic's liens arising out of the contract. In this instance it was also a simple receipt acknowledging payment. This distinction between a receipt and a contract is found in Price v. Treat (1890), 29 Neb. 536, 45 N. W. 790. The syllabus in that case is as follows: "Taken and construed in connection with the several allegations and admissions

set out and contained in the pleadings, the following paper writing set out in defendant's answer, to-wit: 'Received from C. P. Treat $6,532.27, in full settlement of the within contract and in full of all demands. In consideration of said payment already received by me, I hereby release him and also the Fremont, Elkhorn and Missouri Valley R.R. Co., and the Chicago and North-Western Ry. Co., from all claims, actions, or causes of action which have arisen, or may or can arise, to me against any or either of them by reason of any connection I may have had with them heretofore': Held, To be a receipt and not a contract."

Alfred J. Hiller, Defendant's sole stockholder, testified that he did not know whether plaintiff had been paid in full. The only thing he knew was that he had a receipt for payment. Plaintiff's evidence conclusively establishes that payment had not been made.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES CALVIN JACKSON, APPELLANT.

218 N. W. 2d 430

Filed May 23, 1974. No. 39365.

Criminal Law: Presentence Reports: Sentences. Unless it is impractical to do so, when an offender has been convicted of a felony, the court shall not impose sentence without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation.

Appeal from the District Court for Dakota County: JOSEPH E. MARSH, Judge. Affirmed in part, and in part reversed and remanded for resentencing.

Don A. Fitch, for appellant.

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., and Gary R. Welch, for appellee.

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

SPENCER, J.

Defendant pled guilty to manslaughter on October 12, 1973. He was sentenced the same day to imprisonment for 10 years. He perfected an appeal, alleging three assignments of error. The second assignment alleges the trial court abused its discretion in sentencing the defendant without the benefit of a presentence investigation. We affirm the judgment of conviction, and remand for resentencing.

Defendant was originally charged with first-degree murder but the charge was reduced to second-degree murder upon his agreement to testify for the State in a murder trial against another charged with killing the same individual. Defendant entered a plea of guilty to the reduced charge and a presentence investigation was ordered by the court. The other person was subsequently acquitted. Defendant was then allowed to withdraw his former plea and to enter a plea of guilty to manslaughter. The presentence investigation ordered by the court had not yet been completed. Defendant was sentenced without the benefit of a presentence report. A report was filed several days after the sentence was pronounced.

Section 29-2261, R. S. Supp., 1972, so far as material herein, provides: "(1) Unless it is impractical to do so, when an offender has been convicted of a felony, the court *shall not* impose sentence without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation." (Emphasis supplied.) This provision, which came into our law in 1971, makes it mandatory,

unless impractical to do so, to require a written presentence investigation of all felony offenders. This provision was not followed herein. We vacate the sentence and remand the cause for resentencing according to law.

In view of our action herein we do not consider the other assignments of error set out by defendant.

The judgment of conviction is affirmed and the cause is remanded for resentencing in compliance with section 29-2261, R. S. Supp., 1972.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR RESENTENCING.

NEWTON, J., dissenting.

I dissent. Section 29-2261, R. S. Supp., 1972, directs that a presentence investigation be made prior to imposition of sentence on a felony conviction. Although unnecessary in many cases where the court has before it the record of previous felony convictions, I have no quarrel with the procedure prescribed.

The record indicates that defendant participated in the killing of Leonard Scheer. The deceased was hit over the head with a bottle, run over with a car and eight ribs crushed, and left on a wintry road to die of exposure and the injuries inflicted. It is obviously a case of first-degree murder yet the defendant was permitted to escape with a plea of guilty to manslaughter and received a sentence of 10 years.

The presentence report apparently was not completed at the time of defendant's plea of guilty to manslaughter and sentence. The record indicates that both the defendant and his attorney were then cognizant of this fact but informed the court that they were ready to proceed. The presentence report itself fails to reveal any extenuating circumstances other than that defendant had lost a leg at some time in the past and was involved with drugs, factors of which the court was apprised prior to sentence. The report, in this in-

stance, could not possibly have brought about a lighter or different sentence. It was error without prejudice.

Section 29-2261, R. S. Supp., 1972, must, as are other laws, be administered in the light of section 29-2308, R. R. S. 1943, which forbids reversal when no substantial miscarriage of justice has occurred. As this court has frequently said, error may creep into proceedings in criminal prosecutions but it is only error prejudicial to the accused that justifies reversal. See, Texter v. State, 170 Neb. 426, 102 N. W. 2d 655; Franz v. State, 156 Neb. 587, 57 N. W. 2d 139.

STATE OF NEBRASKA, APPELLEE, V. ROBERT FRANKLIN SPIDELL, APPELLANT.

218 N. W. 2d 431

Filed May 23, 1974. No. 39378.

1. **Post Conviction: Pleadings.** In order to maintain an action under the Post Conviction Act the prisoner must allege facts which if proved would constitute an infringement of his constitutional rights.
2. **Trial: Time.** A defendant's right to a speedy trial begins when he is indicted or informed against or arrested.
3. **Post Conviction: Sentences.** Sentences imposed within statutory limits furnish no basis for post conviction relief.
4. **Post Conviction.** A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for appeal or to secure further review of issues already litigated.

Appeal from the District Court for Otoe County: WALTER H. SMITH, Judge. Affirmed.

John F. Steinheider, for appellant.

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

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

WHITE, C. J.

In this post conviction case the defendant asserts that he was denied a speedy trial; that he was entitled to an evidentiary hearing on his petition for post conviction relief; and that he was erroneously sentenced under the indeterminate sentence statute. The District Court denied relief without holding an evidentiary hearing. We affirm the judgment of the District Court.

It is fundamental that in order to maintain an action under the Post Conviction Act the prisoner must allege facts which if proved would constitute an infringement of his constitutional rights. State v. Dabney, 183 Neb. 316, 160 N. W. 2d 163; State v. Bullard, 187 Neb. 334, 190 N. W. 2d 628. The defendant's conviction and sentence on the original offense was affirmed by this court in State v. Spidell, 190 Neb. 181, 206 N. W. 2d 848. The gist of the facts alleged by the petition for post conviction relief is that while the offense was committed on or about September 13, 1970, the defendant remained at large until shortly before his trial in September 1972. The information against him was filed on September 26, 1972, and the trial was held on September 29, 1972. From the conclusionary allegations of the defendant we gather that his contention is simply that he was denied his right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution, because he was not arrested and informed against prior to September 26, 1972. He was not arrested but remained at large until that time. No authority or cases are cited to support the contention that the right to a speedy trial embraces the period of time when the defendant is at large and has not been apprehended, arrested, indicted or informed against. The trial and final disposition of his case was within the express terms of our applicable state statute providing for a period of 6 months. § 29-1207, R. S. Supp., 1972. Under the United States Constitution, a defendant's right to a speedy trial begins when he is indicted or

informed against or arrested. United States v. Marion, 404 U. S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468; Barker v. Wingo, 407 U. S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101. And where the defendant's petition for relief and the files and the records demonstrate that the prisoner is entitled to no relief, the trial court, as here, may deny the defendant's request for an evidentiary hearing. State v. LaPlante, 185 Neb. 816, 179 N. W. 2d 110; State v. Hizel, 181 Neb. 680, 150 N. W. 2d 217.

The defendant seeks to attack and invoke review of his indeterminate sentence of not less than 5 years or more than 10 years for the crime of forgery. The same issue was decided adversely to the defendant in his original appeal on the merits. State v. Spidell, *supra.* Sentences imposed within statutory limits furnish no basis for post conviction relief. State v. Birdwell, 188 Neb. 116, 195 N. W. 2d 502. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for appeal or to secure further review of issues already litigated. State v. Weiland, 190 Neb. 111, 206 N. W. 2d 336; State v. Hizel, *supra.*

The contentions of the defendant are without merit. The judgment of the District Court denying post conviction relief is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIE LEE WATSON, ALSO KNOWN AS WALLACE GEORGE, APPELLANT.
218 N. W. 2d 904

Filed June 6, 1974. No. 39041.

1. **Evidence: Time: Witnesses: Business Records.** Under section 25-12,109, R. S. Supp., 1972, a business record of an act, condition, or event is competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of

business at or near the time of the act, condition, or event, and if, within the sound discretion of the court, the sources of the information, method, and the time of preparation were such as to justify its admission.

2. **Evidence: Business Records.** The purpose of the statute, section 25-12,109, R. S. Supp., 1972, was to permit the admission in evidence of systematically entered records made in the usual course of business, without the necessity of identifying, locating, and producing as witnesses the individuals who made the original entries in the records.

3. ———: ———. No particular mode or form of record is required under section 25-12,109, R. S. Supp., 1972, and a record prepared by electronic equipment and stored on tape, if it complies with the requirements of the statute, is as admissible as a book account or record recording the same information and calculations.

4. ———: ———. The business record statute, section 25-12,109, R. S. Supp., 1972, was intended to bring the realities of business and professional practice into the courtroom and the statute should not be construed narrowly to destroy its usefulness.

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 James J. Duggan, for appellee.

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

ZEILINGER, District Judge.

Defendant Willie Lee Watson, also known as Wallace George, was charged with knowingly uttering an insufficient fund check, exhibit 1, to Goldstein-Chapmans for $124.20 on August 20, 1971, with intent to defraud. He has appealed his conviction and assigns as prejudicial error the reception into evidence of exhibit 8 which is a computer print-out showing rejected transactions of the bank for August 24, 1971. The only issue is

whether or not the State laid sufficient foundation for the admission into evidence of exhibit 8. Section 25-12,109, R. S. Supp., 1972, of the Uniform Business Records as Evidence Act, sets out the requirements for admissibility of business records as evidence; and Transport Indemnity Co. v. Seib, 178 Neb. 253, 132 N. W. 2d 871, 11 A. L. R. 3d 1368 (1965), construes that statute.

In Transport Indemnity Co. v. Seib, *supra,* the court said: "Section 25-12,109, R. R. S. 1943, is as follows: 'A record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission.'

"In construing this statute, our court said in Higgins v. Loup River Public Power Dist., 159 Neb. 549, 68 N. W. 2d 170, as follows: 'The purpose of the act is to permit admission of systematically entered records without the necessity of identifying, locating, and producing as witnesses the individuals who made entries in the records in the regular course of the business rather than to make a fundamental change in the established principles of the shopbook exception to the hearsay rule.' * * *

"No particular mode or form of record is required. The statute was intended to bring the realities of business and professional practice into the courtroom and the statute should not be interpreted narrowly to destroy its obvious usefulness."

A résumé of the pertinent evidence follows. Robert Henrichsen, assistant cashier, United States National Bank, who had been with the bank 13 years and manager of the bookkeeping department for 4½ years, testified in substance as follows: Defendant opened the

account August 20, 1971, with a deposit of $140 in currency, signed the signature card, exhibit 3, was assigned account number 548-105, and received blank checks bearing that number in magnetic tape; that exhibit 4 was a check signed by the defendant payable to Hinky Dinky for $46.18 dated August 20, 1971, and was paid by the bank on August 23, 1971; that exhibit 5 was a check signed by the defendant payable to Wards for $57.95 dated August 20, 1971, and was paid by the bank on August 23, 1971; that all checks are processed through an automated system passing the information from the check against the customer's file and if there are sufficient funds on hand the checks are immediately paid and the funds withdrawn from the account and if there are not sufficient funds the checks are rejected and referred to a responsible individual for action and that deposits are posted in the same manner; that exhibits 4 and 5 had markings on the back indicating that they were so processed; that exhibit 7 was defendant's check to Tully's dated August 21, 1971, for $139.73 and was paid by the bank on August 24, 1971, after Tully's deposited $104.06 when defendant's account balance was $35.67 leaving the account 10 cents overdrawn; that exhibit 1, the check on which the complaint is based, was presented on August 24, 1971, and was rejected for insufficient funds; that checks totalling $361.35 were rejected that day as shown by exhibit 8 and the account was closed August 25, 1971; and that one of his duties as manager of the bookkeeping department was to maintain records of rejected checks which was done in the normal course of everyday banking procedures, through the computer print-out and the defendant's insufficient fund checks shown on exhibit 8 were returned to the banks which presented them and that they were not paid through the bank.

The undisputed evidence was that defendant gave exhibit 1 to Goldstein-Chapmans on August 20, 1971, in

exchange for merchandise, and that it was returned because of insufficient funds in his account. Defendant stipulated that exhibits 1, 4, 5, and 7 bore his signature.

Defendant relies on Transport Indemnity Co. v. Seib, *supra,* and points out that in this case foundation stretched over 141 pages of the record. He contends that there was insufficient foundation as to reliability and accuracy of the data system. The defendant's contention cannot be sustained. When the State started to lay foundation as to the accuracy of the system the defendant objected and the objection was erroneously sustained. On cross-examination the defendant asked no questions about exhibit 8 or the accuracy of the system. The defendant cannot complain successfully about any lack of foundation which he improperly succeeded in keeping out. With regard to the quantity of foundation required, this case differs from the Seib case. In the Seib case the exhibit was prepared by and under the direction of a director of the plaintiff who prepared the information fed into the machine. The output necessarily depended upon the figures plaintiff fed into the machine. That is not the situation in this case. In this case the defendant was a customer of the bank. The bank was not a party to this case and was making no claim against defendant. As stated in the annotation of the Seib case, 11 A. L. R. 3d 1377: "* * * there was, long prior to the emergence of the science of electronics, a rule of law under which entries or memoranda made by third parties (that is, persons not necessarily parties to the litigation in question) in the regular course of business, under circumstances calculated to insure accuracy and precluding any motive of misrepresentation, are admissible as prima facie evidence of the facts stated. Moreover, modern statutes of recent development, but still earlier than the general appearance of electronics, provide for the admissibility of certain business books and memoranda. As

typical of these may be cited the federal statute to this effect (28 U. S. C., § 1732), and the Uniform Business Records as Evidence Act."

On the facts in this case there was no abuse of discretion prejudicial to the defendant. No error appearing, the judgment of the District Court is affirmed.

AFFIRMED.

SMITH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. ROBERT A. HARIG, APPELLANT.

218 N. W. 2d 884

Filed June 6, 1974. No. 39223.

1. **Criminal Law: Evidence: 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.
2. ———: ———: ———. After a jury has considered the evidence and returned a verdict of guilty, that verdict on appeal may not, as a matter of law, be set aside for insufficiency of evidence, if the evidence sustains some rational theory of guilt.
3. **Criminal Law: Habitual Criminals: Indictments and Informations.** The essential allegations which an information must contain for a charge under the Habitual Criminal Act are that said person has been (1) twice previously convicted of crime, (2) sentenced, and (3) committed to prison for terms not less than 1 year each.
4. **Criminal Law: Constitutional Law: Indictments and Informations.** Article I, section 11, of the Constitution of Nebraska, requires that an information must inform the accused with reasonable certainty of the charge against him so that he may prepare his defense thereto and be enabled to plead the judgment thereon as a bar to a later prosecution for the same offense.
5. **Criminal Law: Right to Counsel.** An accused is entitled to be represented by counsel at all "critical stages" of criminal proceedings against him, including the occasion upon which he is sentenced.
6. **Criminal Law: Right to Counsel: Constitutional Law: Waiver.**

Under the Sixth Amendment to the United States Constitution, if a waiver of the right to counsel has been properly made at the arraignment at which a plea of guilty was entered, the trial court is not required at the subsequent sentencing proceeding to again apprise the defendant of his right to counsel, so long as nothing has intervened between the arraignment and the sentencing that should cause the waiver at the arraignment to be ineffective for the purposes of the sentencing proceeding.

7. **Criminal Law: Habitual Criminals: Sentences.** Where a defendant is simultaneously convicted of more than one felony charged on the same information, and the Habitual Criminal Act is applicable, such defendant may be sentenced separately for each underlying conviction, each sentence being enhanced under the Habitual Criminal Act.
8. **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 discretion.
9. **Criminal Law: Continuances.** The matter of the granting of a continuance in a criminal case is particularly within the province and the discretionary judgment of the trial court.
10. **Criminal Law: Bail: Time.** The issue of excessiveness of pretrial bail is not reviewable after a conviction and sentence.

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, Warren D. Lichty, Jr., and Robert G. Avey, for appellee.

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

BRODKEY, J.

In a multicount information, defendant was respectively charged with: (1) Burglary; (2) unlawful possession of a burglary tool; and (3) possession of a firearm by a felon. In addition, the State charged the defendant with being an habitual criminal. After trial, the defend-

ant was found guilty upon each count; and a separate hearing was thereafter held with respect to the habitual criminal charge under section 29-2221, R. S. Supp., 1972. The court found the defendant to be an habitual criminal and thereupon proceeded to sentence him to a term of not less than 15 nor more than 20 years on each of the three felonies, said sentences to run concurrently. Defendant appeals those convictions and sentences to this court. We affirm.

By way of general factual background for the incidents involved in this case, it appears that at or about 2:30 a.m. on November 12, 1972, a Lincoln, Nebraska, police department helicopter pilot was informed by police radio of an ADT alarm at the Western Gun and Supply Company. The helicopter arrived over the premises of Western Gun about 20 seconds later and observed a "station wagon type" vehicle sitting at the southeast corner of the building. As the helicopter approached, the automobile drove away, the pilot observing that its right rear taillight was out and that there appeared to be some plastic coverings on the rear of the vehicle. The helicopter pilot kept the vehicle in his observation at all times, and radioed directions for a police car to intercept the station wagon. The station wagon was stopped by the police vehicle, and the defendant and one Martyn Youngstrom were found to be occupants in the station wagon. Although the testimony was conflicting as to whether the driver of the automobile consented to a search of his vehicle, it is clear that a search was made, which yielded two hand guns and a crowbar. Defendant was subsequently arrested, charged, tried, and sentenced, as set out above. Additional facts of this case will be discussed under the particular assignments of error hereinafter set out.

Among the many errors assigned by defendant is that the trial court erred in overruling his motion to suppress certain evidence of the State. Defendant asserts that no permission was obtained from him by the police before

they searched his automobile and obtained the guns and crowbar previously referred to. There was, however, testimony by one of the arresting officers to the effect that the defendant did give consent to the search of his automobile. Obviously the evidence on this point was conflicting. In such situation, the decision upon the motion to suppress is for the court, and will not be reversed on appeal in the absence of an abuse of discretion. State v. Batchelor, 191 Neb. 148, 214 N. W. 2d 276 (1974). There having been no showing of an abuse of discretion, we hold that no error was committed in that regard.

The defendant asserts that the evidence in this case is insufficient to support the verdict of guilt on each of the three felonies involved. It is clear from the record that there was more than sufficient evidence to submit to the jury for its determination of guilt on the charges of possession of a burglary tool and also upon the charge of possession of a firearm. No further discussion is necessary with reference to those two charges.

We shall, however, discuss the claim of the defendant that the evidence was insufficient with respect to the charge of burglary, particularly with respect to defendant's claim that there was no evidence of an entry by the defendant into the building in question. We add, in passing, that the evidence is clear there was an unlawful breaking of the building, by virtue of the testimony of presence of jimmy marks on a door at the premises; and also the testimony of an FBI agent who examined the crowbar obtained as evidence and testified as to the kind and size of the marks, and also with respect to the paint samples which were taken from the door in question. This evidence as to the breaking was submitted to the jury under proper instructions, and its verdict necessarily reflects its conclusion that there was breaking in this case. Defendant does not seriously attack this conclusion in his brief. Turning to the question as to the sufficiency of evidence to show that defendant in fact did enter the Western Gun and Supply

Company building, the witness, Donald Nielsen, an employee of Notifier Corporation which installed the burglar alarm or security system in the Western Gun and Supply Company building, testified that there were two types of alarm systems in the building, one being a perimeter system having contacts with the doors of the building, and the other being a space type system, designed to detect movements within the building. He testified that if the door had somehow been by-passed as part of the perimeter system, then the only way to trigger the alarm would have been either by entering the area protected by the space type system or by violating another perimeter contact that had not been by-passed. Lee Mason, the assistant store manager of Western Gun, testified that he believed that on November 11, 1972, the jimmied door did not have a "hot contact" with the security alarm system, although he did admit on cross-examination that he was not absolutely certain this was true. It was the theory of the State from the testimony of these two witnesses, that defendant must have entered the building in order to trigger the alarm and therefore there was sufficient evidence of entry. The defendant argues to the contrary that the triggering of the alarm could be accounted for under the equally reasonable theory that the jimmied door had been connected with the alarm system. The rule is that after a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence, if the evidence sustains some rational theory of guilt. State v. Cano, 191 Neb. 709, 217 N. W. 2d 480 (1974); State v. Lewis, 184 Neb. 111, 165 N. W. 2d 569 (1969). In this case, the jury could have found that the alarm system of the Western Gun building could only have been triggered by someone actually entering the building. We therefore hold that there was sufficient evidence of an entry to sustain the verdict of guilt on the burglary charge.

We next turn our attention to a consideration of the errors alleged by defendant in connection with the habitual criminal proceedings following the verdicts returned by the jury and to the sentencing thereafter by the court. As previously stated, the amended information filed in this case, after setting out the three substantive offenses on which the defendant was tried in this action, also incorporated allegations to the effect that the defendant was an habitual criminal under the Nebraska Habitual Criminal Act. Particularly, it alleged that the defendant had been convicted of two prior crimes and was sentenced and committed to prison to terms of not less than 1 year on each of said crimes, all as required by the Nebraska statute. One of the prior crimes with which defendant was charged and convicted, was alleged to have occurred on April 15, 1965. At the habitual criminal hearing, following the verdict of guilty on the three counts with which the defendant was charged in this case, the evidence adduced revealed that the defendant was convicted of a crime on April 4, 1961, and not April 15, 1965. The attorney for the State thereupon moved to amend the information to conform with the evidence and alleged that the felony had occurred on April 4, 1961. Objection to the amendment was made on behalf of the defendant, but the trial court allowed it. The defendant contends that the trial court committed reversible error in permitting the amendment as to the date of one of the two prior felonies alleged in the original information. His theory was that such action constituted a violation of section 29-2221, R. S. Supp., 1972, and of Article I, section 11, of the Nebraska Constitution, and also of the Sixth Amendment to the Constitution of the United States. Section 29-2221, R. S. Supp., 1972, provides in part that: "Where punishment of an accused as an habitual criminal is sought, *the facts with reference thereto* must be charged in the indictment or information which contains the charge of the felony upon which the accused is prose-

cuted. . . . " (Emphasis supplied.) Article I, section 11, of the Nebraska Constitution, and the Sixth Amendment to the United States Constitution both guarantee an accused the right to be informed of the "nature and cause" of the accusation against him.

It must be remembered that the Habitual Criminal Act does not create a new and separate criminal offense for which a person may be separately sentenced, but provides merely that the repetition of criminal conduct aggravates the guilt and justifies greater punishment than ordinarily would be considered. State v. Tyndall, 187 Neb. 48, 187 N. W. 2d 298 (1971). Under this act, the inaccurate allegation of the date or time of a prior felony would have no effect with respect to the sufficiency of the information as to its allegation of the principal or underlying felony or felonies. As to such felonies the time of a prior conviction is only a historical fact. Jacobs v. United States, 24 F. 2d 890 (1928). It is not in any manner a part of the charge of the principal offense or offenses for which the defendant is being tried. See, Jacobs v. United States, *supra;* State v. Held, 347 Mo. 508, 148 S. W. 2d 508 (1941).

Under the Nebraska law, the essential allegations which an information must contain for a charge under the Habitual Criminal Act are that said person has been (1) twice previously convicted of a crime, (2) sentenced, and (3) committed to prison for terms not less than 1 year each. § 29-2221, R. S. Supp., 1972; Rains v. State, 142 Neb. 284, 5 N. W. 2d 887 (1942). These are "the facts with reference thereto" referred to in section 29-2221, R. S. Supp., 1972. While it is undoubtedly desirable and helpful to have the dates of the prior felonies alleged in the information charging a defendant with being an habitual criminal, we do not find that the absence of such allegation would necessarily render the information invalid. In this connection we feel it is necessary to read the provisions of the Habitual Criminal Act, section 29-2221, R. S. Supp.,

1972, with the provision of section 29-1501, R. R. S. 1943, which provides as follows: "No indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings be stayed, arrested or in any manner affected . . . for omitting to state the time at which the offense was committed in any case where time is not the essence of the offense; nor for stating the time imperfectly;. . . ." We also point out in this connection that under Nebraska law, informations are generally subject to the same requirements as are indictments. See § 29-1604, R. R. S. 1943. We may, therefore, refer to the rules relating to the sufficiency of indictments in order to determine the sufficiency of the information in this case. State v. Gascoigen, 191 Neb. 15, 213 N. W. 2d 452 (1973). The exact time of the commission of the offense is not regarded as the essence of a charge, unless the statute involved makes it so, or it is clearly intended to have that effect. See Huffman v. Sigler, 352 F. 2d 370 (8th Cir., 1965). It is clear that the exact time of the commission of an alleged prior felony is not of the essence of a charge under the Habitual Criminal Act, and the failure of the information in this case to state accurately the time of a prior felony does not render that information insufficient under section 29-2221, R. S. Supp., 1972.

Defendant further contends that the insufficiency of the information, as it appeared before the amendment permitted by the court, was violative of Article I, section 11, of the Constitution of Nebraska, and also the Sixth Amendment to the Constitution of the United States. The Nebraska constitutional provision requires that an information must inform the accused with reasonable certainty of the charge against him so that he may prepare his defense thereto and be enabled to plead the judgment thereon as a bar to a later prosecution for the same offense. Moline v. State, 67 Neb. 164, 93 N. W. 228 (1903); May v. State, 153 Neb. 369, 44 N. W. 2d 636 (1950); State v. Gascoigen, *supra*. The same basic re-

quirements are imposed under the Sixth Amendment to the Constitution of the United States. Russell v. United States, 369 U. S. 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962). In view of what we have previously stated, we conclude that where an information charges the applicability of the Habitual Criminal Act, the general allegation of a prior felony conviction, even without a specific allegation of the exact date or time of that prior felony, would not render the information insufficient under either of the aforesaid constitutional provisions. This is not to say that evidence need not be presented to establish the exact time or date of the prior felony or felonies generally alleged. But we see no constitutional problems in this regard so long as means are and were provided for the defendant to obtain the information relative to the specific dates of the offenses relied upon as prior felonies under the Habitual Criminal Act. We further point out in this case, and as revealed by the record, that the defendant's counsel was aware for at least 2 weeks prior to the hearing that the State was going to ask leave to amend the information as to dates involved; and the record also reveals that the trial court offered to grant a continuance to the defendant when the amendment was allowed to show a different conviction, but that counsel for the defendant said that it would not be necessary. Any possible prejudice was thereby waived. It appears that the rights of the defendant were adequately protected, that defendant was not in any manner caught by surprise by the amendment, and we feel that no error was committed by the trial court in permitting the amendment of the information to conform with the proof adduced at the hearing.

The defendant further contends that the trial court erred in considering, for the purpose of the Habitual Criminal Act, a prior conviction in which he had not been advised of his right to counsel. At the habitual criminal hearing in this case, the State introduced a record of an arraignment of the defendant on a charge

of burglary in 1963. The record showed that the defendant had waived his right to counsel at that arraignment and had entered a plea of guilty. However, at the time of sentencing thereon, the defendant, appearing without counsel, was not informed that counsel would be appointed for him if he could not afford to retain counsel of his own. Defendant made proper objections to the court's consideration of that prior conviction. State v. McGhee, 184 Neb. 352, 167 N. W. 2d 765 (1969). He points out, and correctly so, that if the sentencing in that case was not valid, then the 1963 conviction cannot be used for the purpose of enhancing punishment under the Habitual Criminal Act. Losieau v. Sigler, 406 F. 2d 795 (8th Cir., 1969), cert. den., 396 U. S. 988, 90 S. Ct. 475, 24 L. Ed. 2d 452 (1969).

The law is well settled that an accused is entitled to be represented by counsel at all "critical stages" of the proceedings against him, including the occasion upon which he is sentenced. Davis v. United States, 226 F. 2d 834 (8th Cir., 1955); Panagos v. United States, 324 F. 2d 764 (10th Cir., 1963); Mempa v. Rhay, 389 U. S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967). See, also, State v. Journey, 186 Neb. 416, 183 N. W. 2d 494 (1971). The essence of defendant's argument, however, is that his waiver of his right to counsel at his arraignment in 1963 had no effect upon the necessity to inform him of that right at the subsequent sentencing proceedings in that case; and he asserts that the court's failure to apprise him of his right to counsel at those sentencing proceedings was a violation of the Sixth Amendment to the United States Constitution. In support of his position he calls attention to Standard 7.3 of the A B A Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services. This Standard provides in part that: "If a waiver [of counsel] is accepted, the offer should be renewed at each subsequent stage of the proceedings at which the defendant appears without counsel." It is our opinion that such a practice by

the trial courts of this State would be commendable, but we point out that this particular Standard has not been officially adopted by this court, and at this time is not legally required. It has been held that under the Sixth Amendment to the United States Constitution, if a waiver of the right to counsel has been properly made at the arraignment at which a plea of guilty was entered, the trial court is not required at the subsequent sentencing proceeding to again apprise the defendant of his right to counsel, so long as nothing has intervened between the arraignment and the sentencing that should cause the waiver at the arraignment to be ineffective for the purposes of the sentencing proceeding. Davis v. United States, *supra*; Panagos v. United States, *supra*. In Davis, the court stated: "If this were not true, it would mean that in all criminal proceedings where the defendant competently waived the right to counsel and nothing happened in the meantime, such as an unreasonable lapse of time, newly discovered evidence which might require or justify advice of counsel, new charges brought, a request from the defendant, or similar circumstances, he would nevertheless have to be interrogated in the same fashion on each subsequent step therein. That would be neither good law nor good sense." In short, although it may be good practice for the trial court to renew the offer of counsel at the sentencing stage of the proceedings when the defendant appears without counsel, such a renewal is not necessarily required under the Sixth Amendment to be made in every case. None of the intervening elements referred to in the Davis case appear in this case. We must therefore hold that the failure to apprise the defendant of his right to counsel at the 1963 sentencing proceedings did not violate the Sixth Amendment, and did not render the 1963 conviction invalid for the purposes of the Habitual Criminal Act. The 1963 conviction and sentencing of the defendant being valid,

the trial court did not commit error in considering it for the purpose of enhancing the defendant's sentence under section 29-2221, R. S. Supp., 1972.

The defendant also complains of the nature of the sentences entered by the court in this case. As previously stated the court sentenced the defendant to a term of not less than 15 nor more than 20 years on each of the 3 felonies for which he was convicted, the sentences to run concurrently. Defendant contends that such a sentence is not authorized under the Habitual Criminal Act. Section 29-2221, R. S. Supp., 1972, provides in part: "Whoever has been twice convicted of crime, sentenced and committed to prison . . . for terms of not less than one year each, shall, upon conviction of a felony . . . be deemed to be an habitual criminal, and shall be punished by imprisonment . . . for a term of not less than ten or more than sixty years . . . ."

Defendant argues that this section does not authorize punishment from 10 to 60 years for each felony count alleged in the information. In support of this contention he cites State v. Gaston, 191 Neb. 121, 214 N. W. 2d 376 (1974), wherein it is stated that 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 rule set forth in State v. Gaston, *supra,* however, has nothing to do with the case now before us. Gaston stands for the principle that one may not be separately sentenced for the underlying felony conviction and also sentenced under the Habitual Criminal Act. The only sentence which may be imposed upon conviction of a felony is the enhanced sentence under section 29-2221, R. S. Supp., 1972. In this case, we have three separate sentences based upon three separate felonies, each sentence being enhanced under the Habitual Criminal Act. Such a circumstance is not unique in Nebraska law. See, for example, Kitts v. State, 153 Neb. 784, 46 N. W.

2d 158 (1951). The fallacy of defendant's position in this regard is made clear when it is considered that a defendant may, and frequently is, sentenced on more than one occasion under the Habitual Criminal Act. If the separate offenses and convictions involved had occurred on successive dates, rather than all on the same date, it would be very clear that the defendant could have been sentenced as an habitual criminal for each of the consecutive crimes for which he was convicted. We hold that where a defendant is simultaneously convicted of more than one felony charged on the same information and the Habitual Criminal Act is applicable, such defendant may be sentenced separately for each underlying conviction, each sentence being enchanced under the Habitual Criminal Act. The sentencing of the defendant herein is consistent with such rule and must stand.

The defendant also contends that the sentence imposed upon him by the trial court was excessive. While it is true that the trial court imposed separate sentences under the Habitual Criminal Act for each of the three felonies for which he was convicted, the trial court specifically provided that the sentences were to run concurrently, and therefore, for all practical purposes, he received one sentence for the three offenses so far as the maximum possible term of confinement is concerned. We have repeatedly ruled that 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 discretion. State v. Cano, 191 Neb. 709, 217 N. W. 2d 480 (1974); State v. Brown, 191 Neb. 61, 213 N. W. 2d 712 (1974); State v. McCowin, 191 Neb. 31, 213 N. W. 2d 724 (1973). Here, the sentence imposed was clearly within the statutory limits established by section 29-2221, R. S. Supp., 1972. After

having carefully reviewed the record, including a presentence report revealing a rather lengthy criminal record, we have determined that the trial court did not abuse its discretion in the sentence it imposed upon the defendant, and that such sentence must stand.

Defendant has also assigned certain other alleged errors in connection with this appeal. We believe these assignments to be without merit, but will comment on them briefly. Defendant contends his right to a speedy trial was denied in that there was excessive delay between the time the information was filed and the time that the preliminary hearing was held. The record discloses that the delay complained of was caused by defendant's court-appointed counsel with defendant's acquiescence and consent to continuances causing such delay. Defendant has no cause to complain in this regard.

Defendant also assigns as error the failure of the trial court to grant certain continuances requested by him. This court has previously ruled that the matter of the granting of a continuance in a criminal case is particularly within the province and the discretionary judgment of the trial court. State v. Coleman, 190 Neb. 441, 208 N. W. 2d 690 (1973). There was no abuse of discretion involved herein.

Defendant also asserts that the trial court erred in failing to reduce the amount of pretrial bail and argues that the amount of bail set in the sum of $8,000 was excessive and in violation of the Constitution of the United States and Article I, section 9, of the Constitution of the State of Nebraska. The issue of excessiveness of pretrial bail is not reviewable after a conviction and sentence. State v. Watkins, 190 Neb. 450, 209 N. W. 2d 184 (1973). The appropriate form of relief from denial of a motion to reduce bail claimed to be excessive is by habeas corpus. See, § 29-2806, R. R. S.

1943; Kennedy v. Corrigan, 169 Neb. 586, 100 N. W. 2d 550 (1960).

Having considered all the assignments of error alleged by defendant, and having found none of them to be meritorious so as to entitle him to relief in his appeal to this court, we conclude that the convictions and sentences should be and hereby are affirmed.

AFFIRMED.

WHITE, C. J., not participating.

DAVID STAHMER ET AL., APPELLANTS, V. STATE OF NEBRASKA ET AL., APPELLEES.
218 N. W. 2d 893

Filed June 6, 1974. No. 39305.

1. **Constitutional Law: Statutes.** Sections 77-202.25 to 77-202.33, R. S. Supp., 1972, do not constitute an appropriation of state funds and are not violative of Article II, section 1, Article III, section 22, or Article III, section 25, Constitution of the State of Nebraska.
2. ———: ———. It is the duty of this court to give the statute an interpretation which meets constitutional requirements if it can reasonably be done.
3. **Constitutional Law: Statutes: Legislature: Courts.** Legislative construction of a statutory or constitutional provision, although not conclusive on the courts, when deliberately made is entitled to great weight.
4. **Legislature: Taxation: Exemptions.** 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.
5. **Legislature.** When general and special provisions of a state Constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control when the special provisions do not apply.
6. **Legislature: Statutes.** It is competent for the Legislature to classify for purposes of legislation, if the classification rests on some reason of 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.

7. **Taxation: Exemptions: Constitutional Law.** The partial exemption from taxation of the classes of property specified in section 77-202.25, R. S. Supp., 1972, are not unreasonable, constitutionally objectionable as discriminatory, or violative of Article III, section 18, Article VIII, sections 1, 2, or 4, Constitution of the State of Nebraska.

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

James M. Kelley of Kelley & Thorough, for appellants.

Clarence A. H. Meyer, Attorney General, Ralph H. Gillan, and Floyd A. Sterns, for appellees.

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and VAN PELT, District Judge.

NEWTON, J.

Plaintiffs seek a declaratory judgment ruling sections 77-202.25 to 77-202.33, R. S. Supp., 1972, to be unconstitutional. Commencing with the 1972 tax levies, 12½ percent of the actual value of agricultural income-producing machinery and equipment (except motor vehicles, property assessed by the State Board of Equalization, property of public service companies, and buildings), business inventories, livestock, feed, fertilizer, and farm inventories, grain and seed, poultry, fish, honeybees, and fur-bearing animals was exempted from taxation. The exemption was increased by 12½ percent each year in each of the succeeding 4 years. The State Treasurer was directed to place sufficient revenue from sales and income taxes, each year, in a Personal Property Tax Relief Fund to reimburse tax agencies in all counties for tax revenue lost by reason of the exemptions. On certification by the counties of revenue lost, the State Treasurer was directed to transfer the funds in the Personal Property Tax Relief Fund to the county treasurers each year. The county treasurers are directed to

retain 1 percent of the money each receives and to distribute the rest among the various taxing agencies within each county. Plaintiffs' action was dismissed in the District Court.

The Constitution, State of Nebraska, provides in Article II, section 1, for the distribution of powers among the three branches of government and prohibits the delegation of its powers by one branch to another. Article III, section 22, prior to amendment in 1972, conferred upon each Legislature the power and duty to make appropriations for governmental expenses until the expiration of the first fiscal quarter after the adjournment of the next regular session, at which time all appropriations should end. Article III, section 25, forbids the withdrawal of money from the state treasury except pursuant to a specific appropriation and on presentation of a warrant issued as the Legislature shall direct. It is contended that the act delegates the legislative power to appropriate state funds to county officers certifying lost tax revenue. It must be borne in mind that the property partially exempted from taxation is assessed in the regular time-honored manner, the same as other property subject to taxation. The ascertainment of the amount of revenue lost by taxing agencies in each county is simply a matter of mathematical computation. No discretion is vested in any county officer. The revenue thus found to be lost is certified to the State Treasurer. This is a ministerial function. It is not an appropriation of state funds but provides only a basis for the determination by the proper state authority of the appropriation to be made to reimburse the counties.

It is urged that the act provides for a continuing appropriation of state funds and is in violation of Article III, section 22, Constitution, as worded prior to its 1972 amendment, in that the appropriations extend beyond the end of the first fiscal quarter after the adjournment

of the next regular legislative session. Also, that it violates Article III, section 25, in that it permits the withdrawal of state funds without a specific appropriation. The act does direct the State Treasurer to annually transfer tax funds to the Personal Property Tax Relief Fund and directs how the fund shall be expended. It is evident that the directions given are intended to remain in effect through ensuing years but the basic question is whether or not this is an appropriation bill or act. If it is, the act may well be unconstitutional. In construing the act, it is the duty of this court to give the statute an interpretation which meets constitutional requirements if it can reasonably be done. See Heywood v. Brainard, 181 Neb. 294, 147 N. W. 2d 772. Another applicable rule is that: "Legislative construction of a statutory or constitutional provision, although not conclusive on the courts, when deliberately made is entitled to great weight." Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N. W. 2d 236. Laws 1973, L.B. 582, § 19, p. 1528, specifically appropriates the Personal Property Tax Relief Fund, as does Laws 1974, L.B. 997, § 66. It is evident that the Legislature did not intend or consider the statutes to be an appropriation measure. The situation is somewhat akin to that existing in Rein v. Johnson, 149 Neb. 67, 30 N. W. 2d 548, involving section 68-301, R. S. 1943, which provided: "A fund to be known as the 'State Assistance Fund' is created and established in the treasury of the State of Nebraska. There is specifically and absolutely appropriated for said fund and the purposes of sections 68-301 to 68-325, all moneys available therefor from motor fuel taxes, alcoholic liquor taxes, head taxes, and such other taxes as may be provided by law." The court stated in the above case: "It is equally as apparent, however, from the legislative history heretofore recited, that the Legislature never intended that it should operate as

an appropriation in the constitutionally prescribed sense. Rather, the word 'appropriated' as used therein was of constitutional necessity as well as legislative intent, used only to indicate that certain public revenue derived or to be derived from certain described tax revenue sources should be paid into the state treasury, there to be administratively credited, assigned, or allocated to the State Assistance Fund for assistance purposes as distinguished from other public funds of a different nomenclature." We conclude that the act is not in violation of any of the constitutional provisions above mentioned.

Plaintiffs also urge that the statutes are violative of Article III, section 18, and Article VIII, sections 1, 2, and 4, Constitution, in that the classifications exempted are unreasonable, the act serves to exempt certain taxpayers from payment of their proportionate share of taxes, prevents the levy of taxes by valuation uniformly and proportionately, and is discriminatory. The 1970 amendment of Article VIII, section 2, to provide "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*" specifically confers broad authority on the Legislature to classify and exempt personal property from taxation. (Emphasis supplied.) The amended portion of Article VIII, section 2, represents a special constitutional provision adopted later than, and with full knowledge of, the constitutional provisions relied on by plaintiffs. Within the plain ambit of its meaning and purpose it stands supreme and effectively negates plaintiffs' contentions, with the possible exception of the one dealing with the reasonableness of the classifications exempted. "When general and special provisions of a state Constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control when the special provi-

sions do not apply." Elmen v. State Board of Equalization & Assessment, 120 Neb. 141, 231 N. W. 772.

In Swanson v. State, 132 Neb. 82, 271 N. W. 264, it is stated: "So, also, it is a well-recognized canon of construction that, 'when general and special provisions of a Constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control in cases where the special provisions do not apply.' "

In view of the recent amendment of Article VIII, section 2, Constitution, it is doubtful if the statutes are subject to challenge as violating Article III, section 18, dealing with special laws, or Article VIII, section 1, requiring uniform taxation. In any event, we do not find the classifications set forth in the act to be unreasonable. "Ability to bear the burden of the tax is everywhere recognized as a reasonable ground on which to base a classification in tax measures. Classification for tax purposes may be based on the manner of conducting business, and business conducted in one manner may be taxed differently from business conducted in another manner. The purpose for which property is kept or used has long been a recognized, if not a favorite, basis for distinction in taxation. The view has also been taken that reasonable discrimination with respect to tax matters to promote fair competitive conditions, equalize economic advantages, or encourage particular industries from consideration of public policy is lawful." 51 Am. Jur., Taxation, § 182, p. 242. This court has held that: "It is competent for the Legislature to classify for purposes of legislation, if the classification rests on some reason of 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." Shear v. County Board of Commissioners, 187 Neb. 849, 195 N. W. 2d 151.

"The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences in situations and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated." Rehkopf v. Board of Equalization, 180 Neb. 90, 141 N. W. 2d 462.

The exemptions granted pertain to property used in agricultural production, the products thereof, and business inventories. They are granted to all persons engaged in the lines of endeavor mentioned. There can well be public policy reasons for the grant of these exemptions. It is generally recognized that persons engaged in agricultural pursuits and in businesses with large inventories are, in proportion to ability to pay, heavily taxed. A legislative desire to equalize the tax burden with, for example, individuals with major investments in untaxed intangible personal property is not unreasonable.

In Dickinson v. Porter, 240 Iowa 393, 35 N. W. 2d 66, the court considered the validity of an act appropriating $500,000 each year for apportionment as a credit against taxes on each tract of agricultural land in school districts where millage for the general school fund exceeded 15 mills, and defined agricultural lands as tracts of 10 acres or more used for agricultural or horticultural purposes. In upholding the act, the court held: " 'The purpose for which property is kept or used has long been a recognized, if not a favorite, basis for distinction in taxation.' * * *

"It is not debatable that it is part of the public policy of this state, evidenced by our constitution and numerous statutes, to encourage agriculture. It seems equally plain the encouragement of our basic industry

serves the public interest. We are not convinced the legislature might not fairly conclude this law in its practical operation will both benefit and encourage agriculture. * * *

"Since, as we have held, this act is a valid taxing measure it is not rendered invalid by the appropriation provision. The public policy in furtherance of which the classification is made for the purposes of applying a different tax burden or a partial tax exemption, if the law be considered a partial tax exemption measure, is sufficient to support the appropriation."

In Leonardson v. Moon, 92 Idaho 796, 451 P. 2d 542, the court considered a statute very similar to the one before us. It created exemptions which were partial but increased annually until complete. Property exempted consisted of business inventories defined as: "'(1) All livestock, fur-bearing animals, fish, fowl and bees.

"'(2) Any nursery stock, stock-in-trade, merchandise, products, finished or partly finished goods, raw materials, supplies, containers and other personal property which is held for sale or consumption (consumption) in the ordinary course of the taxpayer's manufacturing, farming, wholesale jobbing, or merchandising business.'" In upholding the constitutionality of the statute, the court held that a fundamental purpose of this legislation was to relieve parties benefited from inequitable ad valorem taxes; that the state has the right, by means of tax exemptions, to promote businesses it desires to foster; if the Legislature has the unchallenged power to grant exemptions in toto and in futuro, it may do so in part; and that setting aside sales taxes to reimburse counties and local taxing districts for revenue lost was permissible.

Partial exemptions of property from taxation have long been recognized and widely approved. Common

examples are partial exemptions of assessed value of homesteads and veterans' properties.

Prior to the amendment of Article VIII, section 2, Constitution, the statutes would have been deemed unconstitutional. See State ex rel. Meyer v. McNeil, 185 Neb. 586, 177 N. W. 2d 596. In view of the broad powers conferred on the Legislature by the amendment, we find the situation has changed and hold the statutes to be constitutional.

AFFIRMED.

MAMIE NESTLE, APPELLEE, V. BEULAH WELSH, A SINGLE WOMAN, APPELLANT,
IMPLEADED WITH RAYMOND L. NESTLE, APPELLEE.
218 N. W. 2d 544

Filed June 6, 1974. No. 39327.

1. **Specific Performance: Evidence: Trial.** Where a party seeks specific performance of an oral agreement to leave property, that person has the burden of proving performance of the alleged contract by clear and convincing evidence.
2. **Equity: Appeal and Error: Evidence: Witnesses.** In an appeal in equity this court will, in determining the weight of the evidence of the witnesses who appear, consider that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the other.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Joseph J. Carriotto, for appellant.

Ronald Rosenberg of Ginsburg, Rosenberg, Ginsburg & Krivosha and Barney & Carter, for appellees.

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

SPENCER, J.

Plaintiff, Mamie Nestle, brought this action to quiet

title against defendant, Beulah Welsh, to Lot 3, Block 11, Van Dorn Park, Lincoln, Nebraska. Raymond L. Nestle, a joint owner, was joined as a defendant. He prayed for a decree quieting title in the plaintiff and himself. Defendant, Beulah Welsh, by cross-petition sought specific performance of an oral agreement requiring the plaintiff to convey the property to her so that the fee simple title therein would vest in her at plaintiff's death. The trial court quieted the title in the plaintiff and the defendant Raymond L. Nestle, and dismissed the cross-petition of defendant Beulah Welsh. We affirm.

Plaintiff alleged that on or about the 1st day of August 1971, she entered into a verbal agreement with defendant, Beulah Welsh, hereinafter referred to as defendant, whereby said defendant agreed to move in with her; take care of her; serve as companion and practical nurse; pay taxes on her property; furnish food for her; pay for utilities, and generally look after and maintain the plaintiff who was then 86 years of age, so long as the plaintiff might live. In consideration thereof plaintiff verbally agreed to provide that at her death plaintiff's interest in said real estate would vest in the defendant.

Defendant in her answer alleged that plaintiff told her she owned the premises in question and if she would move in with her, stay with her at night, buy the groceries, pay the utilities and taxes on the property, at her death the defendant was to own the fee simple title to said real estate. Defendant's evidence, however, tended to show a contract to make a deed the performance of which was indefinite.

Defendant, who was 57 years of age at the time, was working as a cashier for a local drug store and had had some business experience. No part of the alleged agreement was reduced to writing. Soon after the defendant moved into the home strained relations developed. No purpose will be served by reviewing the evidence but it is clear the parties were not compatible. This is not

strange considering the differences in age and attitudes and the fact that the parties had not been very close previously.

Defendant's evidence established she had fully paid the utilities, had bought most of the groceries used by the parties, and had paid one-third of the 1971 real estate taxes. She had paid nothing on the 1972 or subsequent taxes.

Where a party seeks specific performance of an oral agreement to leave property, that person has the burden of proving performance of the alleged contract by clear and convincing evidence. Peters v. Wilks (1949), 151 Neb. 861, 39 N. W. 2d 793.

In an appeal in equity this court will, in determining the weight of the evidence of the witnesses who appear, consider that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the other. Pinney v. Hill (1974), 191 Neb. 844, 218 N. W. 2d 212.

The trial court found the record failed to establish by clear and convincing evidence that any agreement existed between plaintiff and defendant whereby defendant acquired any interest in or to the real estate described as Lot 3, Block 11, Van Dorn Park, Lincoln. Certainly whatever agreement was made was indefinite and uncertain. There is a question as to whether the minds of the parties ever met. Plaintiff's evidence can best be categorized as a promise to convey in the future if defendant rendered satisfactory performance, which included being companionable. Defendant's evidence would indicate an agreement for a survivorship deed in return for which she was to buy groceries, pay utilities and taxes, and stay with plaintiff at night. Defendant argues that she has substantially performed her part of the agreement. She excuses the particulars in which plaintiff claimed there was no performance because of the failure of the plaintiff to cooperate with her. Plaintiff did not tell her what groceries she needed, and did

not present the tax bills to her for payment. Even assuming the agreement was as defendant contends, we do not believe she has met the burden of proving performance by clear and convincing evidence. However, we agree with the trial court that whatever agreement was made was not sufficiently definite and certain to justify specific performance.

Plaintiff prayed for an accounting herein. As the trial court found, both parties made contributions to the living arrangement that were substantially equal. We see no reason to disturb that finding.

For the reasons given, we affirm the judgment of the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD R. MOORE, APPELLANT.

218 N. W. 2d 540

Filed June 6, 1974. No. 39342.

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

Alan Saltzman, for appellant.

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

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

CLINTON, J.

This is an appeal from the denial of the motion to set aside under the provisions of the Nebraska Post Conviction Act a conviction for attempting to break and enter. The trial court denied the application. The petitioner appeals. On previous direct appeal we affirmed the conviction and sentence. State v. Moore, 189 Neb. 380, 202 N. W. 2d 747.

The ground alleged for post conviction relief is that of an alleged illegal search and seizure of an automobile in which the defendant was a passenger and a subsequent denial of a motion to suppress evidence seized in the search.

This is essentially the same issue raised on the direct appeal but is supported by a new argument, namely: The initial stop of the automobile constituted seizure of the person of the petitioner and the subsequent search of the automobile was therefore illegal. The petitioner relies upon Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889; and Carpenter v. Sigler, 419 F. 2d 169.

The evidence discloses that the auto in question was stopped by an officer of the state patrol near Minatare, Nebraska, which is a short distance from Scottsbluff, Nebraska, at about 1:15 a.m. on the morning of May 17, 1971. The officer had a short time earlier been advised of an attempted burglary of a Safeway Store at Scottsbluff shortly before midnight on May 16, 1971, and that the perpetrators had been apprehended, but that it was suspected the car with a Wyoming license was involved and accomplices had escaped.

The officer observed the auto, which had Wyoming plates, parked at a cafe in Minatare and one of the three occupants, a young woman, get out, enter the cafe, order three cups of coffee, and take them to the car. The car then departed. The officer followed the relatively slow-moving car and then stopped it and asked for identification and registration of the automobile. The registration was found to be in the name of one Michael Keith Ware. He was not an occupant of the car. The radio inquiry by the officer disclosed that the registered owner, Ware, was one of the persons apprehended in the attempted burglary about an hour earlier. The arrest followed.

The issue of the search and seizure was decided on the direct appeal. We will not reexamine it in this post conviction proceeding. All the circumstances of

the stopping were known at the time of the appeal. See State v. Moss, 191 Neb. 36, 214 N. W. 2d 15.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, v. LARRY T. ESKEW, APPELLANT.

218 N. W. 2d 898

Filed June 6, 1974. No. 39343.

1. **Discovery: Hearings.** At a hearing on a motion to produce filed under the provisions of section 29-1912, R. S. Supp., 1972, it is necessary for the trial court to determine by inquiry of the prosecuting attorney whether or not the prosecution has any item of the classification and kind specifically designated in the statute and in the motion to produce.
2. **Discovery: Hearings: Records.** Whenever the court refuses to grant an order to produce pursuant to the provisions of section 29-1912, R. S. Supp., 1972, it shall render its findings in writing together with the facts upon which the findings are based.
3. **Hearings: Courts.** While it is appropriate for the trial court to thank the jurors at the conclusion of a trial for their public service, such comments ordinarily should not include praise or criticism of their verdict.

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

Thomas A. Wagoner, for appellant.

Clarence A. H. Meyer, Attorney General, and Steven C. Smith, for appellee.

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

McCOWN, J.

The defendant was convicted of burglary and adjudged an habitual criminal. He was sentenced to 20 years in the penal complex.

The facts which affect the critical issues in this case occurred before the jury was sworn and before any evidence was introduced. A brief chronological reference is advisable. The information was filed on August 2, 1973, and on September 12, 1973, trial was set for September 17, 1973. On September 13, 1973, the defendant filed a motion to order the prosecuting attorney to permit the defendant to inspect and copy items under the provisions of section 29-1912, R. S. Supp., 1972. The motion was framed in the statutory language. On September 17, 1973, the court, after hearing, directed the county attorney to furnish the addresses of certain witnesses and overruled the motion to produce. The complete written court notes on this issue read: "Motion to produce is overruled."

On September 17, 1973, the jurors for the case now before us were selected but were not then sworn. Instead, additional juries were selected from the same jury panel and at least one other criminal case, State v. Blue, was tried to a jury. That case involved a charge of driving while under the influence and the case was unrelated to the case now before this court. The defendant in the Blue case was acquitted. Later the jury asked to see the judge and prosecutor to explain the basis for its verdict. The court explained to the jury that since the case was over, he could tell them that Blue had had two previous convictions for driving while intoxicated, and had been found not guilty of auto theft at a previous jury term. He stated to the jurors that they probably misunderstood the instructions or had not read them carefully enough. The court pointed out there had been two possible ways to arrive at a guilty verdict. One was the breath test about which the jury was principally concerned, and the other was the testing by the officer. The court indicated that the prosecutor should have stressed the latter point in closing argument and stated that the misunderstanding was normal or par for a jury hearing its first case.

On September 20, 1973, the defendant in the case before us filed a motion to quash the jury panel. At the hearing on the motion the foregoing facts were brought out by testimony. The foreman of the Blue jury had been selected for the Eskew jury and five other Eskew jurors also sat in the Blue case. The foreman of the Blue jury testified that the discussion with the judge and prosecutor did not change his thinking about the Blue decision but "I think it might have changed the others, on the information we had." He also stated several jurors wished they had held out longer for a guilty verdict in the Blue case.

Following the hearing on the motion to quash the jury panel, the trial court overruled the motion but authorized additional voir dire of the selected jurors in the Eskew case. Defendant's counsel waived any further voir dire. The jury which had been previously selected was then sworn and proceeded to hear this case. The defendant was found guilty.

The defendant contends that the Nebraska criminal discovery statutes are remedial in character and that refusal of the benefits of section 29-1912, R. S. Supp., 1972, denied him a fair trial. Defendant also contends that the comments of the trial judge to the Blue jury after verdict prejudicially affected his right to a fair trial where the jury was selected from the same jury panel, and some of the jurors were common to both cases.

Section 29-1912, R. S. Supp., 1972, provides: "(1) When a defendant is charged with a felony, he may request the court, at any time after the filing of the indictment or information, to order the prosecuting attorney to permit the defendant to inspect and copy or photograph:

"(a) The defendant's statement, if any. For purposes of this subdivision statement shall mean a written statement made by the defendant and signed or other-

wise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof which is a substantially verbatim recital of an oral statement made by the defendant to an agent of the prosecution, state, or political subdivision thereof, and recorded contemporaneously with the making of such oral statement;

"(b) The defendant's prior criminal record, if any;

"(c) The defendant's recorded testimony before a grand jury;

"(d) The names and addresses of witnesses on whose evidence the charge is based;

"(e) The results and reports of physical or mental examinations, and of scientific tests, or experiments made in connection with the particular case, or copies thereof; and

"(f) Documents, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever kind or nature which could be used as evidence by the state.

"(2) The court may issue such an order pursuant to the provisions of this section. In the exercise of its judicial discretion the court shall consider among other things whether:

"(a) The request is material to the preparation of the defense;

"(b) The request is not made primarily for the purpose of harassing the prosecution or its witnesses;

"(c) The request, if granted, would not unreasonably delay the trial of the offense and an earlier request by the defendant could not have reasonably been made;

"(d) There is no substantial likelihood that the request, if granted, would preclude a just determination of the issues at the trial of the offense; or

"(e) The request, if granted, would not result in the possibility of bodily harm to, or coercion of, witnesses.

"(3) Whenever the court refuses to grant an order

pursuant to the provisions of this section, it shall render its findings in writing together with the facts upon which the findings are based.

"(4) * * *."

Section 29-1916, R. S. Supp., 1972, provides that whenever the court issues an order pursuant to section 29-1912, R. S. Supp., 1972, its order may be conditioned by requiring the defendant to grant the prosecution like access to comparable items or information and shall be deemed to constitute a waiver of the defendant's privilege of self-incrimination for the purposes of the section.

The defendant's motion to produce was couched in the language of section 29-1912, R. S. Supp., 1972, and included all six subparagraphs of subsection (1). The trial court advised defense counsel that on the motion to produce he was going to have to be specific. In several instances the court inquired of defendant's counsel what specific information he wanted and was advised that counsel did not know what material the prosecution had, nor what specific items he was looking for. Nevertheless, in many instances the court failed to inquire of the county attorney whether there was any material of that particular kind in the possession of the prosecution.

The court inquired of the defendant's counsel as to whether the defendant gave a statement and the response was: "Not that I'm aware of, Your Honor." The county attorney was not asked whether or not the prosecution had any statement of the defendant in any of the forms described in section 29-1912 (1) (a), R. S. Supp., 1972. Virtually the same thing occurred with respect to the defendant's criminal record. Defense counsel, in response to a question from the court as to whether he had access to defendant's criminal record, said: "I know his criminal record. I don't know if they have anything else that I don't know about, Your

Honor." No inquiry was made of the county attorney as to whether he had furnished the defendant's prior criminal record to defendant's counsel or whether the defendant's prior criminal record was in the possession of the prosecution. Defendant's counsel responded in substantially the same fashion to questions from the court with respect to whether or not any physical or mental examinations of the defendant had been made by saying: "Not that I'm aware of, Your Honor." No questioning of the county attorney on this score was conducted. There is some confusion in the record as to what documents or reports were being referred to under subsection (1) (f). We shall assume that the county attorney's denial of possession of some indefinite kind of documents and reports was intended to be a denial of the existence of any of the items set out in that subsection.

The criminal discovery statutes are remedial in character and designed to meet modern standards for criminal justice. See, A B A Standards Relating to Discovery and Procedure Before Trial, § 1.2. At a hearing on a motion to produce, filed under the provisions of section 29-1912, R. S. Supp., 1972, it is necessary for the trial court to determine by inquiry of the prosecuting attorney whether or not the prosecution has any item of the classification and kind specifically designated in the statute and in the motion to produce. Any other course may effectively thwart the remedial purpose of the discovery statutes.

The importance of the factual determinations as to what items are subject to discovery and production under section 29-1912, R. S. Supp., 1972, is emphasized and spotlighted by subsection (3) of the statute, which provides: "Whenever the court refuses to grant an order pursuant to the provisions of this section, it shall render its findings in writing together with the facts upon which the findings are based." That language is

explicit and mandatory. It was not done here and the facts in the record do not support the denial. It must be presumed, under the circumstances here, that the error was prejudicial and resulted in the denial of a fair trial.

We turn now to the issues raised by the comments of the trial court to the jury in the case of State v. Blue. The comments were made to the Blue jury following the verdict. All parties were not present and no record was made of the proceeding. Six members of the Blue jury, including the foreman, were members of the jury in this case. A reasonable summary of the import of the trial court's comments to the Blue jury would be that the jury had made a mistake and that its verdict of acquittal was wrong.

Jurors, particularly inexperienced ones, are peculiarly sensitive to a judge's views and the revelation of his feelings toward the parties, counsel, or witnesses may influence the jury more than the evidence. See State v. Kimball, 176 N. W. 2d 864 (Iowa, 1970). Obviously, the court's remarks could not have had any effect in the Blue case but where the same jury panel continued, and six of the individual jurors served in both cases, the issue is whether or not the comments created an improper influence in this case. While it is appropriate for the trial court to thank jurors at the conclusion of a trial for their public service, such comments ordinarily should not include praise or criticism of their verdict. The reason for avoiding such comments at the conclusion of any trial is to avoid improper influence in other cases to which the jurors may be assigned. See, Commentary, A B A Standards Relating to Function of the Trial Judge, § 5.13; and A B A Standards Relating to Trial by Jury, § 5.6.

It is uncertain whether the grant and waiver of additional voir dire after the overruling of the motion to quash the jury panel could have been sufficient to

remedy the prejudice here. Nevertheless, in view of our previous determination with respect to the discovery statute, we shall conclude that the remarks and comments of the trial court were such that it may be assumed that the prejudice resulting therefrom is fatal to the validity of the trial here. See Pickerell v. Griffith, 238 Iowa 1151, 29 N. W. 2d 588.

The defendant's contention that he was improperly convicted upon the testimony of an accomplice is wholly rejected. The jury was properly instructed with respect to the testimony of the accomplice and this court adheres to its decision in Smith v. State, 169 Neb. 199, 99 N. W. 2d 8.

Issues respecting the excessiveness of bail bond are moot. No motion for reduction of any such bond was ever filed in this court.

The judgment of the District Court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

NEWTON, J., dissenting.

I cannot agree with the reversal of *this* case on either of the grounds advanced in the majority opinion.

With reference to the discovery motion, the record discloses that the court made careful inquiry in regard to each phase of the motion. I will discuss them in the order in which they appear in the motion and the majority opinion.

(1) It does not appear that any written or taped statement was given by the defendant and none was placed or offered in evidence. (2) Defendant's counsel stated he knew defendant's criminal record but wondered if the State had anything else. Two prior convictions were set out in Count II of the information. These were the only ones mentioned or introduced at the hearing on the habitual criminal count. Defendant's counsel was fully cognizant of these at all times.

(3) There was no grand jury investigation. (4) The names of the State's witnesses were endorsed on the information but the court ordered the State to give defendant's counsel the addresses of all witnesses. (5) There were no physical or mental examinations, scientific tests, or experiments. (6) There were no documents, papers, books, accounts, photographs, objects, or other tangible things which could be used as evidence except a letter or two thought to have been written by a witness. The court had previously authorized the taking of the depositions of all witnesses and stated that if there were such letters, defendant's counsel could obtain them when the depositions were taken.

Under the circumstances disclosed by the record, there was not an abuse of discretion on the part of the court, nor was any prejudice to defendant shown. Clearly there was no error, let alone error with prejudice.

In regard to comments made by the court in the presence of the jury panel, it appears that the Eskew jury was selected but not sworn at the time a previous jury sitting on a DWI case reported in with a verdict of not guilty. The court did not "castigate" this jury but stated that the man acquitted had two previous convictions for DWI and had, at the previous term, been acquitted of auto theft. The court also stated that the jury probably misunderstood the instructions given which was normal for a jury trying its first case. Members of the jury stated they had been dissatisfied with the breath test given the defendant and the court pointed out that they need not have relied only on the breath test but could have considered the tests made by the arresting officer. The jury foreman who testified still thought the defendant would have been acquitted, if the case were reconsidered, notwithstanding the court's remarks. The court then offered counsel in the present (Eskew) case the opportunity to inquire further on voir dire to which defendant's counsel re-

plied: "I'll waive any voir dire, Your Honor." The A B A Standards mentioned in the opinion of McCown, J., indicate that it is inadvisable for the court to praise or criticize the jury's verdict. This we can all agree is correct. Nevertheless, whether such comments require reversal depends on their nature and prejudicial effect in each particular instance. Perhaps examination of other decisions on this point will be helpful.

In Pickerell v. Griffith, 238 Iowa 1151, 29 N. W. 2d 588, the trial court made the following remarks directed at plaintiff's counsel: " 'Yes, *you better try this lawsuit like a lawyer would try it.* * * *

" 'Sustained. *Let's get down to the issues here.'* * * *

" *'The only persons involved here are the plaintiff and the defendant. We are trying this lawsuit. Confine yourself to the parties involved in the lawsuit.'* * * *

" *'Yes, you have gone over that Shultz business about six times.* He may answer again.' "

The remarks were held to be prejudicial.

In State v. Edgell, 94 W. Va. 198, 118 S. E. 144, defendant was indicted jointly with one Roy Wetherholt but separately tried. The court, in the presence of some of the Edgell jurors, remarked to Wetherholt on his acquittal that he was "as guilty as sin." The remarks were referable to Wetherholt's partner in crime, Edgell, and were held to be prejudicial.

In Milam v. State, 50 Okla. Cr. 439, 298 P. 898, during the progress of a trial a jury returned in another case with a verdict of acquittal and the court stated that in arriving at verdicts jurors should exercise common sense and reason in their deliberations. The court held the remarks were not prejudicial as the crimes were not similar and that the jury was not biased or prejudiced.

In Cabaniss v. City of Tuscaloosa, 20 Ala. App. 543, 104 So. 46, the court castigated jurors for not having

been able to agree on a verdict. The remarks were held to be without prejudice to the defendant although made in the presence of jurors sitting on his case.

In Anderson v. Commonwealth, 144 Va. 544, 131 S. E. 207, during prosecution of a liquor case a verdict was received in a similar type case. The court expressed disapproval of the not guilty verdict but admonished the jury that his remarks should not in any way influence its verdict. Held: Non-prejudicial.

In United States v. Kyle, 469 F. 2d 547 (D. C. Cir., 1972), cert. den., 409 U. S. 1117, 93 S. Ct. 920, 34 L. Ed. 2d 700, three jurors had sat on a case 2 days earlier which had been castigated by a different judge for rendering a not guilty verdict. The court held that there was no prejudice as the jurors had been questioned on voir dire in regard to whether they could render an impartial verdict and would acquit if not convinced of guilt beyond a reasonable doubt. It also appeared that the two cases were dissimilar, with different defendants, counsel, and judges.

In view of the general law on the subject as above outlined, it is difficult for me to jump to a conclusion that the jury was prejudiced in the case before us. Here the only criticism made was that the jury had failed to understand the instructions given, the two cases were dissimilar, there were different defendants and counsel, the defendant's counsel was given an opportunity for additional voir dire examination which he declined, and the court instructed that the jury could only convict if convinced of guilt beyond a reasonable doubt. Furthermore, the evidence was reasonably conclusive.

GAYLORD BAUER, APPELLANT, V. THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, A BODY POLITIC AND CORPORATE, APPELLEE.

219 N. W. 2d 236

Filed June 13, 1974. No. 39100.

State: Constitutional Law: Colleges and Universities: Domicile. Under the due process clause of the Fourteenth Amendment to the Constitution of the United States, a State may impose on a student a reasonable durational residency requirement that can be met in student status.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded with directions.

Francis P. Matthews of Matthews, Kelley, Cannon & Carpenter, for appellant.

Kevin Colleran of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

PER CURIAM.

Plaintiff sued to recover the difference between resident tuition fees and nonresident tuition fees charged and paid by him as an adult university student. A governing statutory provision, he alleged, violated the due process clause of the Fourteenth Amendment to the Constitution of the United States. The District Court concluded that the provision was constitutional, denying recovery. Plaintiff appeals.

The statutory provision in question read as follows: "No person shall be deemed to have established a residence in this state during the time of attendance at such state institution as a student, nor while in attendance at any institution of learning in this state, except in the case of a minor who qualifies as provided in this

section." Former § 85-502, R. R. S. 1943 (Laws 1951, c. 348, § 1, p. 1137).

We decided that the quoted provision was constitutional, one judge dissenting. See Thompson v. Board of Regents of University of Nebraska, 187 Neb. 252, 188 N. W. 2d 840 (1971). The Supreme Court of the United States subsequently indicated that a State may impose on a student a reasonable durational residency requirement that can be met in student status. See Vlandis v. Kline, 412 U. S. 441 at 452, 93 S. Ct. 2230 at 2236, 37 L. Ed. 2d 63 at 72 (1973). It subsequently affirmed a judgment in a similar case. See Sturgis v. State of Washington (D. C. Wash. Unrep., 1973), 42 Law Week 3170 (summary), affirmed 414 U. S. 1057, 94 S. Ct. 563, 38 L. Ed. 2d 464 (1973). In both federal cases the court upheld the constitutionality of the statutory provision. In the unreported opinion the court said: ". . . (T)he Supreme Court clearly distinguished between statutory schemes that impose irrebutable presumptions of non-residence and those . . . that use residency requirements as one element in determining bona fide residence."

The federal cases compel us to conclude that the quoted provision, which is separable from the remainder of the statute, violated the federal due process clause.

The judgment is reversed and the cause remanded with directions to enter judgment for the stipulated sum due with interest as provided by law. Plaintiff is allowed $75.30 for services of his counsel in this court. See § 25-1801, R. S. Supp., 1972; Potts v. Mahood, 187 Neb. 142, 187 N. W. 2d 655 (1971).

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, C. J., and SPENCER, J., dissent.

GILLETTE DAIRY, INC., A NEBRASKA CORPORATION, APPELLANT, V. THE NEBRASKA DAIRY PRODUCTS BOARD ET AL., APPELLEES, CARL SORENSON, DOING BUSINESS AS KIMBALL CREAMERY, KIMBALL, NEBRASKA, ET AL., INTERVENERS-APPELLEES.

219 N. W. 2d 214

Filed June 13, 1974. No. 39275.

1. **Constitutional Law: Statutes: Regulations.** Whether a business is charged with such a public interest as to warrant its regulation is a legislative question in which the court ordinarily will not interfere. The Legislature may not, however, under the guise of regulation, impose conditions which are unreasonable, arbitrary, discriminatory, or confiscatory. Such regulations must be reasonable considering the nature of the business and not such as would prevent the carrying on of the business.
2. **Constitutional Law: Statutes: Regulations: Monopolies.** Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. A citizen has a constitutional right to own, acquire, and sell property, and if it becomes apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual.
3. ———: ———: ———: ———. The Legislature, under the guise of regulation, may not indulge in arbitrary price fixing, the destruction of lawful competition, or the creation of trade restraints tending to establish a monopoly.
4. ———: ———: ———: ———. We hold that the Dairy Industry Trade Practices Act, as amended, insofar as it purports to fix a minimum basic cost, discriminates against efficient producers in favor of inefficient producers. Further, the act would tend to foster monopolistic and anticompetitive influences in the industry, contrary to the purposes stated by the Legislature. We therefore conclude the act is an unnecessary and unwarranted interference with individual liberty.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded.

Hutton & Garden, for appellant.

Tews & Noren, Herman Ginsburg, Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellees.

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and RONIN, District Judge.

SPENCER, J.

This action seeks to have sections 81-263.37 to 81-263.49 and 81-263.81 to 81-263.86, R. R. S. 1943, declared unconstitutional and to permanently enjoin the Nebraska Dairy Products Board from in anywise enforcing said statute. The trial court found the questioned acts constitutional and refused the injunction. Plaintiff, a Nebraska corporation, appealed. We reverse.

We capsulize the plaintiff's contentions that the act is unconstitutional as follows: (1) The act grants the defendants authority which exceeds the constitutional police power provided for the state by the Constitution; (2) the public interest is not so affected that the use of police power by the state is warranted; (3) the act fosters monopolistic milk practices; (4) the act is arbitrary, capricious, and discriminatory in regulating the price of dairy products; (5) the act illegally delegates legislative powers to the Nebraska Dairy Products Board and the Department of Agriculture of the State of Nebraska; and (6) the act illegally deprives the plaintiff of certain constitutionally guaranteed property rights.

Plaintiff, Gillette Dairy, Inc., is the only dairy located in the northeastern part of Nebraska that is presently operating a manufacturing and processing plant. Plaintiff alleges that the milk industry has been closely controlled for many years for the protection of the public health. This, plaintiff concedes, is a proper use of the police power of the state. It argues, however, that the power to control the handling of plaintiff's product for health's sake is entirely different and separate from the attempted control by the state of the business eco-

nomics of plaintiff's business in buying, selling, packaging, and distributing dairy products.

Basically, all milk products by all dairies are the same. Plaintiff argues, therefore, that it is in the public interest that an abundance of wholesome dairy products reach the entire state population in various forms (approximately 50), which the public desires at the least possible cost. Plaintiff supplies the 50 products, but 2 of them account for over 80 percent of its business. Competition requires 50 products, and it is competition based to a large degree on price which attracts the customers to some items.

Plaintiff states its dairy operations are very technical. They are divided into a multitude of processes and services so as to best handle its products to serve the need of its customers. This requires plaintiff to be efficient, not only to meet its customers' needs, but to do so at a competitive price while maintaining a high standard for its products.

Plaintiff is a member of a nationwide association known under the name of Quality Check. To maintain membership in this association plaintiff must not only meet all state and federal standards but also must meet additional stringent standards which the association feels are for the benefit of the consuming public. This membership costs plaintiff many thousands of dollars per year, but is an expense plaintiff feels is justified because it keeps its standard above federal and state legal minimums. Plaintiff maintains this membership to give it an advantage in a competitive market.

Section 81-263.38, R. R. S. 1943, is a declaration of purpose in the adoption of the Dairy Industry Trade Practices Act. It reads: "It is hereby declared that the sale of dairy products is a business affecting the public health and welfare and affected with a public interest. Certain trade practices are now being carried on in the sale of dairy products which are unfair and

unjust, which have already driven numerous firms out of business, and which if continued will jeopardize the public interest in securing a sufficient supply of properly prepared dairy products and in preserving the dairy industry of this state free from monopolistic and anti-competitive influences. It is the purpose of sections 81-263.37 to 81-263.49 and 81-263.81 to 81-263.86 to use the police power of the state in order to promote the public interest so declared by outlawing the continuance of such trade practices."

Section 81-263.39, R. S. Supp., 1972, is a definition of the terms used in the act. It defines cost of a dairy product to a distributor as the minimum basic cost determined under the provisions of section 81-263.84, R. S. Supp., 1972. Section 81-263.40, R. S. Supp., 1972, sets up a dairy industry trade practices fund, and prescribes the duties of the director. It provides that the director shall quarterly set a fee of not to exceed 4 mills for each pound of butterfat contained in dairy products sold for consumption within the state, such fee to be an amount that will permit an adequate administration of the provisions of the act. The fees are collectible quarterly from the first processor of dairy products, but liability therefor shall extend to any distributor thereof.

Section 81-263.41, R. R. S. 1943, defines what shall be considered unlawful practices. Included within these is a provision that it shall be unlawful to sell or offer to sell within the state any dairy product for less than the minimum basic cost established by the board. Section 81-263.42, R. R. S. 1943, prescribes unlawful practices for retailers.

Section 81-263.81, R. R. S. 1943, establishes the Nebraska Dairy Products Board and section 81-263.84, R. S. Supp., 1972, prescribes the duties of the board. Section 81-263.84, R. S. Supp., 1972, so far as material herein, provides: "(1) It shall be the duty of the

board to make a current thorough study of the dairy industry within this state * * * and, based on all relevant information made available to the board, *to determine the minimum basic cost to the distributor, which shall be a weighted average of such costs of distributors and others within this state engaged in processing dairy products sold within this state, and the minimum basic cost to the jobber, which shall be a weighted average of such costs of jobbers, of the various dairy products* * * *. In making such determinations, there shall be considered the distributor cost and the jobber cost which, under any system of cost accounting which is in accordance with sound accounting principles and reasonably adapted to the business of such distributor or jobber, is fairly allocable to each dairy product or the sale thereof to its customers or to a particular class thereof. Such costs shall include, but not be limited to, expenses for labor, administration, rent, interest, depreciation, power, raw and process ingredients, materials, supplies, maintenance of equipment, selling, local and national advertising, trading stamps not in excess of the number given in normal trade, transportation, delivery, credit losses, licenses and other fees, taxes other than income taxes, and insurance. The board shall also determine different costs for the different natural marketing areas which it may find within the state." (Emphasis supplied.)

Section 81-263.88, R. R. S. 1943, of the Nebraska Manufacturing Milk Act, is a declaration of public policy. It provides: "It is hereby recognized and declared as a matter of legislative determination that in the field of human nutrition, safe, clean, wholesome milk for manufacturing purposes is indispensable to the health and welfare of the citizens of the State of Nebraska; that milk is a perishable commodity susceptible to contamination and adulteration; that the production and distribution of an adequate supply of clean, safe, and

wholesome milk for manufacturing purposes are significant to sound health and that minimum standards are declared to be necessary for the production and distribution of milk for manufacturing purposes." Plaintiff has no quarrel with this statement of policy.

The United States Supreme Court in Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469, held: "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

It is undisputed that section 81-263.41 (1), R. R. S. 1943, prohibits sales below "minimum basic cost" as established pursuant to section 81-263.84, R. S. Supp., 1972. Minimum basic cost is to be a weighted average of the cost of the distributors and others performing various functions. There is no profit margin considered in the determination of the minimum basic cost.

It is obvious that the actual cost of some producers and distributors will be less than the minimum basic cost, while the actual cost of others will be greater. In both instances the amounts will vary. All, however, will be prohibited from selling below the minimum basic cost set by the board. Plaintiff, who appears to be a concerned and efficient distributor, contends that this act discriminates against it in favor of less efficient distributors. This discrimination exists even though plaintiff does not engage in any unfair trade practices. This discrimination obviously increases as the plaintiff becomes more efficient.

Plaintiff does not contest the right of the Legislature to prevent unfair trade practices such as selling below *actual* cost. It does contend, however, that so long as all sales are above actual cost it should be allowed to increase its sales volume by selling at a profit margin

no greater than that of its competitors. Normally, its greater efficiency will allow it to sell below its competitors and thus increase its sales while still maintaining a competitive profit margin. The act clearly prevents it from doing so, and consequently plaintiff claims this is discriminatory, with the degree of discrimination being more or less directly related to its efficiency versus the inefficiency of its competitors.

Inherent in the vice of forcing plaintiff to sell at the minimum basic cost of the average of its most inefficient competitors is the discrimination it suffers in comparison with some of the national milk chains. Plaintiff's product is displayed along with Meadow Gold and Fairmont, both of which are advertised extensively nationally. If all three products are priced the same, which will the buyer who has not previously tried plaintiff's products select? The answer is obvious.

Efficiency, price, and service are the major competitive advantages small distributors can utilize against distributors with recognizable brand names. Plaintiff, therefore, contends that the act is discriminatory because it abrogates or destroys the major marketing advantage of lesser-known producers (price) while leaving the major advantage of large producers (brand name labeling) intact.

The record conclusively establishes that the dairy industry is now one of the most thoroughly regulated food processing industries in the State of Nebraska. Legislation in the past has achieved safe, clean, wholesome milk products which are indispensable to the health and welfare of the citizens of the state. Regulations to this end are clearly within the police power of the state. The evidence is undisputed that all processors of fluid milk and dairy products pay identical prices for fluid milk under federal milk orders. It is obvious on this record that the cost of production is similar except for efficiency differentials and the difference in

volume purchasing of essential supplies other than the fluid milk.

The public interest expressed is the securing of a sufficient supply of properly prepared dairy products and in preserving the dairy industry of this state free from monopolistic and anticompetitive influences. Plaintiff's evidence would indicate that rather than freeing the state from monopolistic influences it would create monopoly by permitting the large processors to become even larger. It is obvious, regardless of the terms used, that the primary purpose of the act is to establish a price control regardless of the cost of production. If the intent were otherwise a prohibition against each operator selling below his cost of production would permit all producers to compete on an equal basis. In supposedly protecting the public interest it is the public which is caught in the price squeeze promoted by raising the price to that of the average of the inefficient producers.

Plaintiff will be able to sell for a while at an excess profit under this standard. It would seem to be apparent, however, that if its prices must be the same as those of national distributors, its volume will be a great deal less than it would otherwise be because of the prestige of the nationally known brand names. The logical extension of such rationale is that the dairy industry will eventually become a monopoly. It is an anomaly that the Legislature created an antitrust division in the office of the Attorney General to fight monopoly and by this act has promoted the opposite course.

Whether a business is charged with such a public interest as to warrant its regulation is a legislative question in which the courts ordinarily will not interfere. The Legislature may not, however, under the guise of regulation, impose conditions which are unreasonable, arbitrary, discriminatory, or confiscatory.

Such regulations must be reasonable considering the nature of the business and not such as would prevent the carrying on of the business. Boomer v. Olsen (1943), 143 Neb. 579, 10 N. W. 2d 507.

In Lincoln Dairy Co. v. Finigan (1960), 170 Neb. 777, 104 N. W. 2d 227, we said: "A citizen clearly has the right to engage in any occupation not detrimental to the public health, safety, and welfare. Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. A citizen has a constitutional right to own, acquire, and sell property, and if it becomes apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual. The court has also consistently held that the regulation of legitimate business may not be so unreasonable as to result in the confiscation of property and the rights incidental to its ownership. This court cannot give judicial approval to legislation that violates these fundamental principles on any theory that they are permissible under Article I, section 3, of the Constitution of this state, commonly referred to as the due process clause."

This case essentially is not too different from Boomer v. Olsen, *supra,* which involved regulation of private employment agencies. While this case deals with a food product, the regulations presently in effect are sufficient to assure the production and distribution of a wholesome food product. The extension of the police power to price fixing in the instant case is not needed to insure a wholesome product for the general public. Rather, its only effect is to promote the welfare of inefficient dairy processors.

The test in this state for price fixing is at least twofold: First, devotion to a public use; and, second, circumstances where the public interest requires a monopoly to exist in order to prevent costly duplication of facilities at the expense of the ultimate consumer. As suggested before, the interests of the general public appear to be adequately protected by the present exercise of the police power. Clearly, the second test for price fixing has not been met by the evidence in this case. Actually, the opposite effect conclusively appears.

In Terry Carpenter, Inc. v. Nebraska Liquor Control Commission (1963), 175 Neb. 26, 120 N. W. 2d 374, we said: "In Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729, this court held: 'The legislature, under the guise of regulation, may not indulge in arbitrary price fixing, the destruction of lawful competition, or the creation of trade restraints tending to establish a monopoly.' "

It is evident from a reading of the act and the record that the primary purpose of the act is price fixing. While the exercise of the police power in the milk industry is essential to assure a wholesome product, price fixing is not essential to attain that end. This raises a question suggested in Terry Carpenter, Inc. v. Nebraska Liquor Control Commission, *supra:* May the Legislature constitutionally confer upon others a right which it does not itself possess? Ignoring for the moment the suggested standards, the law in question is intended to control the price of the products sold by the plaintiff. To the extent that by administrative fiat a business is prevented from efficiently competing on a price basis, then to the extent it can be restricted as to what price it wishes to sell its products, that administrative fiat could result in plaintiff's entire investment being eroded away to profit inefficient producers at the expense of the general public.

A producer such as the plaintiff must grow if it is

to survive, because its static costs (plant, insurance, and equipment costs), remain the same with greater volume, and its lesser price helps obtain more customers. If plaintiff is not allowed to compete and grow, increasing costs will consume it or force the price so high it will lose enough customers to go under or erode away its investment.

By upholding this legislation we would necessarily hold that the Legislature has the power to require every distributor of an essential food product, whether bread, meat, fruit, milk, or otherwise, to sell at a price determined by averaging his costs with those of his less efficient competitors. We do not believe this is in the public interest. It is obvious the public through price control is subsidizing the inefficient distributors.

We conclude the act is unreasonable, arbitrary, and capricious in that it purports to fix a minimum basic cost that bears no relation to, and is not justified by, any requirements of the public interest. We also hold that the act, insofar as it purports to fix a minimum basic cost, discriminates against efficient producers in favor of inefficient producers. Further, the act would tend to foster monopolistic and anticompetitive influences in the industry, contrary to the purposes stated by the Legislature. We therefore conclude the act is an unnecessary and unwarranted interference with individual liberty.

To forbid unlawful trade practices, to require each distributor to sell above his actual cost, would be in the public interest and would protect the distributor. The act makes it the duty of the board to determine the minimum basic cost for the group and not for the individuals. Nowhere does the act provide that it is in the best interests of the public or required by public interest that the board's duty be such as set forth by the act. The Legislature has the power to act in behalf of the public health and welfare, to control the production,

handling, and purity of milk but under the guise of regulation may not indulge in arbitrary price fixing. The sole end result of the board's duty is to establish a noncompetitive price level between distributors of dairy products in Nebraska. It is strictly a milk price law, with the board's ultimate duty to fix that price.

It is fundamental that the Legislature may not delegate legislative authority to an administrative or executive authority. It does, however, have power to authorize an administrative or executive department to make rules and regulations to carry out an express legislative purpose or for the complete operation and enforcement of a law within designated limitations. It is fundamental, however, that in the legislative grant of power to an administrative agency, such power must be limited to the express legislative purpose and administered in accordance with standards described in the legislative act. See Lincoln Dairy Co. v. Finigan (1960), 170 Neb. 777, 104 N. W. 2d 227. In that case we held: "The limitations of the power granted and the standards by which the granted powers are to be administered must, however, be clearly and definitely stated. They may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available."

With regard to the board, the expressed legislative purpose is clear. The board is to establish the minimum basic cost to the distributor and jobber which minimum basic cost shall be a weighted average of "such cost," of distributors and jobbers. The board is composed of seven members: Two shall be distributors, two shall be retailers, and two shall be Grade A milk producers. The other member shall represent the general public and have no connection with production, processing, distribution, or selling dairy products in any manner. If the purpose of the act is to protect the interests of the public, is one of seven board members adequate for that purpose?

Plaintiff asserts the term "minimum basic cost" is vague and uncertain, and constitutes an unconstitutional delegation of legislative authority to an administrative board. Plaintiff argues: "The Board having no statutory guideline is unable administratively to arrive at the cost decision ordered by the Act because the Act provides only a few vague generalities whereby honest prudent men with honest differences of opinion could come up with a multiplicity of answers which would not honestly relate to the true picture and would not be in or for the best interests of the general public nor for the best interests of the dairy industry or dairies individually."

The act does provide what costs shall be included, but does not limit the board to the items specified. The minimum basic costs are to be a weighted average of the cost to the distributors, etc. In making that determination it may do so under any system of cost accounting which is in accordance with sound accounting principles and reasonably adapted to the respective businesses. Are these definitely sufficient standards which can be easily measured and uniformly applied?

Defendants' evidence would indicate that the term "weighted average" is regularly used in accounting practice, and is clear in meaning. It is not, however, defined to indicate how or by what means the averages are to be weighted. Webster's New International Dictionary (2d Ed.), p. 2899, defines the term as follows: "Statistics. An average of the values of a set of items to each of which is accorded a weight indicative of its frequency or relative importance; in forming the average, the value of each item is multiplied by its weight and the total of these products is divided by the sum of the weights." Weighted averages may be necessary to determine minimum basic costs, but that does not mean that minimum basic costs themselves are necessary, adequate, or fair.

The other term questioned by plaintiff is "sound accounting principles." It suggests that it would be

impossible to pick any group of individuals who would uniformly interpret what constitutes sound accounting principles for the dairy industry. While the standards used in the act leave something to be desired, we do not need to hold that they are so vague and uncertain that knowledgeable individuals will not understand what is meant by the terms.

For the reasons stated, we find the minimum basic costs provisions of the questioned act to be arbitrary, discriminatory, and demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

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

REVERSED AND REMANDED.

WHITE, C. J., took no part in the consideration or decision of this case.

CLINTON, J., dissenting.

I respectfully dissent from the opinion of my colleagues. It appears to me that the majority opinion judges not the constitutionality of the legislation, but its wisdom. It appears to declare the statute unconstitutional on the basis of subjective economic views as to the wisdom of unfettered competition among milk processors and distributors. The opinion makes assumptions which are either contrary to the evidence or which find no support in the bill of exceptions. It pays lip service to the appropriate principle, to wit: "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty," but disregards both the presumption of constitutionality and the evidence as well as the Legislature's declaration of purpose. It would attribute to the judiciary the power to estab-

lish classifications by the court itself declaring two classes: "Efficient" and "inefficient" processors and distributors and gratuitously asserts that it is discriminatory as between them. This legislation does not establish such classes nor is there any *evidence* to establish the existence of such classes nor in which hypothetical category the plaintiff falls. Some processors may have costs which are less than others. It does not follow that some are therefore an "inefficient" class. That some processors because of their volume of sales and ability to make "volume purchasing of essential supplies," as is mentioned in the opinion, does not make their competitors "inefficient." It just makes them less able to compete. All this is mere argument accepted by the majority opinion but without support in the record. Such an arbitrary characterization by the court will enable it to declare almost any classification arbitrary and unreasonable.

The only evidence introduced by the plaintiff is that shown in affidavits which are exhibits 13, 14, and 15. The essence of exhibit 13 is expressed in the following conclusion: Therefore plaintiff and his competitors can only compete on the following items: Types of produce packaging, advertising, quality of service, and the shelf price of the finished product. Exhibits 14 and 15 seem to support the conclusion that the 1962 to 1972 gasoline price stayed the same where dairy products went up. The defendants introduced a great deal of evidence pertaining to the necessity of additional legislation. None of which supports the conclusions of the opinion.

The trial court found: "D. The Act is presumed to be constitutional and the evidence presented herein fails to overcome this presumption of constitutionality."

I submit that the statute is not unconstitutional on its face and that the recital in the opinion six separate times that certain key conclusions are either "obvious" or "apparent" are neither obvious nor apparent, have no evidentiary support, and depend on the a priori

acceptance of certain economic views as to what type of competition is desirable in the milk processing and distributing industry and what the effects of the act will be.

The legislative purpose is set forth in part in the statute as follows: "Certain trade practices are now being carried on in the sale of dairy products which are unfair and unjust, which have already driven numerous firms out of business, and which if continued will jeopardize the public interest in securing a sufficient supply of properly prepared dairy products and in preserving the dairy industry of this state free from monopolistic and anticompetitive influences." § 81-263.38, R. R. S. 1943. The opinion recites: "Inherent in the vice of forcing plaintiff to sell at the minimum basic cost of the average of its most inefficient competitors is the discrimination it suffers in comparison with some of the national milk chains." No evidence supports the statement that plaintiff will be forced to sell "at the minimum basic cost of the average *of its most inefficient competitors.*" (Emphasis supplied.) The act itself provides: ". . . to determine the minimum basic cost to the distributor, which shall be a weighted average of such costs of distributors and others within this state engaged in processing dairy products sold within this state, and the minimum basic cost to the jobber, which shall be a weighted average of such costs of jobbers, of the various dairy products." It is the weighted average of the costs of all distributors which is to be determined and not as the opinion recites, "the cost of the average of its most inefficient competitors." Indeed there is nothing in the evidence to enable us to tell where the plaintiff stands in the scale of efficiency except for whatever conclusions one might draw from the fact that the plaintiff appears to have been successful and is growing, and is one of a rapidly decreasing class of processors and distributors.

The record establishes that in 1950 Nebraska had 151

milk processors and ice cream manufacturers; in 1963 that number had dropped to 55; in 1972 the number was 17. These figures are not challenged. It is apparent that under the existing system monopoly is growing and competition is being eliminated. The Legislature concluded and the evidence supports the proposition that this situation resulted from "milk wars" particularly in populous eastern Nebraska. Expert witnesses through affidavit testified that if "milk wars" are allowed to continue they "could destroy many full service dairies with the result that the consumers and dairy farmers would be hurt as well as full service processors in the price war markets." Also: A "completely unregulated market apparently has not worked satisfactorily in Nebraska due to changes in the industry and its economics, the impact created by chainstore merchandizing and producer cooperative processing." And also that producers have been unable to "cope" with this competitive situation, and affiant is of the opinion "that some form of Government regulation is not only necessary to guarantee a supply of fluid milk products for the consumer in Nebraska, but that in the public interest such laws are absolutely necessary."

The majority opinion states: "Plaintiff's evidence would indicate that rather than freeing the state from monopolistic influences it [the statute] would create monopoly by permitting large processors to become even larger." There is not anything in the record to support the above conclusion. The opinion says: "It is obvious . . . that the primary purpose of the act is to establish a price control regardless of the cost of production." Here it would seem the court is playing with words. First, it seems there could have been at least two "primary" reasons for this act, including: (1) The fact that the state had been unable to establish, under the previous statute, a processors "actual" cost and this act creates an easier way to prove violations by making it illegal to sell below a fixed price rather

than actual cost; and (2) a purpose to protect the dairy industry from the loss of more processors. The majority opinion states: "If the intent were otherwise a prohibition against each operator selling below his cost of production would permit all producers to compete on an equal basis." Two comments are pertinent: (1) Apparently making the producer's own cost the basis of determining the violation under previous legislation had not achieved the Legislature's purpose. Thus the pressure for new legislation. (2) It also appears that under the existing system the desired legislative result was not being achieved.

The Legislature may be right. It may be wrong. The effect of the majority opinion is to say to the Legislature, "This court knows best."

Regulations and statutes similar to those involved here have long been upheld as being constitutional. Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469 (1933), is the leading case on the point and has been followed many times. The New York Legislature, after extensive hearings, had found that the price of milk being paid New York producers was below the cost of production, and that such conditions if allowed to continue might jeopardize (1) the wholesome nature of the product, and (2) the industry itself, thus ending the supply of a product determined essential to the public health.

The appellant in that case was convicted of violating a portion of the act making the selling of milk at a price below levels established by the administrative board a crime. The appellant first challenged the act on the grounds that it violated equal protection of the laws. The court said: "It is shown that the order requires him, if he purchases his supply from a dealer, to pay eight cents per quart and five cents per pint, and to resell at not less than nine and six, whereas the same dealer may buy his supply from a farmer at lower prices and deliver milk to consumers at ten cents the

quart and six cents the pint. We think the contention that the discrimination deprives the appellant of equal protection is not well founded. For aught that appears, the appellant purchased his supply of milk from a farmer as do distributors, or could have procured it from a farmer if he so desired. There is therefore no showing that the order placed him at a disadvantage, or in fact affected him adversely, and this alone is fatal to the claim of denial of equal protection. But if it were shown that the appellant is compelled to buy from a distributor, *the difference in the retail price he is required to charge his customers, from that prescribed for sales by distributors, is not on its face arbitrary or unreasonable, for there are obvious distinctions between the two sorts of merchants which may well justify a difference of treatment, if the legislature possesses the power to control the prices to be charged for fluid milk.* Compare American Sugar Refining Co. v. Louisiana, 179 U. S. 89; Brown-Forman Co. v. Kentucky, 217 U. S. 563; State Board of Tax Commissioners v. Jackson, 283 U. S. 527." (Emphasis supplied.)

Appellant next challenged the statute on the ground that it violated due process: "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because *the reasonableness of each regulation depends upon the relevant facts.*" (Emphasis supplied.)

The court noted that under the milk order there questioned the New York Legislature recognized differences in underlying cost should be reflected in the price charged. "In the order of which complaint is made the Milk Control Board fixed a price of ten cents per quart for sales by a distributor to a consumer, and nine cents by a store to a consumer, thus recognizing the lower costs of the store, and endeavoring to establish a differential which would be just to both. In the light of the facts the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk."

We here interject that the legislative determination that the welfare of the milk producers requires the preservation of substantial number of milk processors is not patently unreasonable or arbitrary.

Regarding the question of due process, the court, in Nebbia v. New York, *supra,* continued: "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. *The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio.* 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' Northern Securities Co. v. United States, 193 U. S. 197, 337-8. And it is equally clear that if the

legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. *With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal.* The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." (Emphasis supplied.)

The matters involved come clearly within the legislative purview. The legislation treats all processors and distributors the same. The regulation is not "demonstrably irrelevant to the policy the Legislature is free to adopt." Nebbia v. New York, *supra.*

GATEWAY BANK, A NEBRASKA CORPORATION, ET AL., APPELLEES, V. DEPARTMENT OF BANKING, APPELLEE, BANK OF LINCOLN ET AL., APPELLANTS, LINCOLN BANK EAST, APPELLEE.

219 N. W. 2d 211

Filed June 13, 1974. No. 39302.

1. **Trial: Evidence.** If a general objection to admission of evidence is overruled, the objecting party may not complain on appeal unless: (1) The ground for exclusion was obvious without stating it, or (2) the evidence was not admissible for any purpose.
2. ———: ———. An objection on the ground of insufficient foundation is a general objection. Where the lack of foundation is not readily apparent and is lacking in some particular respect, the specific attention of the court should be called to such lack.

3. **Trial: Evidence: Records.** An offer of a composite record under the provisions of the Uniform Composite Reports as Evidence Act, sections 25-12,115 to 25-12,119, R. R. S. 1943, is prima facie sufficient if a foundation is laid under section 25-12,115, R. R. S. 1943. A failure of the party offering the evidence to comply with the provisions of section 25-12,117, R. R. S. 1943, must be called to the attention of the court by specific objection.

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

Duane W. Acklie and Peterson, Bowman, Coffman & Larsen, for appellants.

Knudsen, Berkheimer, Endacott & Beam, for appellee Lincoln Bank East.

Cline, Williams, Wright, Johnson & Oldfather and Crosby, Guenzel & Binning, for appellees Gateway Bank et al.

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

CLINTON, J.

This action arises from the application of Lincoln Bank East, a Nebraska corporation and an appellee herein, for a bank charter to engage in business at 68th & O Streets, Lincoln, Nebraska. The appellants, Union Bank and Trust Company and Citizens State Bank, are existing banks who protested the application. The appellant Bank of Lincoln is an applicant for a charter to compete in the same general area and also a protestant. The Director of Banking granted the charter to Lincoln Bank East. Prior to hearing, the protestants requested in accordance with the provisions of section 84-914, R. R. S. 1943, that the rules of evidence applicable to the District Court be made binding. Appeal was made to the District Court under the provisions of section 84-917, R. R. S. 1943; that court made findings in accordance with the statute, and affirmed the order of the Director of Banking. Some of the protestants appeal. We affirm.

On this appeal two assignments of error are made: (1) That the Director erred in receiving a document, exhibit 27, entitled MRI Report—A Study to Evaluate the Feasibility of Establishing a Banking Facility at 68th and O Streets, Lincoln, Nebraska, and the District Court erred in not finding the admission of that exhibit erroneous. (2) The evidence was insufficient to establish the public necessity, convenience, and advantage would be promoted by granting the charter. § 8-122, R. R. S. 1943.

Exhibit 27 was supported by the foundational testimony of James T. LePage, an expert witness for the applicant and the person who had prepared the report. The facts and information contained in the report and on which it was based were accumulated by persons other than the witness but acting under his direction. When the exhibit was offered objection was made upon the ground of hearsay and insufficient foundation.

It seems to be conceded here by all parties that the report is such as is admissible upon compliance with the provisions of the Uniform Composite Reports as Evidence Act, sections 25-12,115 to 25-12,119, R. R. S. 1943. Section 25-12,115, R. R. S. 1943, provides: "A written report or finding of facts prepared by an expert not being a party to the cause, nor an employee of a party, except for the purpose of making such report or finding, nor financially interested in the result of the controversy, and containing the conclusions resulting wholly or partly from written information furnished by the cooperation of several persons acting for a common purpose, shall, insofar as the same may be relevant, be admissible when testified to by the person, or one of the persons, making such report or finding without calling as witnesses the persons furnishing the information, and without producing the books or other writings on which the report or finding is based, if, in the opinion of the court, no substantial injustice will be done the opposite party."

Section 25-12,117, R. R. S. 1943, provides: "Such report or finding shall not be admissible unless the party offering it shall have given notice to the adverse party a reasonable time before trial of his intention to offer it, together with a copy of the report or finding, or so much thereof as may relate to the controversy, and shall also have afforded him a reasonable opportunity to inspect and copy any records or other documents in the offering party's possession or control, on which the report or finding was based, and also the names of all persons furnishing facts upon which the report or finding was based, except that it may be admitted if the trial court finds that no substantial injustice would result from the failure to give such notice."

The appellants argue that the exhibit was inadmissible because of failure to comply with the provisions of section 25-12,117, R. R. S. 1943. The record shows that the protestants did not receive a copy of the report until the noon recess on December 22, 1971, the first day of the hearing before the Director. The question before us, as we see it, is whether the general objection of lack of foundation was sufficient to call to the Director's attention that the objection extended to the failure of the offerer to comply with the provisions of section 25-12,117, R. R. S. 1943, thus making the alleged error properly reviewable in the District Court and in this court.

The record clearly establishes a foundation sufficient under the provisions of section 25-12,115, R. R. S. 1943. The exhibit was therefore admissible unless there was some other valid objection properly and timely made. The following principles govern. If a general objection is overruled the objecting party may not complain on appeal unless: (1) The ground for exclusion was obvious without stating it, or (2) the evidence was not admissible for any purpose. Fries v. Goldsby, 163 Neb. 424, 80 N. W. 2d 171; McCormick on Evidence, § 52,

p. 118; Evidence (manual), Nebraska State Bar Assn., 1966, 4-6. The objection on the ground of insufficient foundation is a general objection. Kennedy v. Woods, 131 Neb. 217, 267 N. W. 390. Where the lack of foundation is not readily apparent and is lacking in some particular respect, the specific attention of the court should be called to such lack. Kennedy v. Woods, *supra.*

As applied to the Uniform Composite Reports as Evidence Act under the facts of this case, the report was apparently admissible under section 25-12,115, R. R. S. 1943. A failure of the offerer to comply with the provisions of section 25-12,117, R. R. S. 1943, would not be apparent to the court in the absence of extraneous proof of noncompliance. We hold that an objection on the grounds stated must be specifically made, and if it is not and a sufficient foundation under section 25-12,115, R. R. S. 1943, has been laid, we will on appeal uphold the overruling of the objection of insufficient foundation. McCormick on Evidence, § 52, p. 118; Fries v. Goldsby, *supra.* The requirement of specificity of objection would seem also to apply under Rule 103 (a) of the proposed Nebraska Evidence Rules. Had proper objection been made, then, of course, the objection should have been sustained or an opportunity afforded to the objecting party to have the benefit of the procedures afforded him by section 25-12,117, R. R. S. 1943.

There is, however, another reason why the appellants' argument must fail on this point. The record shows that the applicant rested its case at the end of the day on December 23, 1971, and the cause was adjourned to January 7, 1972, and later continued to January 14, 1972, at which time the protestants presented their evidence. The record shows that during this time they had a copy of the report and that any foundational information they wished was available to them. If there had been an initial error in ruling on the objection it was rendered harmless by the subsequent occurrences.

With reference to the second issue presented on appeal, we have carefully examined the evidence supporting the issue of public necessity, convenience, and advantage. The finding of the District Court that the order of the Director granting the application "was supported by competent, material and substantial evidence in view of the entire record as made on review," was correct.

AFFIRMED.

IN RE GUARDIANSHIP OF WILLIAM HOWARD FENNER, A MINOR. LAURENCE HOWARD FENNER, APPELLEE, V. WILLIAM STRICKLAND, GUARDIAN, APPELLANT.

219 N. W. 2d 229

Filed June 13, 1974. No. 39336.

1. **Parent and Child: Infants.** Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right.
2. ———: ———. In determining the question of who should have the care and custody of the children, the paramount consideration is the best interests and welfare of the children.
3. **Custody: Infants.** Ordinarily the custody of children of tender years should be kept within the jurisdiction of the court having control over them, unless the best interests of the children demand otherwise.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded.

David S. Lathrop and Richard L. Swenson of Lathrop, Albracht & Dolan, for appellant.

David J. Burleson and Joseph P. Inserra of Krause, Inserra, Petersen & Burkhard, for appellee.

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

NEWTON, J.

This is a contest over the guardianship and, consequently, custody of William Howard Fenner, commonly

referred to as Billy. Billy was born March 2, 1967. The present litigation is between Billy's maternal grandfather William L. Strickland, appellant, and his father Laurence Howard Fenner, appellee. Appellant was appointed guardian in the county court. The District Court reversed the judgment and awarded appellee custody. We reverse the judgment of the District Court.

Appellee spent several years in the United States Navy. He was discharged due to a nervous reaction causing stomach problems and draws a disability pension. The family moved to Arkansas in August 1970 and was accompanied by a young woman referred to as Linda. Linda had one child born out of wedlock to a man with whom she had lived for about a year and a half. The group lived most of the time under very crowded conditions with appellee's parents. The two women found employment but appellee failed to work for a considerable period. There is evidence indicating that Linda and appellee became intimate and appellee's wife left, went to Omaha where her father resided, and established a home for herself and her two children. She and her younger son were killed in a car-train accident on August 6, 1972. Prior to her death appellee's wife had obtained a divorce. Efforts were made to get appellee to contribute to the support of his children but he failed to do so and made no effort to see them until several days after the accident when he contacted Billy in the hospital. In the meantime a child had been born to Linda about 9 months after appellee's wife had left him. Appellee and Linda lived together until after the divorce at which time they married. Appellee has now established a separate home for himself and his family and says he operates a trash-hauling route and a junk and antique business.

Billy's mother had obtained psychiatric treatment for him in Omaha. He was hyperactive and his speech was immature. The doctor's history obtained from the mother states: " 'William does not talk very well and

the reason that he does not talk very well is the fact that every time he used to talk when he first started, his dad used to whip him because he would interrupt him. The mother and father have been divorced two years in November and the mother is going to remarry in September. Billy is reported as being in Head Start, never crying, hitting other kids with sticks, pulling their hair, never sits down. He eats well and she can put him outside and he will stay close to home. She said "If I lay down with him he may go to sleep." He has always been very active. At 5 months he had a hernia and had another hernia repaired two years ago. He was born in Newport, Rhode Island and weighed 7 pounds and 11 ounces and was a good baby. He walked at 1 year and had fairly good developmental milestones. The father had some sort of a mental disorder.' "

Billy was severely injured in the accident sustaining a leg injury and possible brain damage. After the accident Billy's condition regressed. He needed rehabilitation for his leg, speech therapy, a special needs school, perhaps psychiatric care, security, and one caretaker. He has been in the care of his grandfather and step-grandmother, has been well cared for, and appears to be attached to them. He is also under the supervision of the Douglas County social services department.

The problem presented is not one devoid of difficulties. "Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right." Sanny v. Sanny, 182 Neb. 1, 152 N. W. 2d 27.

We are reluctant to hold under the facts of this case that appellee has forfeited all rights to Billy's custody but we do find that at the present time he is unfit to receive custody. His former treatment of the child, his emotional instability, his demonstrated immorality, and his apparent unsteadiness in his work habits are not conducive to a finding of parental fitness. We have

involved here a child at present suffering mental and physical handicaps. His care during the months to come is critical in regard to his future welfare. He is now well cared for by appellant. To change the boy's custody would be to gamble in regard to the continuance of the mental and physical treatments his condition requires. This we are not disposed to do as: "In determining the question of who should have the care and custody of the children, the paramount consideration is the best interests and welfare of the children." Gydesen v. Gydesen, 188 Neb. 538, 198 N. W. 2d 67. See, also, Loveall v. Loveall, 188 Neb. 457, 197 N. W. 2d 381.

We believe that in a case such as this, it is very important to the welfare of the child that he be retained within the jurisdiction of the court so that continued supervision may be had. Ordinarily the custody of children of tender years should be kept within the jurisdiction of the court having control over them, unless the best interests of the children demand otherwise. See Bauer v. Bauer, 184 Neb. 777, 172 N. W. 2d 231.

The judgment of the District Court is reversed and the cause remanded for entry of judgment in conformity with this opinion.

REVERSED AND REMANDED.

DENZEL W. PARKER AS PARKER GARAGE, APPELLANT, V. R. KEITH CHRISTENSEN, REAL NAME UNKNOWN, ET AL., APPELLEES.

219 N. W. 2d 235

Filed June 13, 1974. No. 39372.

New Trial: Motions, Rules, and Orders: Appeal and Error. The provision of section 25-1144, R. R. S. 1943, requiring a written motion for new trial specifying the ground thereof, is mandatory in order to review errors of law occurring at the trial of a law action or the sufficiency of the evidence.

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

John L. Cutright, for appellant.

Thomas B. Thomsen of Sidner, Svoboda, Schilke & Wiseman, for appellees.

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

CLINTON, J.

This is an action commenced in the county court on an open account for repairs to a motor vehicle. The plaintiff recovered judgment in the county court. The defendants appealed to the District Court which, on November 16, 1973, tried the matter and modified the judgment substantially reducing the plaintiff's recovery. The plaintiff filed a written motion for new trial, specifying the following grounds: "1. The decision is contrary to the evidence. 2. The decision is contrary to the law. 3. No evidence was offered in or introduced to the Court upon which the decision of the Court was or could be decided." This motion was overruled on November 19, 1973. On the day following, the plaintiff filed a motion to "vacate the judgment hereto rendered on the 16th of November 1973 for the reason that no bill of exceptions is possible on the record on which it was based." On November 27, 1973, the court sustained the motion to vacate the judgment; granted a new trial; held a new trial "de novo on the record"; and rendered a judgment identical to the earlier judgment of November 16, 1973. The order following the judgment recites: "Plaintiff-Appellee orally moved for new trial. Said motion was and is hereby overruled." Although the judgment recites that an oral motion for new trial was made, none appears in the bill of exceptions and the grounds for the oral motion are unknown.

The issue raised by the plaintiff on appeal is that the judgment is contrary to the evidence. The defendants, while responding on the merits, also argue that because

of the failure of the plaintiff to file in writing a motion for new trial specifying the grounds complained of following the judgment of November 27, 1973, there is left for determination on this appeal to this court only the question of sufficiency of the pleadings to support the judgment. The defendants' position is well taken and we cannot reach the merits of the case.

We have long held that the provision of the statute, section 25-1144, R. R. S. 1943, requiring a timely written motion for new trial specifying the grounds thereof, is mandatory in order to review errors of law occurring at the trial of a law action or the sufficiency of the evidence. In Weber v. Allen, 121 Neb. 833, 238 N. W. 740, we said: "We are next confronted with the disclosure in the record that the only motions for new trial filed in the cases were oral. Section 20-1144, Comp. St. 1929 (now section 25-1144, R. R. S. 1943), requires that an application for new trial must be by motion upon written grounds filed at the time of the making of the motion. The provisions of this statute are mandatory. Carmack v. Erdenberger, 77 Neb. 592. Under the circumstances, there is no motion for new trial in either of the cases. The inquiry of this court in the action at law is limited to the sufficiency of the pleadings to support the judgment. O'Donohue v. Hendrix, 13 Neb. 255; Farris v. State, 46 Neb. 857; Slobodisky v. Curtis, 58 Neb. 211; Walker v. Burtless, 82 Neb. 214; Anderson v. Union Stock Yards Co., 84 Neb. 305. The pleadings, upon examination, disclose that they are sufficient to support the judgment of the court." The sufficiency of the evidence cannot be considered in a law action on appeal in the absence of a motion for new trial. Drainage Dist. No. 2 v. Dawson County Irr. Co., 140 Neb. 866, 2 N. W. 2d 321. The pleadings are sufficient to support the judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES CASPER, APPELLANT.

219 N. W. 2d 226

Filed June 13, 1974. No. 39422.

1. **Homicide: Criminal Law: Evidence.** In a prosecution for homicide, the State may show by circumstantial evidence the cause of death was a criminal act of the defendant.
2. **Witnesses: Criminal Law: Trial.** A witness may be examined concerning prior inconsistent statements to show his testimony has operated as a surprise, to test his recollection, refresh his memory, induce him to change his testimony, or show the circumstances which induced the party to call him.

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

Frank B. Morrison, Sr., and Bennett G. Hornstein, for appellant.

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

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

BOSLAUGH, J.

The defendant appeals from a sentence to life imprisonment for murder in the perpetration of a robbery. He contends the evidence was insufficient to establish the death of Joseph Armstrong, the victim, was a result of the robbery and that errors occurred in the admission of evidence.

The record shows the defendant spent the evening of April 27, 1973, with Gary Wilson and his wife, Sandra Wilson, at several bars in Omaha, Nebraska. When they left Johnny's Lounge, Joseph Armstrong joined the group. They then proceeded in the defendant's automobile to the home of Armstrong's sister where Armstrong procured two $100 bills which she had been keeping for him. At some time there was conversation

between Gary Wilson and the defendant concerning a plan to get Armstrong's $200.

The party then visited several bars in Council Bluffs, Iowa, and spent some time at Lightning's Club 500 in South Omaha. Eventually they drove to the Surfside Marina Club which is located north of Omaha and near the Missouri River. The club was closed but the parking lot was lighted.

The evidence is in conflict as to what happened at the Surfside Club but the jury could find that Gary Wilson and the defendant forced Armstrong to the ground and went through his clothing trying to find the $200. The defendant testified he searched Armstrong but could not find the money. Armstrong's keys and pocketknife were taken from him. The defendant testified Gary Wilson threatened to castrate Armstrong if he did not hand over the money. Armstrong tried to get away from the two men several times and eventually entered the river. The evidence is undisputed that when last seen Armstrong was in the river. Sandra Wilson, who had stayed in the automobile and was some distance away, heard a splash and a cry for help. She then heard the defendant ask Gary Wilson if he could swim. Armstrong was not seen again until his dead body was found floating downstream on May 8, 1973.

On the morning of April 28, 1973, Gary Wilson, Sandra Wilson, and Gary Tiemann, a brother of Sandra Wilson, returned to the Surfside Club and found the two $100 bills. They kept the money and divided it among themselves. Three or four days later the defendant gave Armstrong's knife and keys to Gary Tiemann.

An autopsy was performed on the body of Armstrong by Dr. Jerry Wilson Jones but the cause of death could not be determined from the post mortem examination. Dr. Jones testified there were no tests or findings which would establish conclusively whether a person found in the water under these circumstances had actually died

from drowning. He was allowed to testify over objection that his findings were consistent with drowning.

In a prosecution for homicide, the State may show by circumstantial evidence the cause of death was a criminal act of the defendant. Cryderman v. State, 101 Neb. 85, 161 N. W. 1045; Morris v. State, 109 Neb. 412, 191 N. W. 717.

The proof as to the cause of death in this case was circumstantial. The testimony of Dr. Jones alone did not establish the cause of death. Because of the other evidence, testimony that Armstrong could have died by drowning was relevant. The fact that Armstrong when last seen alive was in the river and his body was found in the river approximately 10 days later would permit an inference that his death was caused by drowning. The expert testimony that death by drowning was consistent with the autopsy findings, and the absence of evidence of other probable causes, together with the other evidence, was sufficient to permit the jury to find that Armstrong's death was caused by drowning.

The defendant argues the robbery was not the cause of Armstrong's death because the robbery, or attempted robbery, had been concluded at the time Armstrong entered the river. Although the efforts of Gary Wilson and the defendant to rob Armstrong had not been successful, the jury was not required to find the plan to rob Armstrong had been abandoned. Armstrong made several attempts to escape before he entered or was forced into the river. In a statement to the police, the defendant had said: "* * * we was threatening that we was going to take him out and throw him into the water, you know, * * * and the next thing that I knew, we started chasing him towards the river * * *." The jury could have found the robbery was still in progress at the time Armstrong entered the river.

Sandra Wilson was called as a witness by the State. She had been charged as an accessory after the fact and was clearly a hostile witness and uncooperative. She

had given a written statement to the police concerning the events on April 27 and 28, 1973, but it is apparent her testimony varied considerably from her earlier statement. On direct examination the State questioned her concerning her previous statement. Over objection, the State was allowed to inquire if, after she had viewed Armstrong's body at a funeral home, she had told Gary Wilson: " ' * * * that it was the man, and that he and Charles Casper had killed that man.' " It has long been the rule that a witness may be examined concerning prior inconsistent statements to show his testimony has operated as a surprise, to test his recollection, refresh his memory, induce him to change his testimony, or show the circumstances which induced the party to call him. Welton v. State, 171 Neb. 643, 107 N. W. 2d 394. See, also, State v. Fronning, 186 Neb. 463, 183 N. W. 2d 920. Under the circumstances in this case the ruling on the objection was not erroneous. See Ewing v. United States, 135 F. 2d 633.

The judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

Section 28-401, R. S. Supp., 1973, provides: "Whoever shall * * * in the perpetration of or attempt to perpetrate any * * * robbery, * * * kill another; * * * shall be deemed guilty of murder in the first degree * * *."

The evidence, including the defendant's own testimony, established the attempted robbery. However, the evidence failed to establish that the defendant had *killed* the decedent.

The doctor who performed the autopsy reported that there was nothing to indicate the decedent had died of other than natural causes. There was no evidence of any trauma, externally or internally or on X-ray examination. The doctor could not state with medical certainty the cause of death of the decedent. He could not state that the decedent drowned, but he did testify that the findings were not inconsistent with a patient

who had died from drowning, even though there was no water in his lungs. The doctor testified that the findings were equally consistent with drowning, diabetic coma, and arteriosclerosis. The decedent was a known diabetic receiving insulin shots each morning. The time of death could not even be fixed within a period of several days. No one ever saw the decedent go into the river or saw him in the water except the defendant. The defendant's testimony denied any act or acts which caused decedent's death.

It might well be said that the evidence established that an attempted robbery occurred and that the victim of the attempted robbery died at some time within a few days thereafter, and that his death might have been connected with the attempted robbery. Only one of the three possible causes of death could be even remotely connected with the attempted robbery or with the defendant. On that evidence the defendant was convicted of first degree murder.

In Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539, we said: "Homicide corpus delicti is not established until it is proved that a human being is dead, and the death occurred as the result of the criminal agency of another. * * *." The State "must prove that * * * death was the result of a criminal act, and unless and until this is proved, it is presumed that death resulted from innocent, noncriminal causes. * * * Any fact or circumstance susceptible of two interpretations must be resolved most favorably to the accused."

While the State may show by circumstantial evidence that the cause of death was a criminal act of the defendant, the facts and circumstances tending to connect accused with the crime charged must be of such a conclusive nature as to exclude every reasonable hypothesis except that of his guilt of having killed the decedent in the perpetration or attempted perpetration of a robbery. State v. Sedlacek, 178 Neb. 322, 133 N. W. 2d 380.

Here the evidence is absolutely uncontradicted that

no human agency can determine what caused the decedent's death. All three equally probable causes of death may be innocent and noncriminal. Only one of the three possible causes might be either criminal or innocent. Yet the jury was permitted to speculate that death was caused by a criminal act of the defendant. The basis for that speculation rests on the fact that the defendant, one of a group of intoxicated persons, participated in an attempt to rob the decedent in an area near the Missouri River, and the decedent's body was found in the river several days later. The State's evidence indicated that the death might have resulted from drowning while fleeing from the defendant at the time of the attempted robbery.

"The burden of proving that a specific crime has been committed is not fulfilled by evidence that a crime probably occurred." State v. Addison, 191 Neb. 792, 217 N. W. 2d 468. "Suspicion or speculation may never justify a conviction." Reyes v. State, *supra.*

The evidence here does not support the conviction.

STATE OF NEBRASKA EX REL. VANCE D. ROGERS, APPELLANT AND CROSS-APPELLEE, V. WAYNE R. SWANSON, STATE TREASURER, APPELLEE AND CROSS-APPELLANT.
219 N. W. 2d 726

Filed June 20, 1974. No. 39032.

1. **Constitutional Law: Time: Statutes.** An act of the Legislature that is forbidden by the Constitution at the time of its passage is absolutely null and void, and is not validated by a subsequent amendment to the Constitution authorizing it to pass such an act.
2. **Constitutional Law: Statutes.** The constitutional validity of an act of the Legislature is to be tested and determined, not by what has been or possibly may be done under it, but by what the law authorizes to be done under and by virtue of its provisions.
3. **Constitutional Law: Statutes: Legislature.** The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly.

4. **Constitutional Law: Records: Legislature.** The record of a floor explanation or debate is legislative history, and it may be an extrinsic, secondary source in statutory interpretation.
5. **Constitutional Law: Statutes: Legislature.** The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment.
6. ———: ———: ———. The Legislature may legislate in regard to a class of persons, but it cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes and enact different rules for the government of each.
7. **Constitutional Law.** The guarantee of the Establishment Clause of the First Amendment to the Constitution of the United States is protected against state infringement by the Fourteenth Amendment to the Constitution of the United States.
8. **Constitutional Law: Colleges and Universities: Public Funds.** We find L.B. 1171 in violation of Article III, section 18, and Article VII, section 11, of the Constitution of Nebraska.
9. ———: ———: ———. We find L.B. 1171 unconstitutional under the Establishment Clause of the First Amendment to the Constitution of the United States.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Kutak, Rock, Cohen, Campbell, Garfinkle & Woodward, for appellant.

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

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

SPENCER, J.

This appeal is from the denial of a petition for mandamus filed by Dr. Vance D. Rogers, relator-appellant. The problem involved is the constitutionality of sections 85-701 to 85-721, R. S. Supp., 1972, hereinafter

referred to as L.B. 1171, relating to education in independent institutions of higher education. The statute in brief provides for public grants to students in need of tuition aid to attend private colleges. The District Court determined the statute violated certain sections of the Constitution of Nebraska, and denied relator any relief. Relator perfected this appeal. Respondent-appellee cross-appeals because the trial court did not find a violation of Article I, section 4, Constitution of Nebraska, and also contends that the statute violates the federal constitutional prohibition against state establishment of religion.

Relator sought reimbursement of an expense incurred September 6, 1972, under the statute. On September 13, a warrant upon the treasury of the State of Nebraska was issued and transmitted to respondent, the State Treasurer, who refused to countersign it. The legality of respondent's action depends upon the constitutionality of the statute. The District Court held L.B. 1171 unconstitutional. We affirm.

Respondent invoked Article III, section 18, and Article VII, section 11, of the Constitution of Nebraska, the pertinent provisions reading respectively as follows: "The Legislature shall not pass * * * special laws in any of the following cases, * * *. Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise * * *. * * * where a general law can be made applicable, no special law shall be enacted. * * *

"No sectarian instruction shall be allowed in any school * * * supported in whole or in part by the public funds set apart for educational purposes, * * *. * * * the state Legislature * * * shall * * * (not) make any appropriation from any public fund, * * * in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state * * *."

After enactment of the statute in question, Article

VII, section 11, Constiution of Nebraska, was amended. The amendment does not affect the question involved herein. See Whetstone v. Slonaker (1923), 110 Neb. 343, 193 N. W. 749. We there held: "An act of the legislature that is forbidden by the Constitution at the time of its passage is absolutely null and void, and is not validated by a subsequent amendment to the Constitution authorizing it to pass such an act." Whether or not the amendment could possibly be so construed we do not pass upon its effect even though respondent argues the unconstitutionality of the statute under the amended version.

Respondent argues that L.B. 1171 is in violation of Article VII, section 11, of the Constitution of Nebraska, in that it amounts to an appropriation from a public fund in aid of a sectarian or denominational educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof. Article VII, section 11, Constitution of Nebraska, was amended by the Constitutional Convention of 1920. The committee on education originally adopted the attitude that such aid should be denied to any educational institution which was not "exclusively controlled by the state." The motion was made that this be amended to read as it presently appears in the Constitution, "exclusively owned and controlled by the state." The proposer of the amendment stated his position as follows: "As far as I am personally concerned, I desire to have the Constitution prohibit any state aid under any guise to any educational institution other than the public school. It is not a difficult matter, if the Legislature sees fit to find an excuse in the interests of general welware, to make donations under the guise of military training or normal training or what not, in a private institution. I have absolutely no hostility to those institutions, but it will invariably bring on the kind of warfare that this state should stay clear from, if you mingle the state and church even to that extent."

Respondent argues: "We submit that if aid can be extended by a tuition grant of this nature, then the grant could be enlarged and the class of recipients could be enlarged until the state could be paying all tuition for all students in all private educational institutions in the state so long as the students were not pursuing a course of study leading to a degree of theology or divinity. We do not think this is within the intent of this constitutional provision."

The constitutional validity of an act of the Legislature is to be tested and determined, not by what has been or possibly may be done under it but by what the law authorizes to be done under and by virtue of its provisions. United Community Services v. The Omaha Nat. Bank (1956), 162 Neb. 786, 77 N. W. 2d 576. In that case we held that the Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly. Here the grant is not directly to a private school but rather to a student, but it must be used for tuition at a private school.

The following provisions from section 1 of L.B. 1171 are pertinent herein: "(2) The increasing costs of operating our independent colleges and universities have forced tuition increases which make freedom of choice in education difficult for many of the students of this state; * * * (4) A system of financial assistance to qualified residents of college age will enable them to attend qualified independent institutions of higher learning of their choice in this state." While the tuition payments are to be made to the students, they must be used in a private institution in this state.

It is a reasonable assumption that the intent is to indirectly benefit the private institutions. This is apparent when we consider section 5 of the act which indicates that the amount of the tuition grant to the student shall be based upon the charge of the institution over and above the amount of money he would spend for tuition had he attended the University of Nebraska at Lincoln.

In addition, it is to be noted section 6 provides that the state will look to the institution for any refunds that are made on the tuition grants should the student discontinue his attendance. It seems obvious that the Legislature recognized the fact that the student would merely be a conduit through which the funds would be funneled to the educational institution concerned.

The trial judge found the primary intent of the Legislature in enacting L.B. 1171 was to provide financial aid to private colleges and schools in Nebraska through tuition grants to the students attending those institutions, rather than to give financial assistance to resident students to enable them to attend an institution of their choice. He further noted that an examination of the legislative history and particularly the floor debate as well as the practical operation of the legislation indicates a primary concern for the continued solvency and operations of the institutions involved. In Norden Laboratories, Inc. v. County Board of Equalization (1973), 189 Neb. 437, 203 N. W. 2d 152, we held: "In the Legislature the record of a floor explanation or debate is legislative history, and it may be an extrinsic, secondary source in statutory interpretation."

In the debate on the bill Senator Carpenter said as follows: " '* * * we have a large number, not a large, a number of privately owned schools of all denominations who I think, as I recall, have about anywhere from 12-1500 vacancies in their dormitories and area of education in which they cannot fill. * * * Now if we don't do something for these private schools, they're going to have to close the doors to some of them.' " On another occasion Senator Carpenter said: " 'I would like to find some legal way in order to have the state make a contribution, either in the bill or any other area, in order to use up the unused parts of these private schools.' " Senator Johnson, one of the introducers of the bill, stated: " 'Mr. President, members of the legislature, it has been brought out that there are campuses

over the state where fine facilities, fine instructors, but they lack students.' " Senator Moylan stated: " 'Now it's not only a thing of keeping these colleges alive, it's the case of financial assessts (sic) to the state.' " It thus appears that the trial judge's finding with respect to the intent of the Legislature is adequately shown by the floor debate.

Relator argues that L.B. 1171 does not appropriate state funds to or in aid of institutions of learning not exclusively owned and controlled by the state and that Article VII, section 11, Constitution of Nebraska, was intended to prohibit only those appropriations made directly to private schools for their support and not those appropriations which aid students who attend such colleges. In Almond v. Day (1955), 197 Va. 419, 89 S. E. 2d 851, the Virginia court held a law for payment of tuition for orphans of war veterans at secondary schools and colleges approved by the state to be violative of the state's constitutional prohibitions against the appropriation of money to schools or institutions not owned or exclusively controlled by the state or subdivision thereof, or to any sectarian institution. The court interpreted "appropriation to" an institution to have reference to appropriations for the benefit of such an institution. It held that such appropriations violated the constitutional prohibition in question, even though payment was not made directly to the institution, stating that tuition fees go directly to the institution, "and are its very life blood."

The Supreme Court of Alabama, in Opinion of the Justices (Ala., 1973), 280 So. 2d 547, answered questions propounded by the Alabama House of Representatives concerning the constitutionality of a bill which provided for tuition grants to resident students attending private colleges and universities in Alabama. The Justices were of the opinion that the bill violated federal and state constitutional provisions insofar as it provided state funds to be used directly or indirectly for payment of tuition grants to students attending sec-

tarian schools. It is to be noted that the declaration of purpose of the Alabama act, like the act adopted by our Legislature, recited there were a number of accredited independent institutions whose facilities could be used effectively in the public interest by granting financial assistance to citizens of the state who chose to attend such colleges and by paying a portion of the tuition charges at such institution, thereby reducing educative costs to the taxpayers. The Alabama court further stated: "* * * we are of the opinion that the cumulative impact of the relationship between the State and church related institutions which is provided for in H.B. 247, involves 'an excessive entanglement' between the State and religion and would therefore be unconstitutional under the Religion Clauses of the First Amendment to the Federal Constitution, as well as its Alabama counterpart, Article 14, Section 263."

In Hartness v. Patterson (1971), 255 S. C. 503, 179 S. E. 2d 907, the South Carolina Supreme Court struck down a legislative enactment making public funds available to provide financial aid to students attending independent institutions of higher learning. The South Carolina act is very similar to our own. It provides tuition grants to students attending independent institutions of higher learning, creates a committee to administer the tuition grants, sets forth eligibility requirements for the students to receive the aid, and makes a tuition grant unavailable to any student enrolled in a course of study leading to a degree in theology, divinity, or religious education. It also sets forth the standards to be met by any participating independent institution of higher learning.

Quoting from the South Carolina case: "Under the terms of the Act, the tuition grant is made available to the student only after he has been accepted by or is registered in a particular eligible institution of his choice. After the tuition grant has been made, it is unlawful for the student to expend the funds for any purpose

other than in payment of his tuition at the institution he is authorized to attend under the tuition grant. It is conceded that the tuition grant is not made directly to the school, but is made to the student who is required to pay it to the school selected by him."

Section 3 of L.B. 1171 provides: "A tuition grant may be awarded to any resident of Nebraska who is admitted and in attendance as a full-time resident student at any independent institution and who established financial need." Section 6 of L.B. 1171, so far as material herein, provides: "If the student discontinues attendance before the end of any semester, or equivalent academic term, after receiving payment under the grant, the entire amount of any tuition refund due that student, up to the amount of any payments made under the annual grant, shall be paid by the independent institution to the State of Nebraska."

The holding of the South Carolina court in Harkness, *supra,* is as follows: "Use of public funds, under statute making such funds available to provide financial aid for students attending independent institutions of higher learning, to provide tuition grants to students attending participating religious institutions constituted 'aid' to such institutions within the meaning of, and prohibited by, article of Constitution prohibiting use of public money, directly or indirectly, to aid institutions of higher learning controlled by sectarian groups."

Miller v. Ayres (1972), 213 Va. 251, 191 S. E. 2d 261, involved statutes relating to tuition assistance loans at private institutions for collegiate or graduate education. The statutes provided that satisfactory scholastic achievement would be considered repayment of the loan. The court held the loans constituted gifts, and that since such gifts or grants may be made to students in sectarian institutions, they violate preceding provision of Constitution prohibiting state appropriation to schools and institutions of learning not owned or exclusively controlled by State or some subdivision thereof.

The South Dakota court in Synod of Dakota v. State (1891), 2 S. D. 366, 50 N. W. 632, 14 L. R. A. 418, expressly held that a constitutional prohibition of the appropriation of lands, money, or credit "to aid any sectarian school" applied to any such appropriation whether made as a donation or in payment for services rendered the state by said school, as in the case of payment of tuition for students being trained to teach in the common schools. The South Dakota court took the position that the payment of the plaintiff's university demand for tuition would be for the benefit of or to aid the university, although it was contended that it would be for services rendered to the state or to its students. The court stated that: "This contention, while plausible, is, we think, unsound, and leads to absurd results. If the state can pay the tuition of 25 students, why may it not maintain at the institution all that the institution can accommodate, and thereby support the institution entirely by state funds?"

In Committee for Public Education & Religious Liberty v. Nyquist (1973), 413 U. S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948, the Supreme Court had before it a New York law granting tuition reimbursement and tax benefits to the parents of elementary and secondary private school students. The court stated: "As Mr. Justice Black put it quite simply in Everson: 'No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.' 330 U. S. at 16.

"The controlling question here, then, is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result. * * * Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure

that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid — to perpetuate a pluralistic educational environment and to protect the fiscal integrity of over-burdened public schools — are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions. * * *

"First, it has been suggested that it is of controlling significance that New York's program calls for reimbursement for tuition already paid rather than for direct contributions which are merely routed through the parents to the schools, in advance of or in lieu of payment by the parents. The parent is not a mere conduit, we are told, but is absolutely free to spend the money he receives in any manner he wishes. * * * A similar inquiry governs here: if the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward or a subsidy, its substantive impact is still the same."

To the same effect is Sloan v. Lemon (1973), 413 U. S. 825, 93 S. Ct. 2982, 37 L. Ed. 2d 939, wherein it was said: "The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequences is to preserve and support religion-oriented institutions." See, also, Almond v. Day, 197 Va. 419, 89 S. E. 2d 851; Hartness v. Patterson, 255 S. C. 503, 179 S. E. 2d 907; Wolman v. Essex, 342 F. Supp. 399, affirmed 409 U. S. 808, 93 S. Ct. 61, 34 L. Ed. 2d 69; Kosydar v. Wolman, 353 F. Supp. 744, affirmed 413 U. S. 901, 93 S. Ct. 3062, 37 L. Ed. 2d 1021; Public Funds for Public

Schools of New Jersey v. Marburger, 358 F. Supp. 29; People ex rel. Klinger v. Howlett (1973), 56 Ill. 2d 1, 305 N. E. 2d 129.

Although these cases dealt with questions arising under the First Amendment to the Constitution of the United States, they specifically hold that tuition allowances from public funds to parents of students are, in effect, appropriations for, or in aid of, private schools, and as such are impermissible. Direct allowance of such tuition funds to the students as distinguished from their parents is immaterial. The same factors are present. It is a patent attempt to sanction by indirection that which the Constitution forbids.

That aid to private schools was intended by the Legislature is quite apparent from the following language comprising part of the declared purpose in section 1 of the act, to-wit: "The independent institutions of this state have the capacity to handle more students without increasing faculty or facilities and can do so at a reduced cost to this state with the help of tuition grants; * * *." Furthermore, as heretofore noted, declarations made on the floor of the Legislature during consideration of the act make this purpose obvious. Further, unless this was the intention, would the grant have been limited to only students who attend independent institutions in Nebraska? Limiting the grants to students attending independent institutions in Nebraska insures that all these funds will inure to the benefit of institutions not owned or controlled by the state.

Respondent contends that L.B. 1171 is invalid as being in violation of Article III, section 18, of the Constitution of Nebraska, which prohibits the granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchises whatever and which further provides that in all other cases where a general law can be made applicable, no special law shall be enacted. As we pointed out in United Community Services v. The Omaha Nat. Bank (1956), 162 Neb.

786, 77 N. W. 2d 576: "The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment.

"The Legislature may legislate in regard to a class of persons, but it cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes and enact different rules for the government of each."

There are two areas in which L.B. 1171 violates this constitutional provision: The first is with reference to students who arguably are to benefit from the tuition grants involved in this legislation; the other involves institutions where post high school training may be received. These two propositions as they appear in L.B. 1171, while somewhat related, are nevertheless separate and distinct points.

The students must be resident students of college age; they must attend one of the independent colleges within the state; and they must meet a financial need test, which incidentally is not a poverty or welfare test. The student must be domiciled in Nebraska and admitted to a private college in Nebraska within 5 years of his high school graduation. Years spent in military service, however, will not count against this 5-year limit.

It thus appears the class of students eligible to receive these benefits is somewhat restricted. All students who are admitted to private colleges may not participate. Those students who wait over 5 years before their admission are not eligible for grants in any event. No exception appears for sickness or complete lack of funds to make the basic payment upon tuition. Age alone cannot be claimed to be a factor inasmuch as military service is specifically exempted in computation of the

5-year period. Furthermore, no grant is permissible for students who meet the qualifications otherwise but who wish to attend private schools outside the state. The nature of the classification of the students appears to be primarily for the purpose of aiding the private institutions in the state rather than resident students.

If the purpose is to aid needy students in securing a post high school education, the classification is questionable in another regard. The training in the private schools is limited to the academic field. A student desiring to enter a private institution specializing in a vocational-type training is not eligible. Even if a student otherwise eligible is seeking vocational-type training in one of these authorized institutions, it appears he would not be eligible for the grant unless he is actually enrolled in a course of study which leads to an academic degree. It appears to us the law does not operate equally upon all individuals in the state but singles out a select few to whom a gift of taxpayers' money is to be made.

There is also a question as to the classification of the colleges, even assuming the law is not invalid because of the sectarian nature and private nature of the institutions concerned. Under the statute the school must either be an accredited school as that term is defined in the act or a school in existence at the time of the passage of the act and having a certain number of pupils. A reading of the floor debate indicates clearly that the purpose of the provision concerning a school in existence with at least 200 pupils was to permit John F. Kennedy College at Wahoo to participate in this benefit program. This is a sort of grandfather clause and does not require Kennedy College to become accredited. So long as it operates, it is eligible to participate. However, no other school in the future may so qualify. In fact, while it appears that the class is open insofar as church-related colleges are concerned, the class is really closed in all other respects. In view of the foregoing, we hold the

act is in violation of Article III, section 18, Constitution of Nebraska.

Respondent's cross-appeal urges L.B. 1171 violates the Establishment Clause of the First Amendment to the Constitution of the United States as made applicable to the states by the Fourteenth Amendment. The guarantee of the Establishment Clause of the First Amendment is protected against state infringement by the Fourteenth Amendment. Cantwell v. Connecticut (1940), 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A. L. R. 1352.

In Lemon v. Kurtzman (1971), 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745, the Supreme Court of the United States laid down a three-part test for a statute to pass constitutional muster when considered against the restrictions of the Establishment Clause. They are: First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and third, the statute must not foster an excessive government entanglement with religion.

We have heretofore referred to Committee for Public Education & Religious Liberty v. Nyquist (1973), 413 U. S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948, which covered a tuition grant program for tuition reimbursement for parents of children attending elementary or secondary nonpublic schools. In Sloan v. Lemon (1973), 413 U. S. 825, 93 S. Ct. 2982, 37 L. Ed. 2d 939, the Supreme Court held a Pennsylvania legislative enactment providing funds to reimburse parents for a portion of tuition expense incurred in sending their children to nonpublic schools was indistinguishable from Nyquist, and voided the statute.

A stipulation as to certain written policies of the various colleges and expected testimony of the presidents of the various colleges is a matter of record in this case. Of the independent institutions of higher education which resident students may attend to obtain grants, only two are not church related. All the others except two

require some courses in religion. Two of them require daily devotions or attendance at campus religious services. In the two which require no religious courses, members of the particular denomination predominate on the controlling board.

The stated purpose of L.B. 1171 is to make tuition grants to students attending institutions of higher education which are operated privately and not for profit. The purpose of the act is stated in section 1 thereof. It clearly applied only to independent colleges and universities. This includes those colleges and universities which are controlled or operated by religious groups. There is no attempt made in the bill to restrict the use of the tuition funds provided by the state solely to secular subjects. As suggested, all but four of the institutions require students to take some religious courses. It is to be noted that the only limit respecting religion appears in section 17 (1) of the act. This section provides that a student pursuing courses leading to a theological or divinity degree shall not be eligible to receive tuition grants. There is no restriction in the act that the proceeds received through these grants be limited to secular subjects, so obviously in some institutions these tuition grants finance sectarian subjects. This alone shows secular and sectarian subjects are so intertwined in and supported by the tuition grants that L.B. 1171 violates the Establishment Clause.

For the reasons given, we affirm the judgment of the District Court holding L.B. 1171 unconstitutional. We specifically find it in violation of Article III, section 18, and Article VII, section 11, of the Constitution of Nebraska. We also find L.B. 1171 unconstitutional under the Establishment Clause of the First Amendment to the Constitution of the United States, which question the trial court did not cover.

AFFIRMED.

CLINTON and MCCOWN, JJ., dissenting.

The majority opinion holds the statutes here involved

unconstitutional on three separate grounds, finding that they violate (1) Article VII, section 11, of the Constitution of Nebraska; (2) the First Amendment to the Constitution of the United States; and (3) Article III, section 18, of the Constitution of Nebraska. This seems to us to be a case of judicial overkill and while the finding based upon ground numbered (1) is essentially one of first impression so far as our own precedents are concerned and must necessarily stand or fall without directly supporting authority (although analogous cases from other jurisdictions support a finding of constitutionality), we feel that the findings on grounds (2) and (3) either disregard or misapply, or both, sound precedent of the Supreme Court of the United States which is the basic authority when the Constitution of the United States is to be construed. Ground (3) involves our state Constitution and relates essentially to a classification question and United States Supreme Court opinions on the issue are in principle applicable.

A statute essentially the same as the one we have under consideration here was considered by a three-judge court in the United States District Court for the District of Kansas in the case of Americans United for Separation of Church & State v. Bubb, —— F. Supp. —— (February 27, 1974). The opinion in that case collates the applicable principles from opinions of the Supreme Court of the United States. Because of the availability of this convenient collation, we will in some instances quote from the opinion in that case as well as the primary authority and sometimes adopt the approximate language of that opinion without specific citation.

We first deal with the question of constitutionality as it relates to Article III, section 18, of our own Constitution re "exclusive privileges" and the asserted invalid classification. The majority opinion seems to say: That the requirement that the students be (1) residents of Nebraska; (2) they meet certain financial tests; (3) that they must be admitted to the college within 5 years

of high school graduation, but the time in military service is excluded from those years; (4) that the act is not applicable to students who want to attend a private school outside the state; and (5) that the act does not apply to students seeking vocational type training, all make the classification invalid.

No authority whatever is cited. The limitations are patently related to one of the purposes of the act which are stated by the Legislature to be to relieve the load on the public university and at the same time to provide a freedom of choice to the student with a consequent benefit to the taxpayers of the state. Absent the possible prohibiting effect of Article VII, section 11, the object sought to be accomplished is within the legislative purview and the means the Legislature has adopted are not demonstrably irrelevant to this policy which it would be free to adopt. The finding of the majority to the contrary seems to us to be an arbitrary edict and fails to observe the applicable constitutional standard found in the following cases: Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469; Ferguson v. Skrupa, 372 U. S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93, 95 A. L. R. 2d 1347; Allied Stores of Ohio v. Bowers, 358 U. S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480.

We believe the matter will be seen in a clearer perspective if one were to in effect reverse the classification and assume that the Legislature had determined that the state had a great need for persons skilled in the vocational occupations, for example, the building trades; and that the state vocational schools could not accommodate the demand, and that to meet the need without expanding the state schools it authorized tuition aid to students to meet these needs. Surely the classification is not suspect because merely academic training is not included; nor because some financial need is a criteria. The Legislature can classify in accordance with the needs of the state and take necessary steps to meet those needs.

Adoption of a ground of decision based on classification, we believe, bodes ill for future cases involving classification questions. We doubt greatly the judicial wisdom of such a precedent.

In Americans United for Separation of Church & State v. Bubb, *supra,* the court held the classification valid, saying: "The law is well settled, however, that the equal protection clause of the Fourteenth Amendment does not deny a state the power to treat different classes of persons differently; what the clause does prohibit is legislation treating those statutorily imposed classes differently based upon criteria wholly unrelated to the objective of the statute. If the statutory classification is reasonable, and rests on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated are treated alike, there is no violation of the equal protection clause. Reed v. Reed, 404 U. S. 71 (1971); Dandridge v. Williams, 397 U. S. 471 (1970). While the Statute in question establishes a class of students limited to those attending private colleges, the Statute in no way discriminates against the class of students attending state colleges and universities. Any student attending a state institution of higher learning automatically receives state aid at least equal to the amount a student may receive under the tuition grant program. (This is true in our case also.) Admittedly two classes of college students exist, but both are treated similarly and thus the Statute creates no discrimination between the two classes.

"Assuming arguendo the Statute does produce unequal treatment, plaintiffs still have failed to show that the Statute bears no rational relationship to legitimate state purposes. As noted in Brown v. Board of Education, 347 U. S. 483, 493 (1954), 'education is perhaps the most important function of state and local governments.' And education is enhanced by the role private institutions play in raising national levels of knowledge, competence

and experience. Board of Education v. Allen, 392 U. S. 236 (1968). The State therefore has a legitimate interest in advancing the welfare of its college population and of its private educational institutions."

The majority opinion completely ignores the mandate of our own Constitution contained in Article I, section 4, which after the provision for freedom of worship, conscience, and the prohibition against compulsory attendance and support of any place of worship and the prohibition of discrimination on account of religious belief or lack of it, goes on to say: *"Religion, morality, and knowledge,* however, being essential to good government, it shall be the duty of the Legislature to *pass suitable laws* to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, *and to encourage schools and the means of instruction."* (Emphasis supplied.) The words in this section of the Constitution directing the passage of suitable laws to encourage schools certainly mean more than a mere statutory exhortation of encouragement. The term "pass suitable laws" can only mean laws which have an effect and which require implementation. This section of our Constitution cannot refer to the common schools of the state, the mandatory establishment of which is required by the specific provisions of Article VII, section 1, which reads: "The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years."

Let us now turn to the First Amendment argument. The majority opinion properly relies upon the three-pronged test of Lemon v. Kurtzman, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745, but, we believe, misapplies it. There is not the slightest evidence of intent to aid religion either in stated legislative purpose or in the stipulated evidence. The Supreme Court of the United States has repeatedly and consistently held that the First Amendment does not prohibit all contact between state and church. As Justice Black said in Zorach v.

Clauson, 343 U. S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952) (as paraphrased in Americans United for Separation of Church & State v. Bubb, *supra*): ". . . if all contact were prohibited between church and state policemen would not be allowed to help parishioners into their place of worship, prayers in our legislative halls would be prohibited, the proclamation making Thanksgiving Day a holiday would be unconstitutional, and all references to God running through our laws, our public rituals, and ceremonies would be flouting the First Amendment."

The interpretations of the Supreme Court of the United States indicate that the Establishment Clause does not demand separation in all respects. For example, New York City's public schools were permitted to release during school time those students who wished to attend religious courses operated outside the school building by a duly constituted religous body. Zorach v. Clauson, *supra*. New Jersey was allowed to spend tax dollars to pay the bus fares of parochial school pupils. Everson v. Board of Education, 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711. New York was permitted to order local public school authorities to lend textbooks free of charge to students in grades 7 through 12 attending parochial schools. Board of Education of Central School Dist. No. 1 v. Allen, 392 U. S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968). And South Carolina was allowed to issue revenue bonds which provided to a Baptist controlled college financial assistance in the construction of additional buildings and facilities. Hunt v. McNair, 413 U. S. 734, 93 S. Ct. 2868, 37 L. Ed. 2d 923.

The United States Supreme Court cases, including Hunt v. McNair, *supra*, have all reiterated: "Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. E.g., Bradfield v. Roberts, 175 U. S. 291 (1899); Walz v. Tax Comm'n, 397 U. S.

664 (1970); Tilton v. Richardson, supra. Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

"Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. In Tilton v. Richardson, supra, the Court refused to strike down a direct federal grant to four colleges and universities in Connecticut. Mr. Chief Justice Burger, for the plurality, concluded that despite some institutional rhetoric, none of the four colleges was pervasively sectarian, but held open that possibility for future cases: 'Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics.' 403 U. S., at 682." Hunt v. McNair, *supra.*

The cases have all pointed out that the mere fact that a college is church related does not bar aid and that a mere formalistic relationship does not render all aid in violation of the Establishment Clause. Hunt v. McNair, *supra,* note 8. The burden of proof of showing the extent of church relationship in applying the three-pronged test is upon the plaintiffs. Hunt v. McNair, *supra,* note 8; Board of Education of Central School Dist. No. 1 v. Allen, *supra.*

In our case the legislative purpose is clearly a secular one: To relieve the burden on the public institutions by enabling qualifying students to attend the private school of their choice. A tuition grant on the college level is not a sectarian purpose. Committee for Public Education & Religious Liberty v. Nyquist, 413 U. S. 756,

93 S. Ct. 2955, 37 L. Ed. 2d 948; Americans United for Separation of Church & State v. Bubb, *supra.*

Does the present act have the primary effect of advancing religion? The Nyquist, Sloan, and Levitt cases (all referred to in Bubb) all involved elementary and secondary schools with a sectarian mission. Here the issue is whether the colleges involved have a sectarian mission. To determine that issue we must look at the evidence. This is what the Federal District Court did in Americans United for Separation of Church & State v. Bubb, *supra,* in accordance with the directions of the Supreme Court of the United States in Hunt v. McNair, *supra.*

The Supreme Court of the United States recognizes and has repeatedly reiterated that aid to education does not necessarily have the same effect in church related institutions of higher learning as it does in parochial and elementary schools. Walz v. Tax Commission, 397 U. S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697; Tilton v. Richardson, 403 U. S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790; Hunt v. McNair, *supra.* The Kansas federal court in the case referred to summarizes the criteria laid down by the Supreme Court of the United States in making such determinations under the following considerations: (1) Religious restrictions on admission. (2) Required attendance at religious activities. (3) Required obedience to doctrine and dogmas of a particular faith. (4) Required attendance at courses on theology or doctrine of a particular faith. (5) Are the colleges an integral part of the religious mission of the church sponsoring them. Mere opportunity for involvement is not disabling. (6) Is a substantial purpose the inculcation of religious values. (7) Are religious restrictions imposed on faculty appointments.

Accordingly the court would be required to examine the evidence in this case and make a separate determination with reference to each of the schools involved. Our own examination would indicate that two or perhaps

three of the schools involved would be debarred and that the others are not. In Tilton, at p. 687, the United States Supreme Court concluded: "In short, the evidence shows institutions with admittedly religious functions but whose predominate higher education mission is to provide their students with a secular education." In Tilton, direct aid to church-related colleges was upheld, the court saying: "There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.' . . . By their very nature, college and post-graduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal discipline. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students." We note here that students studying for the ministry are excluded from tuition aid under the act.

The entanglement criteria is, in our judgment, not at all applicable in this case.

We will now turn to the central question and that is the application of Article VII, section 11, of our own Constitution. If, of course, the plan which the statute authorizes is not "in aid of" then the First Amendment issue is effectively disposed of as is the Article VII, section 11, question.

The sole possible benefit which can accrue to any of the institutions in question is the possibility that the statute will get for them more students. The plan does not relieve any of the institutions of any portion of their costs or expense. The evidence shows that the cost of educating a student in each of the colleges in question exceeds the tuition charge by a substantial amount. The tuition grant which an eligible student will receive, to-

gether with the amount paid by him from his own funds or other sources, does not in any case equal the cost to the institution of educating the student. The institution gets no more than it would in any event. It is not aided in the constitutional sense.

We think the point can be well made by analogizing the method under which the tuition grants would operate to the manner in which the State of Nebraska provides education for students in veterinary medicine and surgery. The state has no veterinary school but it does appropriate to the University of Nebraska a sum of money known as "(8) the Veterinary School Fund." § 85-122, R. R. S. 1943. The University then contracts with out-of-state veterinary schools to accept Nebraska residents for training at the same tuition charges made to their own resident students. The University of Nebraska then makes up this difference from the Veterinary School Fund. A part of this package is reciprocity to other schools in areas of training which their own schools do not afford.

It seems to us that the fact that the contracts are made by the University of Nebraska and paid from tax funds cannot change the color of the horse. Neither can the fact that services are exchanged affect the nature of the transaction.

We do not believe that this procedure for providing veterinary education for Nebraska residents violates the "in aid of" provision of our Constitution merely because a school outside the state, which of course is "not exclusively owned and controlled by the state or any subdivision thereof," is enabled to better perform its function or because the State of Nebraska accomplishes a desirable result using the facilities of out-of-state schools. The benefit accrues to the state and its people just as it does in the case of the tuition aid program we are considering. Yet if the act we are considering is unconstitutional, so is the appropriation to

the "Veterinary School Fund," the proceeds of which go directly to schools "not exclusively owned and controlled by the state or a governmental subdivision thereof." We believe in the constitutionality of that appropriation and abhor the precedent of the majority opinion which would require, if the issue is ever raised, a declaration of the unconstitutionality of the appropriation for veterinary training if we are to adhere to the principle of stare decisis. This, of course, we must do in cases which are not distinguishable if we are to be governed by principle and are not ourselves to be considered lawless.

The appellant's brief sets forth pertinent authority on the "in aid of" question and we quote directly from the brief: ". . . in Community Council v. Jordan, 102 Ariz. 448, 432 P. 2d 460 (1967), the Arizona Supreme Court measured that state's constitutional prohibition of appropriations 'in aid of' sectarian organizations against a program whereby the State Department of Welfare provided matching funds of $1.00 (40%) for every $2.50 spent by the Salvation Army in giving emergency relief to needy residents. In holding that the 40% reimbursement did not constitute the type of 'aid' that was forbidden by the Arizona Constitution, that Court said:

" 'In order to fulfill the original intent of the constitution, the word "aid" like the word "separation" must be viewed in the light of the contemporary society, and not strictly held to the meaning and context of the past.

" '. . . The encouragement by partial reimbursement of any person or an organization to spend more than it will receive is hardly "aiding" that person or organization on to a healthy financial future and in fact, may tend to preclude any future at all.' 432 P. 2d at 466. . . .

"The interpretation given to the term 'aid' by the Arizona Court in Jordan, supra, has been expressed by

other jurisdictions as well, particularly in tuition reimbursement cases. In State ex rel. Atwood v. Johnson, 170 Wis. 251, 176 N. W. 224 (1920) the Supreme Court of Wisconsin upheld the Wisconsin Educational Bonus Law, an Act that would provide financial assistance to servicemen who wished to continue their education after discharge. The Act provided that all institutions, public or private, sectarian or non-sectarian, which enrolled qualifying veterans would be reimbursed by the state for the actual increase of costs incurred through the attendance of such students. Opponents of the bill challenged its constitutionality on the ground that it 'gives financial aid to religious schools.' 176 N. W. at 224. To this the Wisconsin Court replied:

" 'The contention that financial benefit accrues to religious schools from the Act is untenable. Only actual increased cost to such schools occasioned by the attendance of beneficiaries is to be reimbursed. *They are not enriched by the service they render. Mere reimbursement is not aid.*' 176 N. W. at 228 (emphasis added)."

The case of Synod of Dakota v. State, 2 S. D. 366, 50 N. W. 362, 14 L. R. A. 418, cited in the majority opinion, is not applicable because there the state was paying 100 percent of the cost of the education.

We continue from appellant's brief: "The 'less than cost' doctrine has also been adopted by the Illinois Supreme Court in interpreting that part of the Illinois Constitution which prohibits state 'aid' to sectarian institutions. In Dunn v. Chicago Industrial School for Girls, 280 Ill. 613, 117 N. E. 735 (1917) that Court held that Illinois' constitutional prohibition on 'aid' to sectarian institutions was not violated when Cook County appropriated and paid $15 per month for each girl committed by the juvenile court to the Chicago Industrial School for Girls, a school conducted by the Religious Sisters of Mercy. This was so because the

amount paid by the state was less than it would cost the state if it were to send the girls to the State Training School for Girls ($28.88/month) and the amount paid was also 'less than the cost of food, clothing, training, medical care, *and tuition* furnished to the wards of the county' by the institution. 117 N. E. at 736 (emphasis added). Thus, no prohibited 'aid' resulted from such payments.

"The Supreme Court of Oklahoma has adopted this same point of view. In Murrow Indian Orphans Home v. Childers, 197 Okla. 249, 171 P. 2d 600 (1946), it was held that state payments to a Baptist children's home were not in violation of the Oklahoma constitutional prohibition against appropriations 'directly or indirectly, for the support or benefit of' a church or sectarian institution. The record demonstrated that the State made annual payments of $70 per child, but the actual per capita operating costs of the home were from $225 to $250 per child. The Oklahoma court determined that the State was not only fulfilling its duty by such payments, but that it was also receiving a substantial element of return in such an arrangement. As a result, the payments were deemed to be relevant 'to the affairs of the State' and not offensive to the state constitution."

This seems to us clearly a case where the proposition (which we have up to now rather consistently adhered to), that where there is a reasonable doubt as to constitutionality the statute must be upheld is applicable. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N. W. 2d 236. We would find the statutes in question constitutional.

STATE OF NEBRASKA, APPELLEE, V. RAMON REYES, APPELLANT.

219 N. W. 2d 238

Filed June 20, 1974. No. 39339.

1. **Post Conviction.** The Post Conviction Act specifically authorizes the trial court to examine the files and records and to determine whether or not a prisoner may be entitled to the relief he seeks. If the trial court finds from such examination that the proceeding is without foundation, an evidentiary hearing may be properly denied.
2. **Post Conviction: Right to Counsel: Evidence.** A claim of error on the ground of ineffective assistance of counsel must be supported by a record showing that counsel's assistance was so grossly inept as to jeopardize the rights of the defendant and shock the court by its inadequacy.

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

Alan Saltzman, for appellant.

Clarence A. H. Meyer, Attorney General, and Terry R. Schaaf, for appellee.

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

SPENCER, J.

Defendant appeals from the denial of his motion to vacate the judgments and sentences entered on his pleas of guilty to second-degree murder and assault with intent to inflict great bodily injury. His pleas were entered pursuant to a plea bargain. No appeal was taken from his sentences which were the sentences recommended in the plea bargain. The court reviewed the motion, files, and records, and denied defendant's motion for appointment of counsel and his motion to vacate the judgments and sentences without granting an evidentiary hearing. Essentially the question here is whether an evidentiary hearing was necessary to determine if defendant's pleas were voluntarily and intelligently

made and to determine if he had effective assistance of counsel. We affirm.

Defendant alleges facts which contradict the record. Defendant's allegations that his pleas were involuntary and his counsel ineffective are premised on his belief that he had a colorable claim of self-defense.

Upon arraignment, defendant attempted to plead no contest but the county attorney would not accept that plea. The county attorney advised the court that he entered the plea bargain with the feeling that he could produce evidence that the defendant intentionally, purposely, and with design killed the victim; that the bullets recovered from the body were fired from the gun which the defendant surrendered to the police; and that an innocent bystander was struck by a bullet from defendant's gun. The county attorney because of the strength of the evidence would not agree to a plea of no contest. Defendant pled guilty.

A part of the record reviewed by the court herein included defendant's signed statement. It indicates after defendant met the victim in the tavern he ran back to his car to obtain the gun. After he obtained the gun and moved 10 to 15 feet from the car he shot the victim who was then standing by the corner 15 feet away. The victim was shot five times. At that time the victim had two six-packs of beer, one in each hand. Defendant also shot at the victim when the victim was running away, but didn't think he hit him. When defendant was asked the question, "How many times did you shoot Ballesteros before he fell?" he answered, "He didn't fall to the ground but I shot him two or three times when he stooped down before he run." Defendant did not think he shot Ballesteros five times. He thought he only hit him with one shot.

Reviewing the record, we agree with the trial judge the record shows defendant entered his pleas of guilty voluntarily, understandingly, and intelligently. "The

Post Conviction Act specifically authorizes the trial court to examine the files and records and to determine whether or not a prisoner may be entitled to the relief he seeks. If the trial court finds from such examination that the proceeding is without foundation, an evidentiary hearing may be properly denied." State v. LaPlante (1970), 185 Neb. 816, 179 N. W. 2d 110.

In State v. Oziah (1971), 186 Neb. 541, 184 N. W. 2d 725, we held: "A claim of error on the ground of ineffective assistance of counsel must be supported by a record showing that counsel's assistance was so grossly inept as to jeopardize the rights of the defendant and shock the court by its inadequacy."

This record will not support a claim of ineffective assistance of counsel. Defendant was facing a charge of first-degree murder. While the trial court could have submitted lesser-included offenses, first-degree murder was a very definite possibility on this record. Even if the jury would have found the defendant guilty of second-degree murder he still could have been sentenced to life imprisonment. § 28-402, R. R. S. 1943.

Defendant's counsel was able to obtain a plea agreement with the county attorney for a recommendation of a 20-year sentence on the second-degree murder offense and a 5-year sentence on the assault offense, with the further recommendation that both sentences run concurrently. The county attorney made these recommendations and the trial court accepted them and sentenced defendant accordingly. Defense counsel cannot be faulted on this score.

For the reasons given, the District Court was not in error in denying defendant relief under the Post Conviction Act, and the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN L. PENN, APPELLANT.
219 N. W. 2d 445

Filed June 20, 1974. No. 39364.

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 Terry R. Schaaf, for appellee.

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

BOSLAUGH, J.

The defendant pleaded guilty to unlawful possession of marijuana weighing 1 pound or less and was fined $300. He appeals, contending the sentence was excessive.

The statute provides for a fine of not more than $500 or imprisonment in the county jail for not more than 7 days or both. § 28-4,125 (4), R. S. Supp., 1973. The sentence was well within the statutory limit.

Although the defendant has no prior criminal record, the presentence report shows the defendant had been using drugs and other stimulants for some time. The record shows no abuse of discretion by the trial court.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MAURICE SCOTT, APPELLANT.
219 N. W. 2d 445

Filed June 20, 1974. No. 39401.

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 Melvin K. Kammerlohr, for appellee.

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

NEWTON, J.

In this case defendant was charged with first degree arson. Following plea bargaining the charge was reduced to second degree arson and a plea of guilty entered. A sentence of not less than 1 year nor more than 2 years was imposed. On appeal defendant asserts the sentence is excessive.

Section 28-504.02, R. R. S. 1943, fixes the penalty for second degree arson at 1 to 10 years. The defendant was 17 years of age. He had previously been found guilty in juvenile court of assault with intent to inflict great bodily injury as the result of a shooting, was subsequently expelled from school for assaulting a principal, arrested for disturbing the peace, for concealing stolen property, and for damaging a door to a woman's apartment. In the present instance defendant participated in scattering gasoline and setting fire to an apartment house.

The sentence given was minimal in nature and it is evident there has not been an abuse of discretion. See State v. Medina, 189 Neb. 765, 204 N. W. 2d 785.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. NARCISSE MERRICK, JR., APPELLANT.

219 N. W. 2d 232

Filed June 20, 1974. No. 39402.

1. **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.

2. ———: ———. A court may properly sentence a convicted criminal to consecutive terms in the Penal and Correctional Complex for separate offenses.

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 Melvin K. Kammerlohr, for appellee.

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

SPENCER, J.

Defendant, pursuant to a plea bargain, entered pleas of nolo contendere to a charge of escape from custody and a charge of assault with intent to commit rape. A charge of assault with intent to inflict great bodily injury was dismissed. Defendant was sentenced to 1 year on the escape offense, and 3 to 5 years on the offense of assault with intent to commit rape. These sentences were imposed consecutively with each other and with the sentence defendant was serving prior to his escape. The only issues raised on appeal are whether the trial court erred in imposing consecutive sentences and whether the sentences imposed are excessive. We affirm.

The statutory confinement penalty for escape or breaking custody is not less than 1 year nor more than 10 years. § 28-736, R. R. S. 1943. The statutory penalty for assault with intent to commit rape is not more than 15 nor less than 2 years. § 28-409, R. R. S. 1943. It is evident that defendant received a minimum penalty on the charge of escape.

In the attempt to commit rape, the defendant used a knife. The victim, an elderly lady, sustained knife

wounds requiring 42 stitches. She also sustained some permanent disability as a result of the assault. The attempt was frustrated by the appearance of two family members. It would seem a sentence of 3 to 5 years would be a minimum one under the circumstances.

Defendant had no prior felonies except the one for which he was serving time when he broke custody. A sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record. State v. Zeigler (1974), 191 Neb. 322, 215 N. W. 2d 80. On this record it is apparent that the trial judge did not abuse his discretion.

Defendant contends that the trial court erred in refusing to have the imposed sentences run concurrently rather than consecutively. While the District Court may impose concurrent sentences, it is under no obligation to do so. This court has previously held a court may properly sentence a convicted criminal to consecutive terms in the penitentiary for separate offenses. Culpen v. Hann (1954), 158 Neb. 390, 63 N. W. 2d 157.

In view of the minimum sentences imposed on defendant we find the trial judge properly imposed consecutive rather than concurrent sentences.

For the reasons stated, the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARTIN JEROME WADE, APPELLANT.

219 N. W. 2d 233

Filed June 20, 1974. No. 39473.

1. **Criminal Law: Sentences: Post Conviction.** Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief.
2. **Judgments: Post Conviction.** Relief under the Post Conviction Act is limited to cases in which there was a denial or infringe-

ment of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States.

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

Martin Jerome Wade, pro se.

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

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

BOSLAUGH, J.

The defendant was originally charged in separate counts with possession with intent to distribute cocaine and heroin. Pursuant to a plea bargain the second count in the information was dismissed. The defendant then entered a plea of guilty to possession of cocaine with intent to distribute and was sentenced to imprisonment for 5 to 6 years. Later this sentence was set aside, pursuant to L.B. 261 which amended section 28-4,125, R. S. Supp., 1972, effective September 2, 1973, to provide for a sentence of 1 to 10 years for a first offense. § 28-4,125 (2), R. S. Supp., 1973. The defendant was resentenced to imprisonment for 3 to 5 years.

The defendant now seeks post conviction relief on the ground the sentence is in violation of section 83-1,105 (1), R. S. Supp., 1972, because the minimum sentence fixed by the court is more than one-third of the maximum sentence fixed by the court.

Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. State v. Birdwell, 188 Neb. 116, 195 N. W. 2d 502. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the

Constitution of the United States. State v. Bullard, 187 Neb. 334, 190 N. W. 2d 628.

The defendant's contention was determined adversely in State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793. In that case we determined the limitation upon the minimum term is the sentence provided by law and not the maximum sentence imposed by the court. See, also, State v. Deloa, 191 Neb. 290, 214 N. W. 2d 621.

The judgment of the District Court is affirmed.

AFFIRMED.

BRODKEY, J., not participating.

STATE OF NEBRASKA, APPELLANT, V. EARL E. WEIDNER, APPELLEE.

219 N. W. 2d 742

Filed June 27, 1974. No. 39288.

Intoxicating Liquors: Motor Vehicles: Criminal Law. Section 39-727, R. S. Supp., 1972, defines but one offense, namely the operation of a motor vehicle while (1) under the influence of alcoholic liquor, (2) being under the influence of any drug, or (3) having ten hundredths of one percent or more by weight of alcohol in the body fluid.

Appeal from the District Court for Burt County: WALTER G. HUBER, Judge. Exception sustained.

Ralph M. Anderson, Jr., for appellant.

Moyer & Moyer, for appellee.

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and BUCKLEY, District Judge.

BUCKLEY, District Judge.

This is an error proceeding brought by the county attorney of Burt County, Nebraska, pursuant to section 29-2315.01, R. R. S. 1943.

In 1966, the defendant was convicted in Platte County,

Nebraska, of operating a motor vehicle while under the influence of alcoholic liquor. On May 8, 1973, he was convicted in the county court of Burt County for operating a motor vehicle while having ten hundredths of one percent or more by weight of alcohol in his blood. For purposes of the sentence, the county court found that the second conviction was for a second offense, but upon appeal, the District Court for Burt County modified the judgment of the county court by finding and adjudging that the defendant's two convictions were for two separate offenses and that, therefore, the second conviction was for a first offense.

By this proceeding the Burt county attorney asks us to determine whether section 39-727, R. S. Supp., 1972, contains only one crime and whether "operating under the influence of alcoholic liquor or of any drug" and "operating with ten hundredths of one percent of alcohol in his blood" are the same offenses with regard to second and subsequent convictions under the statute.

The defendant moves for a dismissal of the appeal because the application of the county attorney for error proceedings was prematurely made. Defendant was convicted by the District Court on August 24, 1973. The application for error proceedings was presented to the District Court on September 7, 1973, and to this court on September 21, 1973. Defendant was sentenced October 2, 1973, and his motion for new trial was overruled on January 8, 1974.

Section 29-2315.01, R. R. S. 1943, provides in part that: "Such application shall be presented to the trial court within twenty days after the final order is entered in the cause, . . . The county attorney shall then present such application to the Supreme Court within one month from the date of the final order . . ." We have stated before that in a criminal case the final order made by the court below must include a sentence and that the defendant may appeal from the overruling of

the motion for new trial or the imposition of sentence, whichever is the later. Kennedy v. State, 170 Neb. 193, 101 N. W. 2d 853. In State v. Taylor, 179 Neb. 42, 136 N. W. 2d 179, we said: "This court has held repeatedly that an order is final only when no further action is required to dispose of the cause pending and that when the cause is retained for a new trial or further action to dispose of it, the order is interlocutory and not final." In State v. Taylor, *supra,* the county attorney brought error proceedings after the District Court sustained a motion for a new trial. Finding that the order granting a new trial was not final and quoting with approval from State v. Hutter, 145 Neb. 312, 16 N. W. 2d 176, we said that "'. . . it would appear to be the better rule that generally this court require that a final order or judgment completely disposing of the case shall have been entered below before we will decide any questions therein presented, *unless it is clearly shown by the record that the decision can in no manner reverse or affect the case in which the bill was taken.*'" (Emphasis supplied.)

Here, if the defendant had been granted a new trial, then clearly the error proceedings must be dismissed, because such an order is not final, and such proceedings would constitute a piecemeal review of the case. State v. Taylor, *supra.* But the defendant's motion for new trial was overruled and he did not appeal. Therefore, any decision on this error proceeding cannot affect the defendant, who has been placed in jeopardy. State v. Taylor, *supra;* § 29-2316, R. R. S. 1943.

The proper practice would be to institute error proceedings after sentence is imposed or the motion for new trial is overruled, whichever is later. However, since our decision here will not affect the defendant and will govern only pending or future similar cases, the motion to dismiss is overruled.

Before 1971, the relevant section of the statute in

question provided: "Any person who shall operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug shall be deemed guilty of a crime and, upon conviction thereof, shall be punished as follows: . . . ." There followed prescribed penalties depending upon whether the conviction was for a first, second, or third or subsequent offense. § 39-727, R. R. S. 1943.

In 1949, the Legislature enacted section 39-727.01, R. S. Supp., 1949, which provided that in any criminal prosecution for a violation of section 39-727, R. S. Supp., 1949, evidence of the weight of alcohol in the defendant's body fluid gave rise to rebuttable presumptions. If the weight was 0.05 percent or less, the presumption was that the defendant was not under the influence of intoxicating liquor; if the weight was in excess of 0.05 but less than 0.15, there was no presumption at all; if the weight exceeded 0.15, the defendant was presumed to be under the influence of intoxicating liquor. Laws 1949, c. 116, § 2, p. 311.

In 1963, the Legislature enacted this provision: "It is unlawful for any person to drive or be in actual physical control of any motor vehicle within this state when that person has fifteen-hundredths of one per cent or more by weight of alcohol in his or her blood as shown by chemical analysis of that person's blood, spinal fluid, breath, saliva, or urine." Laws 1963, c. 229, § 4, p. 717; § 39-727.14, R. S. Supp., 1963. In 1969, this statute was amended to reduce the prescribed weight of alcohol from 0.15 percent to 0.10 percent. Laws 1969, c. 319, § 2, p. 1160.

Then in 1971, section 39-727, R. R. S. 1943, was amended to read: "Any person who shall operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or while having ten-hundredths of one per cent by weight of alcohol in his blood . . . shall be deemed

guilty of a crime. . . ." At the same time, the Legislature repealed section 39-727.01, R. S. Supp., 1969, dealing with presumptions on weight of alcohol in the body fluid, and section 39-727.14, R. S. Supp., 1969, making it unlawful to drive with, first, 0.15, later 0.10 or more percent weight of alcohol in the blood. Laws 1971, L.B. 948, § 8. Section 39-727.14, R. S. Supp., 1969, was, in effect, transferred to section 39-727, R. S. Supp., 1971.

The defendant argues that when the Legislature added "*or* while having ten-hundredths of one percent by weight of alcohol in his body fluid," a separate and distinct offense was defined in section 39-727, R. S. Supp., 1971. (Emphasis supplied.) He reasons that the facts required to prove the classic indicia of being under the influence of alcoholic liquor — slurred speech, unsteady gait, slowed reflexes, etc. — and the facts required to prove the existence of ten-hundredths of one percent or more by weight of alcohol in the body fluid are totally different and that a person may have the required amount of alcohol in the body fluid and not be "under the influence," and vice-versa. He claims that the conjunctive rather than disjunctive use of the word "or" further demonstrates this.

We have said: "The distinctive characteristics of all liquors is that they contain alcohol, the basis of all intoxicating drinks; that they are capable of being consumed as a beverage; and that when so used, they will produce intoxication to some extent in the usual and common acceptation of the term." Franz v. State, 156 Neb. 587, 57 N. W. 2d 139. See, also, O'Neill v. Henke, 167 Neb. 631, 94 N. W. 2d 322.

In Danielson v. State, 155 Neb. 890, 54 N. W. 2d 56, we approved this instruction: "The meaning of the term 'under the influence of alcoholic liquor' as applied to a person operating a motor vehicle is, if the alcoholic liquor has so far affected the nerves, brain and muscles of the operator of a motor vehicle so as to impair to

any appreciable degree his ability to operate his motor vehicle in the manner that an ordinary prudent and cautious man, in full possession of his faculties would operate the same, then the operator of said motor vehicle is under the influence of alcoholic liquor."

We need only note the amount of motor vehicle travel in Nebraska and the public concern for safety on our highways to conclude that the operation of a motor vehicle, after ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner, is a wrong injurious to the public which the State in its police power may declare to be a crime and punish accordingly. See Smith v. State, 124 Neb. 587, 247 N. W. 421.

We find the Legislature intended that having ten-hundredths of one percent or more by weight of alcohol in the body fluid appreciably impairs the ability to operate a motor vehicle. It should be noted that we do not pass on the wisdom of the Legislature in setting the prohibited percentage of alcohol by weight at that level, but only its intended effect.

If the Legislature did not intend that the ingestion of the minimum weight of alcohol prescribed will appreciably impair the ability to operate a motor vehicle, then it has not defined a crime at all, a patently unreasonable interpretation. "A statute subject to interpretation is presumed not to have been intended to produce absurd consequences, but to have the most reasonable operation that its language permits." 73 Am. Jur. 2d, Statutes, § 265, p. 434. By specifying the amount of alcohol in percentages of weight of body fluid, the Legislature simply described in an additional way the same unlawful act — driving while under an unnatural influence.

In Commonwealth v. Bishop, 182 Pa. Super. 151, 126 A. 2d 533, the same question was presented regarding

the Pennsylvania statute, which prohibited the operation of a motor vehicle "while under the influence of intoxicating liquor, or any narcotic drug or habit producing drug." The court there said: " 'Here the legislature has not defined three separate crimes; it has denounced one act committed as a result of three different though similar activating conditions. The Act does not define three separate and distinct offenses, i.e., first, operating a motor vehicle under the influence of intoxicating liquor; second, operating under the influence of a narcotic; third, operating under the influence of a habit producing drug. Only one crime is proscribed, i.e., operating a motor vehicle while under the influence of substances which impair the mental and physical faculties of the operator, an impairment produced by means of the ingestion of one or two or all of the substances mentioned. *The gravamen of the offense, the act which the law denounces, is the result, the influence produced by the substances and the operation of a motor vehicle under that influence.*' " (Emphasis supplied.)

In Uldrich v. State, 162 Neb. 746, 77 N. W. 2d 305, it was contended that a different portion of the statute involved here, "to operate or be in the actual physical control of," defined two separate offenses, the word "or" being disjunctive. There we said: "In Phillips v. State, 154 Neb. 790, 49 N. W. 2d 698, this court, quoting from Smith v. R. F. Brodegaard & Co., 77 Ga. App. 661, 49 S. E. 2d 500, said: 'The word "or", when used not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the same result, states but a single ground, and not the alternative.' 46 C. J., 1125(4). This rule of construction has been recognized and applied by our courts in both criminal cases and civil cases." (Citing cases.)

"In Poppe v. State, 155 Neb. 527, 52 N. W. 2d 422, this

court, in speaking with reference to section 39-727, R. S. Supp., 1949, which is now section 39-727, R. S. Supp., 1955, said: 'It is noted that the statute defines one crime.' "

We adopt the reasoning in Commonwealth v. Bishop, *supra,* and conclude that section 39-727, R. S. Supp., 1972, defines but one offense, namely, the operation of a motor vehicle while under an unnatural influence. This single unlawful act can be the result of three different conditions: (1) Being under the influence of alcoholic liquor, (2) being under the influence of any drug, or (3) having ten-hundredths of one percent or more by weight of alcohol in the body fluid. It matters not that the facts evidencing each of the three conditions may well be different. Thus, we conclude that any conviction under section 39-727, R. S. Supp., 1972, is a conviction for the same offense.

The judgment of the District Court that defendant's second conviction was for a first offense was erroneous and the exception of the county attorney is sustained.

EXCEPTION SUSTAINED.

RAYNARD RUSKAMP ET AL., APPELLEES, V. HOG BUILDERS, INC., A CORPORATION, ET AL., APPELLANTS.
219 N. W. 2d 750

Filed June 27, 1974. No. 39317.

1. **Sales: Warranty: Vendor and Purchaser.** Where the seller at the time of contracting has reason to know a particular purpose for which the goods are required, and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under section 2-316, U. C. C., an implied warranty that the goods shall be fit for such purpose.
2. **Sales: Warranty: Vendor and Purchaser: Customs and Usages.** To exclude or modify an implied warranty of fitness, the exclusion must be a writing and conspicuous, except that an

implied warranty can also be excluded or modified by course of dealing, or course of performance, or usage of trade.

3. **Sales: Warranty: Vendor and Purchaser.** Warranties, whether express or implied, shall be construed as consistent with each other and as cumulative wherever such construction is reasonable. Expressed warranties displace inconsistent implied warranties, other than an implied warranty of fitness for a particular purpose.
4. **Sales: Warranty: Vendor and Purchaser: Animals.** The old rule that there is no implied warranty of soundness in the sale of animals where the unsoundness is hidden, unknown to the seller, and difficult to discover, is no longer in effect where there is an implied warranty of fitness for a particular purpose under section 2-315, U. C. C.
5. ———: ———: ———: ———. Where a seller sells animals for the purpose of breeding and raising young and improving the quality of a herd, knowing that the buyer is buying the animals for such purposes and is relying on the seller's skill or judgment to select or furnish suitable animals, there is an implied warranty that the animals are reasonably fit for such purposes and that they are not infected with a disease which substantially destroys their value for such purposes.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

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

Marks, Clare, Hopkins, Rauth & Garber, for appellees.

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

MCCOWN, J.

This is an action for damages for breach of warranty in connection with the sale of 22 breeding gilts purchased by plaintiffs Ruskamp from one of the defendants, Hog Builders, Inc. The jury returned a verdict for the plaintiffs for $14,500. Defendants appeal.

The plaintiffs live on a farm near Dodge, Nebraska, and have raised hogs for 20 years. In January 1968, at the invitation of a representative of defendant, Hog

Builders, Inc., Mr. Ruskamp attended a sales meeting sponsored by the defendant to familiarize potential customers with its product. The defendant made a slide presentation promoting the hybrid hogs the defendant was offering for sale, which showed the conditions under which the hogs were produced. A question and answer period followed, during which Ruskamp asked if the defendant's hogs were free of rhinitis. He was assured that they were. Copies of the defendant's printed warranties were available at the meeting. There were express warranties that the animals will have been vaccinated for erysipelas and leptospirosis and that they will have passed a negative test for brucellosis and/or originate from defendant's brucellosis-free herd. Defendant's purchase order form also contained a provision that the written certificate of vaccination would also cover hog cholera. Neither the guarantee form nor the purchase order contained any disclaimer of other warranties nor any language which would exclude or modify any implied warranties of fitness.

In January 1968, Ruskamps purchased 2 boars and 12 gilts. The plaintiffs were fully satisfied with these animals. The gilts produced about 9 pigs per litter. On September 20, 1968, based on his previous experience, Ruskamp ordered 22 gilts, "just like the 12 that I ordered before." The purchase price was $90 each, plus $3 delivery, a total of $2,046.

The written guarantee and the purchase order form were the same as those on the previous order except that the words "hog cholera" were crossed out on the purchase order form. The gilts for plaintiff's first order in January had come from defendant's farm in Missouri. The gilts for the second order came from the Bobbie Larson farm in South Dakota, and were delivered at the Ruskamp farm on November 7, 1968. Ruskamp did not notice anything unusual about any of them while he was feeding the medicated feed during the 2 or 3 weeks before he turned them in with the

boars. Then during December 1968, he noticed that two of the gilts were turning runty. A couple of the gilts had nose bleeds. The two runty gilts and four others did not get impregnated. The other 16 gilts did. The 16 gilts that farrowed averaged 6 pigs each.

After the pigs were 2 weeks old, they started sneezing. They would rub their noses on the cement floor, and by the time they were 8 or 10 weeks old, their noses started turning a little crooked. It took 7 months to a year to bring the pigs to market weight. Normal time is 5½ to 6 months. In June of 1969, 96 young pigs had nose problems and on June 11, 1969, plaintiffs' veterinarian diagnosed the disease as atrophic rhinitis, a contagious, infectious disease peculiar to swine. No one is absolutely certain what causes the disease but it is caused by one or more organisms and viruses. It is primarily transmitted by contact, and/or droplets from the nose which could contaminate the feed and water. The symptoms are excessive sneezing, nasal discharge, watery eyes, some hemorrhaging from the nose, deviation of the snout and malocclusion of the jaws in young pigs, and gauntness and rough-hair coat. Because of lower resistance, the animals may contract pneumonia. It may take 30 to 60 days for the symptoms to manifest themselves. There is no way to vaccinate against the disease and no cure for it. It is not a killer. "It just makes poor pigs out of them." They can still be sold for human consumption.

Ruskamps' veterinarian recommended marketing all plaintiffs' herd of swine, disinfecting the premises and buildings and allowing them to remain empty for 3 to 6 months before restocking. The plaintiffs sold their herd and discontinued hog raising for approximately 1 year.

The defendant's veterinarian testified that there were no signs of atrophic rhinitis in the Larson herd in South Dakota when he examined the animals on October 31, 1968, about a week before the shipment of these

gilts. He acknowledged that the disease could be characterized as a latent disease.

Larson was a bailee of the defendant and had been since July 1967. All his breeding stock was supplied by the defendant and belonged to the defendant. He received a fee from the defendant, partly payable when the gilts reached a certain weight and the balance when they were sold by the defendant. He testified that the gilts were sold and delivered for the purpose of breeding and improving the breeding stock of the farmers who purchased them. In his opinion the defendant's gilts were a better yielding, better meat-type hog with less back fat. He also testified that he never had atrophic rhinitis in his herd during his 20 years in business.

Delivery from the Larson farm was made by truck and the same truck delivered animals to three purchasers in addition to Ruskamp. Two of those purchasers testified that the animals they received in that shipment manifested the symptoms of atrophic rhinitis and that they had not had it in their herds before. One of the purchasers also testified that he visited the Larson farm in the spring or early summer of 1969, and, in his opinion, a large percentage of the hogs he saw there had atrophic rhinitis. They had crooked noses, lots of sneezing, and some had blood on their snouts.

The trial court withdrew any issue of express warranty from consideration by the jury, apparently upon an interpretation of the parol evidence rule. The matter was submitted to the jury on the issue of implied warranty of fitness for the particular purpose for which the goods were required, and no error has been assigned regarding the instructions. The jury returned a verdict for the plaintiff in the sum of $14,500 and there is no dispute as to the amount of damages.

The defendants essentially contend that where animals are sold with an implied warranty of fitness for breeding purposes, the scope of the warranty is limited to breed-

ing and producing offspring, and that no warranties as to disease may be implied where there are express warranties that the animals have been vaccinated or tested for certain specified diseases. Defendants also contend that under the usage of the trade, there is a particular designation for a hog that is guaranteed by the seller to be free of all disease. The argument is that there can be no implied warranty of soundness or freedom from a disease involving fitness for a particular purpose where the parties know they are not dealing with that kind of animal.

It should be noted here that defendant's written guarantee provided that if any gilt proved to be a nonbreeder within 90 days after receipt by the buyer, the buyer would receive full credit for the purchase price of the animal provided he had followed handling procedures required by the defendant. The defendant complied with that guarantee with respect to the six gilts that did not breed.

Section 2-315, U. C. C., provides: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

With exceptions not here material, section 2-316, U. C. C., provides in part: "* * * to exclude or modify any implied warranty of fitness the exclusions must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.' * * * (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade."

Section 2-317, U. C. C., provides that warranties,

whether express or implied shall be construed as consistent with each other and as cumulative wherever such construction is reasonable and specifically provides that: "Expressed warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose."

There is nothing in any of the printed or written warranties of the defendant which excludes any implied warranty of fitness. Neither do we find any inconsistency between the implied warranty of fitness here and any express warranties. Even if there were an inconsistency, section 2-317, U. C. C., specifically provides that any implied warranty of fitness for a particular purpose would not be displaced.

The evidence is substantially without contradiction that Ruskamp purchased the gilts from the defendant "for the purpose of breeding and raising pigs and improving the quality of his herd." The defendant was aware of Ruskamp's requirements and Ruskamp relied on the defendant to select and furnish suitable animals. The facts here clearly establish an implied warranty of fitness for a specific purpose, which the defendant did not exclude or modify as it might have done under the provisions of section 2-316, U. C. C.

The defendants contend that an implied warranty of fitness of an animal for breeding purposes is limited to breeding and producing offspring exactly as provided by the express warranty here, and that an implied warranty does not extend to the soundness of the animals nor the quality of offspring nor that they will not communicate a disease to other hogs. Defendants cite cases such as Barton v. Dowis, 315 Mo. 226, 285 S. W. 988 (1926), in support of that proposition. That case held that in the sale of animals the rule of caveat emptor applies and there is no implied warranty that the animals are free from disease. It also held that an implied warranty of fitness for breeding purposes was not a warranty that the hogs would not communicate

a disease to other hogs. Obviously the case was long before the days of the Uniform Commercial Code.

We think the view expressed by the Idaho court in the case of Paullus v. Liedkie, 92 Idaho 323, 442 P. 2d 733 (1968), reflects a far more realistic viewpoint on the subject. That court said: "When one sells hogs for breeding, with an implied warranty that they are fit for that purpose, and the hogs turn out to be infected with a disease that renders them useless as breeders, and in fact substantial numbers of the piglets die, then it would be ridiculous to say that the pigs were fit for the purpose intended." Where, as in this case, the gilts were infected with a disease which caused them to produce smaller litters of pigs than other gilts of the identical kind which were not diseased and where the pigs actually produced took a much longer time to bring to market condition because of the disease, and the disease adversely affected the entire herd, it seems equally illogical to say that the gilts were fit for the purpose intended.

It seems clear that at least with the advent of the Uniform Commercial Code, the old rule that there is no implied warranty of soundness in the sale of animals where the unsoundness is hidden, unknown to the seller, and difficult to discover, is no longer in effect where there is an implied warranty of fitness for a particular purpose under the provisions of the Uniform Commercial Code.

The Iowa case of Reed v. Bunger, 255 Iowa 322, 122 N. W. 2d 290 (1963), makes it clear that the older decisions in that state applying the doctrine of caveat emptor to the purchase of animals are no longer in effect, and that there may be an implied warranty of reasonable fitness of an animal notwithstanding the seller's lack of knowledge that it does not comply with the warranty.

In Ver Steegh v. Flaugh, 251 Iowa 1011, 103 N. W. 2d 718 (1960), a statement by the seller that boars were

good breeders and clean was found not inconsistent with an implied warranty of fitness for a particular purpose and the court specifically held that where a seller sells an animal for breeding purposes, knowing that the buyer is buying the animal for that purpose there is an implied warranty of its reasonable fitness therefor and that it is not infected with any disease which destroys its value for such purpose. That court also held that there may be an implied warranty of fitness for a particular purpose notwithstanding the seller's lack of knowledge that the animal does not comply with the warranty and notwithstanding the difficulty of discovering the fact.

The clear implication of the cases involving animals is that soundness is an element of fitness for a particular purpose. In the case now before us, the jury was specifically instructed that the plaintiffs were required to prove, in addition to other things, "that the plaintiff relied upon the implied warranty of the defendants as to the soundness and fitness for their intended use." No error has been charged with respect to that instruction.

In Long v. Carpenter, 154 Neb. 862, 50 N. W. 2d 67, this court dealt with an express warranty that a show animal was sound when at the time of purchase the animal was allegedly unsound and unfit for use as a show horse because of a latent, progressive, and incurable defect or disease. This court said: " 'A warranty that an animal is sound implies the absence of any defect or disease which impairs or in its progress will impair the animal's natural usefulness for the purpose for which it is purchased, which defect must be existent at the time of sale, and is breached by any defects which render it permanently less serviceable, as, for example, a disease, or malformation of the animal's body or the animal's disposition, although the defect may not be fully developed at the time of the sale, and although the defect was not known to the seller.' "

We hold that where a seller sells animals for the purpose of breeding and raising young and improving the quality of a herd, knowing that the buyer is buying the animals for such purposes and is relying on the seller's skill or judgment to select or furnish suitable animals, there is an implied warranty that the animals are reasonably fit for such purposes and that they are not infected with a disease which substantially destroys their value for such purposes.

Whether there has been a breach of warranty, express or implied, is largely a question of fact. There was evidence from which the jury could find that the breeding gilts here were infected with atrophic rhinitis at the time of sale and delivery of the animals to the plaintiffs. The jury was also entitled to find that because of that disease, the animals were unfit for the particular purposes of breeding and raising pigs and improving the quality of plaintiffs' herd. The fact that the animals produced smaller litters of pigs than identical gilts which were not diseased and that the pigs took longer to bring to market condition was clearly relevant on the issue of fitness for the particular purpose for which the gilts were sold and purchased. The liability of the defendant for a breach of the implied warranty of fitness for the particular purpose is not affected by the fact that the defendant was unaware of the existence of the disease at the time of the sale and delivery of the animals. To return to the doctrine of caveat emptor is wholly unacceptable. If the defendant desired to exclude implied warranties imposed by the Uniform Commercial Code, it could have done so.

The claim that a usage of the trade with respect to an SPF hog modifies the provisions of the Code with respect to implied warranties is not supported by the evidence. Defendants' contention, if correct, would eliminate any implied warranty of fitness for a particular purpose in the case of hogs, whenever the unfitness arose because of any disease. That position is untenable.

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

AFFIRMED.

DONALD CROMWELL, APPELLEE, V. MARCINA WARD ET AL., APPELLANTS.

219 N. W. 2d 446

Filed June 27, 1974. No. 39331.

1. **Cotenancy and Joint Ownership: Property: Replevin.** Where a personal chattel is owned by several persons, one part owner cannot maintain replevin for it, for the reason that all joint owners, unless there is an agreement to the contrary, are equally entitled to the property, and neither has the right to the immediate and exclusive possession of the property as against the other.
2. **Parties: Waiver.** A defect of parties will be waived if not raised by demurrer or answer.
3. **Pleading: Affidavits: Replevin.** In general there must be a substantial, although not a technical, correspondence between the petition and the affidavit in replevin.
4. **Parties: Property: Replevin.** One having custody of the property in dispute is a proper defendant in replevin.

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

S. Caporale of Shrout, Caporale, Krieger, Christian & Nestle, for appellants.

Daniel G. Dolan and Richard L. Swenson of Lathrop, Albracht & Dolan, for appellee.

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

BRODKEY, J.

This case involves an action in replevin brought by the plaintiff, Donald Cromwell, against the defendants, Marcina Ward and James Kostka, to recover certain

restaurant equipment and inventory located in the Hillside Cafe and Inn, located on U. S. Highway No. 73-75, Sarpy County, Nebraska. A trial by jury having been waived, the court proceeded to hear evidence on the matter after which it found in favor of the plaintiff, and entered a judgment granting possession of the personal property to the plaintiff, or in the alternative, ordering the payment of the value of that property in the amount of $7,250. Thereafter, the trial court sustained the motion of the defendants for a new trial on the issue of the value of the goods replevied. After hearing additional evidence, the trial court entered judgment for the plaintiff in the amount of $2,627.26. Defendants appeal to this court. We affirm.

It appears that plaintiff Cromwell became the owner of the Hillside Cafe and Inn in June of 1965, having purchased it from the previous owners, Charley and Bertha Ducker. The sale of the cafe did not include the building or the land upon which it was located, which was owned by one Lawrence Iske. Cromwell owned and operated the business until August 1969, when he listed it for sale with Warga Realty of Plattsmouth, Nebraska, which eventually negotiated a sale of the business, inventory, and equipment to James and Grace Keisner. The sale agreement entered into between the parties was dated August 28, 1969, and had attached to it as an exhibit, a list of the personal property, fixtures, and inventory accompanying and a part of the transaction. The agreement specifically provided: "It is hereby further agreed that the buyers are purchasing the good will of said business together with a minimum inventory to be on hand on October 1, 1969 and that the buyers shall further acquire title to the personal property and equipment shown on the attached pages, consisting of 13 pages, marked 'Exhibit A' and by this reference made a part thereof, and that upon the payment in full of the purchase price said

property shall become the property of the buyers." In this agreement the sellers were listed as Donald F. Cromwell and JoAnn M. Cromwell, husband and wife, and the purchasers were referred to as James P. Keisner and Grace L. Keisner, husband and wife. All four of the above-named parties signed the agreement. The sale agreement referred to was not, however, recorded in Sarpy County, Nebraska, where the cafe was located.

The Keisners operated the cafe for a period of approximately 16 months, at which time the Cromwells received a letter dated March 31, 1971, from Mr. Keisner stating as follows: "You and each of you will take notice that the undersigned, James P. Keisner and his wife, Grace L. Keisner, will cease operating the Hillside Cafe and Inn effective this date, which said business is located on Highway 73-75, Sarpy County, Nebraska, and was purchased from you on August 28, 1969. You are further notified that no further payments will be made in connection with a certain sales agreement, dated August 28, 1969." The cafe was again put up for sale with Warga Realty, which was eventually contacted by defendants Kostka and Ward, who were interested in purchasing the cafe. They were informed at that time that the property was not free and clear and that a portion of the purchase price had to be repaid to Cromwell. They then went to talk to Lawrence Iske, the owner of the land and building, who informed them he had bought the place from Keisner, and they would have to deal with him if they wanted to take it over. Defendants, without purchasing the cafe, took over the operation of the cafe from Iske who was in possession of the restaurant and equipment, and entered into an agreement with him to rent the premises from him for a fixed monthly rental, the understanding being that any profit made would belong to the defendants. The cafe was operated in this fashion until January 1972. The plaintiff, however, filed this action in replevin on

May 4, 1971, to regain possession of the personal property involved in this case. The defendants were still operating the cafe and were in either possession or custody of the property when the sheriff made his inventory and return in the replevin action.

There seems to be no question but that plaintiff still retained title to the personal property involved herein under the sale agreement dated August 28, 1969, and was entitled thereunder to possession of the property covered thereby upon the repudiation of the agreement by the Keisners by virtue of their letter of March 31, 1971. Defendants contend, however, that plaintiff cannot prevail in this replevin action for the reason that the action is brought in the name of Donald Cromwell, plaintiff; whereas it is clear from the record in the case, particularly from the sale agreement, exhibit 1, that the property was in fact in joint ownership, the sellers being referred to therein as Donald F. Cromwell and JoAnn M. Cromwell, husband and wife. In support of their contention they rely on the general rule that where a personal chattel is owned by several persons, one part owner cannot maintain replevin for it, for the reason that all joint owners, unless there is an agreement to the contrary, are equally entitled to the possession of the property, and neither has the right to the immediate and exclusive possession of the property as against the other. First Nat. Bank v. Morgan, 172 Neb. 849, 112 N. W. 2d 26 (1961); 77 C. J. S., Replevin, § 49, p. 34; 20 Am. Jur. 2d, Cotenancy and Joint Ownership, § 87, p. 188, § 113, p. 212.

We have no quarrel with the general rule that cotenants must join in any action brought for the recovery of personal property coowned by them and of an indivisible character. However, we point out that the apparent defect in parties plaintiff in this action existed from the day the petition was filed, and could and should have been raised by the proper pleadings before

the case came to trial. We further point out that section 25-806, R. R. S. 1943, provides as follows: "The defendant may demur to the petition only when it appears on its face . . . (4) that there is a defect of parties, plaintiff or defendant; . . . ." Section 25-807, R. R. S. 1943, provides: "The demurrer shall specify distinctly the grounds of objection to the petition. Unless it do so, it shall be regarded as objecting only that the petition does not state facts sufficient to constitute a cause of action." Section 25-808, R. R. S. 1943, reads as follows: "When any of the defects enumerated in section 25-806 do not appear upon the face of the petition, the objection may be taken by answer, and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action." Our law is well settled that a defect of parties will be waived if not raised by demurrer or answer. Cunningham v. Brewer, on rehearing, 144 Neb. 218, 16 N. W. 2d 533 (1944); Engel v. Dado, 66 Neb. 400, 92 N. W. 629 (1902). In the instant case the defendants filed no demurrer and the answer filed on behalf of each defendant was a general denial.

In no way was the issue of misjoinder of parties plaintiff raised, and therefore, under the rules stated above, defendants must be deemed to have waived any such defect. It is true that during the trial defendants did demur ore tenus, but it is far from clear from a reading of the record as to what the particular demurrer referred so far as a claim of misjoinder of parties is concerned, nothing specifically being said in that regard. We quote the verbatim language of counsel as it appears in the demurrer ore tenus during trial: "Second reason: They've got a misjoinder of parties, and I suppose this would be in the form of a motion rather than towards the demurrer ore tenus, and that's under the cases of

Margaret Fuente — (spelling) F-u-e-n-t-e versus Robert L. Shevin (spelling) S-h-e-v-i-n and Paul Barnum (spelled phonetically) versus Americo V. Cortez (spelled phonetically), which is 32 Lawyer's Edition 2nd, provides that the taking of any property prior to a judicial hearing is in deprivation of the due process and is null and void." It is obvious that the portion set out above contains not one word with reference to a lack of one of the parties plaintiff or voices any objection in connection therewith. Assuming, however, that the point had been raised, even then it would avail the defendants naught in this case for the reason that under the authorities previously referred to such an alleged defect must be raised by demurrer or answer before trial or be deemed to have been waived.

Defendants also assign as error the fact that the plaintiff in his petition alleges special ownership in himself, without stating the underlying facts in reference thereto. It is true that in paragraph II of his petition plaintiff alleges as follows: "That the plaintiff has a special ownership in the following described property, to-wit: See attached Exhibit 'A', incorporated by reference as if fully set forth at this point." The exhibit "A" referred to is the itemized list of the cafe property and inventory sought to be replevied. However, the plaintiff further alleges in his petition in paragraph III: "That the plaintiff is the owner of said property and entitled to the immediate possession thereof, as plaintiff originally sold to James P. Keisner & Grace L. Keisner under agreement dated August 28, 1969. . . ." This is the agreement, previously referred to, by which the plaintiff sold the cafe and property to the Keisners. The agreement itself, being attached as an exhibit to the petition, shows on its face what interest plaintiff is claiming in the property sought to be replevied and his right to do so. Furthermore, in plaintiff's affidavit which accompanied his petition for replevin, he again alleges that he is the "owner of said property and is entitled

to immediate possession thereof, and that said property is wrongfully detained by the defendant. . . ."

The most that can be said in this case is that there may possibly be a variance between the allegation of special ownership in one paragraph of the petition and the allegation of "ownership" as contained in the subsequent paragraph of the petition and in the affidavit for replevin. Is such variance fatal? We think not. A similar situation was presented to the court in First Nat. Bank v. Cochran, 17 Okla. 538, 87 P. 855 (1906), where the court stated: "As to the question of variance between the affidavit and the petition, in general it may be said that there must be a substantial, though not a technical, correspondence between the petition and the affidavit in replevin. The office, however, of the affidavit in replevin, if a petition is filed, ceases when the property has been delivered thereunder and jurisdiction conferred. The action thereafter proceeds upon the petition. The affidavit is not necessarily a part of the pleadings in the district court, and its allegations do not and cannot control in offering evidence upon matters essential to be proved; that the court will look only to the contents of the petition, and not to those of the affidavit, in that particular." We hold that any variance in this case, if such there were, was not prejudicial and was immaterial.

Defendants also claim that replevin will not lie unless the defendants were in actual or constructive possession of the property sought to be replevied. It is not clear from the record in this case whether defendants were in possession or in mere custody of the property in question; but under the law it is immaterial which relationship existed. The law is settled in this state that one having custody of the property in dispute is a proper defendant in replevin. Engel v. Dado, *supra.*

Finally, defendants assign as error the failure of the plaintiff to file of record with the county clerk of Sarpy County, Nebraska, the conditional sale contract between

plaintiff and his wife and the Keisners, in which the title to the property involved herein was reserved until full payment of the purchase price. In their brief on this point the defendants quote the language of what was formerly section 36-207, R. R. S. 1943, which required such filing in order to validate a reservation of title as against purchasers and others without notice. The section referred to was, however, not in effect at the time of the execution of the agreement in question, that section having been repealed in 1963. Even if said provision had still been in force and effect it would not have changed the result for the reason that it is clear from the record that defendants had actual knowledge of the interest of the plaintiff in the property in question. At their first contact with Warga Realty, the defendants were told that the Keisners did not have title to the property free and clear and that a portion of their purchase money had to be repaid to the plaintiff and his wife. They were put on notice at that time that someone other than Iske had an interest in the property. Furthermore, when they thereafter contacted Iske to negotiate the terms of the lease they were told by him that he had a mortgage on the property. They cannot now be heard to say that they were "without knowledge" of a security interest in the plaintiff. Defendants could not prevail under the provisions of the present Uniform Commercial Code even assuming they were "buyers" of the property. See § 9-301, U. C. C. In fact the record is clear that they did not purchase the property, either from the plaintiff or Iske, or anyone else; nor did they claim to do so. The property was on the premises when they leased from Iske and therefore their interest was limited to either possession or custody. This assignment of error by defendants is without merit.

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

AFFIRMED.

CLINTON, J., concurring.

The rule that all cotenants must join in an action to recover possession of personal property should not be held to be applicable to those cases where possession is sought from a stranger to the property, but only to those cases where the party from whom possession is sought is another cotenant or one claiming under another cotenant. The rule is properly applied in the opinion in this case and in First Nat. Bank v. Morgan, 172 Neb. 849, 112 N. W. 2d 26, cited in the opinion. I do not agree that the rule should have the broad scope inferable from the statement of the rule in the first sentence of the fifth full paragraph of the opinion or the first sentence of the text of the citation, 20 Am. Jur. 2d, Cotenancy and Joint Ownership, § 113, p. 212. The rule is probably applicable only where the effect of the action would be to exclude from possession a cotenant or one claiming under a cotenant.

BERNADINE ROSS, IN HER OWN RIGHT AND AS ADMINISTRATRIX OF THE ESTATE OF EVERT ROSS, DECEASED, APPELLANT, V. ESTHER ROSS ET AL., APPELLEES, IMPLEADED WITH MELANIE ROSS ET AL., APPELLANTS.

219 N. W. 2d 756

Filed June 27, 1974. No. 39332.

1. **Specific Performance: Frauds, Statute of: Contracts: Evidence.** In an action for specific performance of an oral contract to convey real estate where partial performance is relied upon to avoid the defense of the statute of frauds, the evidence of the alleged contract and its terms must be clear, satisfactory, and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear, satisfactory, and unequivocal evidence, they are unenforceable unless it is also proved by evidence of like character that there has been such performance as the law requires.
2. **Specific Performance: Frauds, Statute of: Contracts.** The acts

> constituting performance must be such as are referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract or relation. They must be something that the claimant would not have done unless and on account of the contract and with the direct view to its performance so that nonperformance by the other party would amount to fraud upon him.

Appeal from the District Court for Howard County: DONALD H. WEAVER, Judge. Affirmed.

Robert E. Paulick, for appellant Bernadine Ross.

John A. Wagoner, for appellants Melanie Ross et al.

Guyer Grimminger, for appellees.

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

CLINTON, J.

This is an action brought by Bernadine Ross against Esther Ross and others to compel specific performance of an oral contract to convey a 200-acre tract of farmland. The defendant Esther Ross entered a general denial and also pled the statute of frauds. The plaintiff sought equitable relief on the basis of alleged part performance. The plaintiff commenced the action initially both in an individual capacity and as administratrix of the Estate of Evert Ross, her deceased husband. Later her claim as administratrix was withdrawn and the three children of Evert Ross were joined as parties-defendants. Two of these are minors and are represented by a guardian ad litem. Two are the issue of a prior marriage and one by the marriage to Bernadine. The children join by cross-petition in a claim for specific performance by virtue of being the heirs-at-law of Evert Ross who is alleged to be a purchaser under the oral contract. The pleadings do not set forth the specific interest which the children claim.

The defendant Esther Ross was the record title owner of the real estate in question and the mother of Evert

Ross, deceased. The defendant James Ross, a son of Esther, and the defendant Rose, wife of James, are persons to whom Esther, after Evert's death, conveyed the property in question.

The plaintiff and the children presented their evidence and when they rested the court granted the motion of the defendants Esther, James, and Rose for a directed verdict and found that the plaintiff and the cross-petitioners had failed to prove by a preponderance of the evidence the necessary elements to entitle them to specific performance.

The following principles govern the disposition of this case: In an action for specific performance of an oral contract to convey real estate where partial performance is relied upon to avoid the defense of the statute of frauds, the evidence of the alleged contract and its terms must be clear, satisfactory, and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear, satisfactory, and unequivocal evidence, they are unenforceable unless it is also proved by evidence of like character that there has been such performance as the law requires. The acts constituting performance must be such as are referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract or relation. They must be something that the claimant would not have done unless and on account of the contract and with the direct view to its performance so that nonperformance by the other party would amount to fraud upon him. Caspers v. Frerichs, 146 Neb. 740, 21 N. W. 2d 513.

In many respects, as the trial court properly found, the evidence of the alleged contract and its terms is not clear, satisfactory, and unequivocal. The first and most important deficiency is the uncertainty as to the identity of the buyers and the nature of their interest. Bernadine's theory is that she and Evert were to acquire

a joint tenancy and this is the theory upon which she brought the action. There is no evidence to clearly support that proposition. The second uncertainty is that the testimony is insufficient to define clearly the contract terms, including purchase price, time of performance, and the nature and extent of the improvements which allegedly were to be made as a portion of the purchase price.

Bernadine testified to a conversation which took place a few weeks after her marriage to Evert. This conversation was between her and Esther. We summarize the testimony by setting forth the answers. The questions we believe are reasonably inferable. "She said that Evert and I would have a wonderful farm if we worked it real hard. . . . We were buying it. . . . From Esther Ross. . . . The understanding was we was supposed to fix the buildings up on the place. After got on was supposed to pay $25.00 a month like the rest of the boys. . . . $5,000.00." Later she testified the purchase price was $6,000. "That we were building the farm up and we fix the buildings up, repairing the farm, and when we got to the point where could afford it, we pay $25.00 a month on it." With reference to when such payments should start, she stated: "When we got so we were able to run a farm, good equipment, like most farmers have, buildings, machinery and land in good condition." Later she testified: "When we got the farm at least situated." Evert does not appear to have been a participant in these conversations or present at the time.

The record shows that Evert made improvements on the property which consisted of constructing a basement and foundation for a house and moving on a house which he owned, the construction or moving on of outbuildings, the construction of a well and a water system, fencing for hog pens, septic system, and the planting of a shelter belt. At the time of Evert's death the repair and improvement of the house was still underway.

The witness testified that Evert had purchased the house for $2,500 before he met or married Bernadine and that she had been told by him that there was some understanding at that time that the house would be placed on the farm. There is, however, no evidence as to what the agreement was under which this was to be done.

While Evert and Bernadine occupied the farm, a period of about 4 years, they received all the income and paid neither rent nor payments on the alleged contract, but did pay the real estate taxes during that time. Bernadine testified that the improvements on the farm were worth $17,000, but there is no foundation for this opinion. There is no evidence to indicate the extent to which the improvements enhanced the value of the farm, nor any evidence of the value of the farm itself.

The above recitals lead to the conclusion that it is uncertain whether Evert alone was the purchaser, or whether Evert and Bernadine were the purchasers, and if so whether as tenants in common or joint tenants. If Evert alone was the purchaser, then Bernadine's interest would be one-fourth and that of the children three-fourths. If they were purchasers as tenants in common, then Bernadine's interest would be four-sixths and the children's two-sixths. If, as Bernadine theorizes, she was a joint tenant, then Bernadine's interest would be 100 percent. If the children have an interest, there is no suggestion as to how their portion of the purchase price is to be paid. After Evert died, rent was demanded and Bernadine moved off the farm.

It seems apparent that the proof of the alleged contract was unsatisfactory and equivocal in some of the essential terms. It further seems that the partial performance relied upon is as referable to considerations of present use together with a probability of inheritance or gift as it is to a contract to purchase. The trial court properly denied specific performance.

The plaintiff also complains that the court erred in

setting aside a finding of default which it had earlier made against defendants and permitting them to answer. No judgment having been entered it was clearly within the discretion of the court to permit a late answer to be filed.

The judgment is affirmed.

AFFIRMED.

JOSEPHINE M. JOHNSON, MOTHER AND NATURAL GUARDIAN OF MARTY D. JOHNSON, A MINOR, APPELLEE, V. RAY E. ENFIELD, APPELLANT.

219 N. W. 2d 451

Filed June 27, 1974. No. 39351.

1. **New Trial: Appeal and Error.** The standard of judicial review of a trial court's order granting a new trial is whether or not the trial court abused its discretion.
2. ———: ———. This court will not ordinarily disturb a trial court's order granting a new trial, and not at all unless it clearly appears that no tenable grounds existed therefor.
3. **Trial: Verdicts.** A trial judge may, in his discretion, set aside a verdict whenever it is inconsistent.
4. **Motor Vehicles: Negligence.** Generally, a motorist undertaking to leave a parked position has the duty to keep a proper lookout, and not to depart from the parked position until, in the exercise of reasonable care, he may safely do so.

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

William J. Riedmann of Riedmann & Welsh, for appellant.

J. Thomas Rowen of Miller & Rowen and J. Patrick Green, for appellee.

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

WHITE, C. J.

In this truck-motorcycle personal injury accident, the

plaintiff mother brought suit for her minor son for the personal injuries he sustained, and joined her own derivative action to recover the hospital and medical expenses. The jury returned a verdict for the plaintiff on the cause of action for the son's personal injuries; and on the derivative action for the plaintiff herself, the jury returned a verdict for the defendant. On motion of the plaintiff, the District Court granted a new trial on both causes of action, from which the defendant appeals. We affirm the judgment and order of the District Court granting a new trial.

We outline only the facts necessary for a decision on this appeal. The defendant's truck was parked parallel to the curb on the north side of a narrow city street in Omaha, Nebraska. Its motor was running. The plaintiff's minor son while riding a small Yamaha motorcycle passed to the defendant's left, pulled up to the curb in front of the defendant's truck, and stopped for the purpose of restarting the engine on the motorcycle. Back of the defendant's truck, a car driven by an elderly lady was slowly approaching to pass the defendant, and the defendant being apprehensive of turning into the street until after she had passed, placed his head out the cab window and kept this car under observation until she had passed. As she passed or just after she had passed, he placed the truck in gear, went directly forward, and was in collision with the boy's motorcycle. The day was clear, and the pavement was dry.

It is undisputed and conclusive in the evidence that the boy suffered personal injuries as a result of the accident. It is also undisputed and conclusive that the boy's mother incurred certain expenses caused by the hospitalization of her son and his medical treatment, which resulted from the accident. The hospital bill was admitted into evidence upon a stipulation that it was a fair and reasonable bill. The medical expenses for treatment also were undisputed. The hospital and med-

ical expense came to a total of $871. The two verdicts were irreconcilable because the issue of damages from medical and hospital expense and proximate cause are foreclosed under the evidence. Because the mother's action was purely derivative from the son's, and, thus, the two verdicts were inconsistent, the District Judge, on motion, ordered a new trial on both causes of action.

We are unable, as the trial court was, to perceive any realistic or common sense way of reconciling the two apparently inconsistent verdicts. We can only speculate as to any collateral reasons why the jury returned the two verdicts. Since the evidence on damages and proximate cause was undisputed and undenied the finding of liability on the son's cause of action is directly contrary to a verdict for the defendant on the mother's cause of action on the same issues. Whether this result flowed from confusion or misunderstanding of the court's instructions or for collateral reasons, we do not need to decide. The trial court itself, in exercising its discretion, determined that the only way to resolve the problem was to grant a new trial. For many years under our Nebraska procedural decisions, the trial court's discretion in granting a new trial was absolute. It is true that the granting of a new trial is now judicially reviewable in this court. We have consistently and recently held that the standard of judicial review of a trial court's order granting a new trial is whether or not the trial court abused its discretion. Wagner v. State, 176 Neb. 589, 126 N. W. 2d 853; Webster v. Halbridge, 185 Neb. 409, 176 N. W. 2d 8; Lechliter v. State, 185 Neb. 527, 176 N. W. 2d 917. By its terms this discretion is necessarily broader than a narrowly isolated and rigid examination of the merits of each alleged error in the record. A combination of errors, for example, each of which in itself might not be grounds for granting a new trial, may result in a finding by the trial judge that justice will be served by retrying the

issues in the case. We have held that this court will not ordinarily disturb a trial court's order granting a new trial, and not at all unless it clearly appears that no tenable grounds existed therefor. Webster v. Halbridge, *supra*; Lechliter v. State, *supra;* Wagner v. State, *supra.* We have also held that a trial judge may set aside a verdict whenever it is inconsistent. Olsen v. Shellington, 162 Neb. 325, 75 N. W. 2d 709. It would seem that this rule would apply a fortiori when the inconsistency arises in the context of a derivative action in which any determination as to liability must necessarily be the same on the two joined causes of action. See, 66 C. J. S., New Trial, § 66b, p. 198, § 72a, p. 235; 58 Am. Jur. 2d, New Trial, § 129, p. 336.

Our decision on this point is supported by the overwhelming weight of authority. In 58 Am. Jur. 2d, New Trial, § 129, p. 336, it is stated as follows: "Where two or more causes of action arise out of the same set of circumstances, and suit is brought on each cause of action, the verdict should be consistent; otherwise both verdicts may be set aside and new trials awarded. For example, in actions by a husband and wife for personal injury sustained by one and for consequential damages sustained by the other, the verdicts should be consistent, and if the jury finds in favor of one plaintiff and against the other, the verdicts are inconsistent and the trial court should grant a new trial in both cases."

The defendant's contention that the two verdicts are consistent is based upon a rather ingenious argument by analogy to several cases from other jurisdictions. But the attempt to color match these cases fails. In each of these cases, it was the defendant, and not the plaintiff, who moved for a new trial, and the court's holding refusing to grant a new trial, was based either on the fact that the jury could reasonably have denied relief in the derivative action because there was no adequate proof of damages, or because if the defendant moved for a new trial and not the plaintiff, then the

verdict in favor of the prevailing plaintiff will not be set aside if it is sustainable under the evidence and the instructions. Moreover, we point out, these cases arise in jurisdictions under different procedural statutes and holdings of the court. For example, one of the cases cited by the defendant is Chance v. Lawry's, Inc., 24 Cal. Rptr. 209, 374 P. 2d 185. In this California case, besides what we have said above, it appears that under the California practice and procedure, in the event of an inconsistent verdict the trial judge is authorized to determine which of the two jury verdicts is the correct one, and then allow that one to stand.

The defendant also assigns as error the failure of the trial court to sustain his motion for judgment notwithstanding the verdict upon the son's cause of action. We observe that the plaintiff did not request an instruction on liability and does not assert error in this respect by way of cross-appeal. The resolution of this question under the facts is clear. Beside what we have already recited about the facts, we point out that the accident took place at noon on a clear day. The defendant was parked at the curb side of a street. The son had driven his motorcycle around the defendant's truck and parked at the curb at least 10 feet in front of the defendant, and there is evidence that he was parked there for almost 2 minutes before the defendant undertook to start his truck. The defendant, who had been observing another car approaching from the rear, started his truck, drove directly forward, and struck the motorcycle upon which the son was sitting. The defendant admits that he did not see the boy. As we have said many times, it was his duty to see that which was in plain sight. The motorcycle was approximately 3 to 4 feet high, and the boy was sitting on it. The motorcycle was parked at least 10 feet ahead of the defendant's vehicle. There was clearly a jury issue on the defendant's duty to keep a proper lookout and reasonable control of his truck under the circumstances.

Newkirk v. Kovanda, 184 Neb. 127, 165 N. W. 2d 576; Stewart v. Ritz Cab Co., 185 Neb. 692, 178 N. W. 2d 577; Ritchie v. Davidson, 183 Neb. 94, 158 N. W. 2d 275; Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528; Capital Transit Co. v. Holloway, 35 A. 2d 649 (Mun. Ct. App. D. C., 1944).

The judgment of the District Court granting a new trial on both causes of action is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES P. GRAHAM, APPELLANT.

219 N. W. 2d 723

Filed June 27, 1974. No. 39380.

1. **Trial: Probation and Parole: Criminal Law.** There is no requirement in our law that trial judges discuss parole possibilities with defendants.
2. **Criminal Law: Hearings: Habitual Criminals: Waiver.** Participation in a hearing on an habitual criminal charge without objection is a waiver of the notice required by section 29-2221(2), R. S. Supp., 1972.
3. **Criminal Law: Indictments and Informations: Guilty Plea: Habitual Criminals: Hearings.** 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.

Appeal from the District Court for Otoe County: WALTER H. SMITH, Judge. Affirmed.

William B. Brandt, for appellant.

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

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

SPENCER, J.

Defendant appeals from the denial of relief in this post conviction proceeding. He predicates his appeal on four points: (1) Nebraska's habitual criminal statute, section 29-2221, R. S. Supp., 1972, is unconstitutional in that it inflicts cruel and unusual punishment; (2) his sentence was vague and indefinite in that it did not specify upon which count it was based; (3) he was not properly advised of his rights upon and prior to his plea of guilty to the habitual criminal charge; and (4) prescribed statutory procedures were not followed in applying the habitual criminal statute. We affirm.

Defendant, who at all times herein was represented by counsel, pled guilty to an amended information of two counts. The first count charged forcible breaking and entering; the second count charged defendant with being an habitual criminal. Defendant appeared for arraignment on February 7, 1969. At that time he filed an affidavit of poverty and the private counsel whom he had earlier retained was appointed to represent him. After the court fully advised defendant of his constitutional rights and the nature of the charges contained in counts I and II, defendant's counsel asked that further proceedings be deferred until February 13, 1969. This request was granted.

Defendant, who was released on bond, escaped from custody of his bail bondsman, and a bench warrant was issued for his arrest. He was apprehended outside the jurisdiction and returned to Nebraska. On March 7, 1969, he again appeared for arraignment. After again being advised of his rights, defendant advised the court he was ready to plead. He entered pleas of guilty to the charges contained in both counts I and II. Defendant's whole attack herein is premised on the proceedings relative to count II.

When the information was amended to include the habitual criminal charge, the court told the parties: "As

our Supreme Court has repeatedly said, a count relative to the Habitual Criminal Act does not allege a separate and distinct offense or crime; it merely goes to the question of increasing the penalty on the last felony conviction, * * *."

At the time of arrignment both counts were explained to defendant. With reference to count II, he was advised by the court that if found to be an habitual criminal, he would be subject to imprisonment in the Nebraska Penal and Correctional Complex for a term of not less than 10 nor more than 60 years. At the sentencing the court received and considered the presentence report. It revealed at least four prior felonies as well as some lesser offenses. The county attorney advised the court he had informed defendant's attorney that he would recommend a sentence of 10 years in the Nebraska Penal and Correctional Complex. Defendant's counsel, in reviewing defendant's record, told the court in his opinion the "minimum sentence under the habitual criminal act would be in order." The court accepted the recommendations and sentenced defendant to imprisonment in the Nebraska Penal and Correctional Complex for a term of 10 years, which is the minimum sentence for an habitual criminal.

On cross-examination in this post conviction proceeding, referring to the fact that the court had sentenced him to a term of 10 years in the Penal and Correctional Complex, defendant was asked: "Q And that's what you expected to receive, was it not? A That was the least I could get. Q And that is what I advised the Court and recommended and what your court-appointed attorney told you that he suspected would be the sentence? A Ten years, yah."

Also, on cross-examination, referring to his conversation with his attorney prior to sentencing, he said: "Yes. I think he said the best he could get was 10 years on habitual."

Defendant's first contention, in summary, is that the

habitual criminal statute constitutes cruel and unusual punishment because it is invoked only in the discretion of the county attorney and not in every instance in which it might be used. In State v. Losieau (1969), 184 Neb. 178, 166 N. W. 2d 406, we said: "This court has repeatedly sustained the constitutionality of the Habitual Criminal Law. In State v. Huffman, 181 Neb. 356, 148 N. W. 2d 321, this court said: 'The contention that the recidivist statute, section 29-2221, R. R. S. 1943, violates constitutional guaranties of due process and equal protection is not persuasive. See, State v. Konvalin, 179 Neb. 95, 136 N. W. 2d 227; Poppe v. State, 155 Neb. 527, 52 N. W. 2d 422; Rains v. State, 142 Neb. 284, 5 N. W. 2d 887; Davis v. O'Grady, 137 Neb. 708, 291 N. W. 82.' See, also, Spencer v. Texas, 385 U. S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606.

"In Davis v. O'Grady, 137 Neb. 708, 291 N. W. 82, this court held: 'This court is committed to the doctrines, viz.: * * * The legislature may enact an habitual criminal law punishing habitual offenders. * * * The habitual criminal law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the guilt and justifies heavier penalties. * * * The fact that a defendant has been guilty of a second felony does not make him guilty under the habitual criminal law of an offense for which he may be separately sentenced, but increases the punishment for the last felony. * * * "Habitual criminality" is, under the habitual criminal law, a state rather than a crime, and warrants greater punishment because of past conduct.' "

The purpose of the habitual criminal act is to provide greater punishment for repetition of criminal conduct. The county attorney is permitted to use it where a defendant has had two previous felony convictions. Here, it was not invoked until defendant had four previous felony convictions. While it would be best to use it in every instance where a defendant has two previous felony convictions, there are other factors which a prose-

cuting attorney must consider. Time and availability of records are two of them. Whenever it is invoked, the county attorney must investigate the proceedings concerning the previous convictions and be prepared to defend those proceedings against attack. The fact that the county attorney is permitted a certain discretion and does not use the habitual criminal act in every instance does not make the act itself or its application unconstitutional as imposing cruel and unusual punishment. See State v. Martin (1973), 190 Neb. 212, 206 N. W. 2d 856.

There was nothing vague nor indefinite about the sentence imposed on defendant. Defendant understood the habitual criminal count only enhanced the sentence for breaking and entering. He further understood that the minimum he could receive was 10 years. He was given the minimum on the recommendations of the county attorney and his own counsel.

Defendant's third argument is premised on his allegation that no one told him that on an habitual criminal charge the minimum time which must be served would be 6 years and 25 days, which would be the period required for a 10-year sentence with time off for good behavior and statutory time. There is no requirement in our law that trial judges discuss parole possibilities with defendants. See State v. Rhodes (1971), 187 Neb. 332, 190 N. W. 2d 623.

Defendant's fourth assignment of error alleges the prescribed statutory procedures were not followed in his case. Section 29-2221(2), R. S. Supp., 1972, provides in part: "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."

After his plea and conviction for breaking and entering, defendant was asked if he was ready to plead to

count II. When he answered in the affirmative, the trial judge asked him if he wished to visit further with his counsel before entering a plea. Defendant answered that he did not. When defendant acknowledged he was aware that count II alleged he was an habitual criminal, the court accepted his plea of guilty and found him to be an habitual criminal. Defendant knew what was happening and wanted the court to take his plea without further delay. We held in State v. Huffman (1970), 185 Neb. 417, 176 N. W. 2d 506: "Participation in a hearing on an habitual criminal charge without objection is a waiver of the notice required by section 29-2221, R. S. Supp., 1967." More recently, however, in State v. Youngstrom (1974), 191 Neb. 112, 214 N. W. 2d 27, we said: "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."

There is no merit to any of the defendant's assignments of error. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. WESTERN NEBRASKA TECHNICAL COMMUNITY COLLEGE AREA, APPELLEE, V. KATIE TALLON, COUNTY TREASURER OF SHERIDAN COUNTY, NEBRASKA, ET AL., APPELLANTS.

219 N. W. 2d 454

Filed June 27, 1974. No. 39522.

1. **Constitutional Law: Statutes: Taxation: Colleges and Universities.** Where state and local purposes are commingled in a statutory enactment creating a new, independent, statewide system of technical community college areas, the crucial issue of the use of property tax levies to support the system turns on a determination of whether the controlling and pre-

dominant purposes are state purposes or local purposes. The application of the constitutional amendment prohibiting the State from levying a property tax for state purposes hinges on that determination.

2. ———: ———: ———: ———. Where the State assumes the control and the primary burden of financial support of a statewide system of technical community college areas under the provisions of the Nebraska Technical Community College Act, the property tax levy provided for in section 79-2626, R. S. Supp., 1973, is for a state purpose within the meaning of Article VIII, section 1A, of the Nebraska Constitution.

Appeal from the District Court for Sheridan County: ROBERT R. MORAN, Judge. Reversed and remanded for further proceedings.

Michael V. Smith of Smith & King, for appellants.

Russell E. Lovell of Lovell, Raymond & Hippe and John K. Sorensen, for appellee.

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

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

MCCOWN, J.

This is an action in mandamus in which the respondents challenge the constitutionality of section 79-2626, R. S. Supp., 1973, which provides for the raising of funds by a property tax levy in partial support of the system of technical community colleges initially created by L.B. 759 of the 1971 legislative session. The relator, the Western Nebraska Technical Community College Area, brought this action against the treasurer and commissioners of Sheridan County to require them to remit to the relator all proceeds of a one mill property tax levy which had been made in Sheridan County pursuant to section 79-2626, R. S. Supp., 1973. The District Court, after hearing, found the Technical Community College Area Act to be constitutional in the respects challenged and issued a peremptory writ of mandamus as requested

by the relator. Respondents' motion for a new trial was overruled and they have appealed.

The critical determinations in this case all turn on the provisions of Article VIII, section 1A, of the Nebraska Constitution. That section was first adopted in 1954, and amended to its present form in 1966 after Nebraska had adopted a state sales and income tax. It provides: "The state shall be prohibited from levying a property tax for state purposes." The application of that constitutional provision to what has been called the Nebraska Technical Community College Area Act requires a résumé of the provisions of the act as well as some history and background as to the former post-secondary, non-baccalureate public education system in Nebraska and its relationship and incorporation into the system created by the act. Hereafter sections 79-2601 to 79-2633, R. R. S. 1943, together with amendments to those sections in successive legislative sessions, generally known as the Nebraska Technical Community College Area Act, will be referred to as the act.

The traditional 2-year academic junior colleges were the first of the post-secondary, non-baccalaureate public educational institutions to be established in Nebraska. Two were established in 1926 at McCook and Scottsbluff. Norfolk followed in 1928, Fairbury in 1941, North Platte in 1965, and Columbus in 1969. They were local institutions, locally controlled and financed by local property taxes on the property within the local district, which by 1969 was usually one county. The first post-secondary state-operated and state-financed school to offer exclusive occupational or vocational programs was established in Milford in 1941, and a second state-operated and state-financed institution was established some 25 years later at Sidney. In 1965, the Legislature authorized the establishment of area vocational schools over multi-county areas. They were area controlled and financed by an area property tax levy. The first

institution of this group to be established was at Hastings, followed later by North Platte and Norfolk. Omaha and Lincoln were added by legislative action in 1967. In 1969, the names of these schools were changed to technical colleges. At the time of passage of the act in 1971, all the schools and colleges designated above were placed into the statewide system provided for under the act. Six junior colleges, five area vocational schools or colleges, and two state vocational institutions comprised the original thirteen institutions with which the new statewide independent system of technical community colleges commenced its operations under the act. See Schleiger, "The Evolution of the Nebraska Comprehensive Technical Community College System."

The Legislature declared that its intent and purpose in adopting the act was "to create a new statewide, independent system of locally-governed technical community colleges which will:

"(1) Insure that each technical community college area shall offer comprehensive educational, training, and service programs to meet the needs of both the communities and students served by combining realistic and practical courses in vocational technical education, high standards of excellence in academic transfer courses, and comprehensive community service programs;

"(2) Provide administration by state and area boards which will avoid unnecessary duplication of facilities or programs, which will encourage efficiency and creativity in education and training to meet the needs of the community and students;

"(3) Allow for the growth, improvement, and modification of the technical community colleges and their programs as future needs arise; and

"(4) Establish that technical community colleges are, for the purpose of education, an independent, unique, and vital segment of the state's higher education system, separate from both the established grade and high school

system and from other institutions of higher education, and not to be converted into four-year baccalaureate degree-granting institutions." § 79-2601, R. R. S. 1943.

A technical community college is defined as an institution operating pursuant to the act and "offering vocational technical education, two-year academic programs, and comprehensive community service programs; * * *." § 79-2602, R. R. S. 1943.

The initial act in 1971 designated eight different community college areas but did not place each of the counties in the State of Nebraska into an area but left the forming or joining of areas to the vote of the citizens, or otherwise for designation by the Legislature during the 1973 legislative session, since the act did not become fully effective operatively until July 1, 1973. The 1973 Legislature designated seven rather than eight technical community college areas. The entire State of Nebraska, designated by counties or portions of counties, was placed into one of the seven areas. § 79-2603, R. S. Supp., 1973.

Operation of any state vocational technical college, area vocational technical school, or junior college, located within the geographical boundaries of a technical community college area was to be assumed by the area on July 1, 1973. When the area assumed the operation of any of the three types of institutions, the technical community college area succeeded to all the property and property rights of every kind held by or belonging to the state vocational college, area vocational technical school, or junior college, and was to be liable for and assume and pay all contracts and obligations of those institutions. The institutions were to be deemed fully compensated by the assumption of the obligations and contracts for all the properties and property rights of every kind acquired by the technical community college area. After assumption of operation by the area, the former institutions were to be operated as "a tech-

nical community college with major emphasis on occupational education." § 79-2604, R. S. Supp., 1973.

The act created a State Board of Technical Community Colleges. The state board consisted of one member to be chosen by each area board from among the members of such area board and one member to be chosen by the State Board of Vocational Education from among the members of such board. § 79-2612, R. R. S. 1943.

The state board was given general supervision and control over the state system of technical community colleges. It was charged with various powers, duties, and responsibilities in order to insure that each community technical college area would offer comprehensive educational, training, and service programs. Those powers involve broad general policy matters, including financial and budgetary procedures and the establishment of guidelines and plans for the development of technical community college education and training in the state. The powers and duties of the state board include the reviewing the budgets prepared by area boards; the establishing of guidelines for the disbursement of funds; and responsibility to receive and disburse such funds for maintenance and operation and capital support for the technical community college areas. The state board's duties also include establishing minimum standards to govern the operation of the technical community colleges with respect to qualifications and credentials of instructional and key administrative personnel; internal budget accounting, auditing, and financial procedures; content of the curriculum and other educational and training programs, and the requirements, degrees, and diplomas awarded; setting of standard admission policies which "may provide for preference for Nebraska residents"; criteria and procedures for all capital construction, including the establishment, installation, and expansion of facilities within the various technical com-

munity college areas; and exercising any other powers, duties, and responsibilities necessary to carry out the purpose of the act. § 79-2616, R. S. Supp., 1973.

The act also creates a technical community college board of eleven members for each of the areas. In 1971, the initial members were appointed by the Governor but thereafter are to be elected, except that the board of education of the Omaha school district is designated as the area board for that technical community college area. Members are required to be residents and electors of the particular area. See, §§ 79-2617 and 79-2620, R. S. Supp., 1973.

Each area board has the power and duty to operate all public junior colleges and vocational technical schools and colleges in its area in accordance with the provisions of the act. Essentially the powers and duties of the area board involve administrative control of the area institutions, which in almost all major instances is subject to the state board. The area boards may establish fees and charges for the facilities authorized by the act, including reasonable rules and regulations for the government thereof, not inconsistent with the rules and regulations of the state board. The area boards may construct, lease, or purchase facilities only "with the approval and direction of the state board." The area boards may issue and sell revenue bonds for construction or acquisition of capital assets only "with the approval of the state board." The area boards are required to enforce the rules and regulations prescribed by the state board and promulgate such rules and regulations, and perform all other acts not inconsistent with the law or rules and regulations of the state board. The last 2 of 17 enumerated powers and duties of the area boards are: "(16) May perform other activities consistent with (the act) and not in conflict with the directives of the state board; and

"(17) Shall perform any other duties and respon-

sibilities imposed by law or rule and regulation of the state board." § 79-2619, R. R. S. 1943.

Section 79-2621, R. R. S. 1943, provides: "After July 1, 1973, when any resident of the state enrolls in any program or course maintained or conducted by a technical community college area other than the one in which he is a resident, such person shall pay the same tuition as a resident of the area offered the course."

The crucial section as to constitutionality here is section 79-2626, R. S. Supp., 1973. That section provides in part: "Beginning July 1, 1973, all costs of technical community college areas shall be financed as provided in sections 79-2601 to 79-2633. The governing board of each area shall annually, prior to July 1, 1972, and each year thereafter, prepare a proposed budget for the fiscal year beginning the following July 1. The budgets shall show all expenditures proposed by the board, and the revenue anticipated from tuition, state appropriations, the property tax levy, and all other sources. Such budgets shall be submitted by August 1 to the state board. The state board shall review such budgets and attach its recommendations thereto and transmit them to the Director of Administrative Services not later than September 15. The final budget for each area shall be set by the Legislature. * * * From the final budget for each area, the Legislature shall deduct (1) the amount to be received from tuition and other fees, (2) the amount to be received from property tax, (3) federal funds other than direct grants, and (4) revolving funds other than auxiliary enterprises. The Legislature shall appropriate to the area boards the amount remaining after such deductions. The distribution of state funds shall be made to each area board on July 1, October 1, January 1 and April 1 of each year. Such appropriation shall be from the General Fund or other available funds. The balance of the budget for each area shall be raised by the area board from tuition and other nontax sources

and by a levy of not to exceed one mill on all taxable property within each area. The state board shall advise each area board of the budget and appropriation for that area adopted by the Legislature. Each area board shall then determine the amount necessary to be raised by the property tax levy and prior to September 1 of each year shall certify to the county board of equalization of each county within the area a levy not to exceed one mill, uniform throughout the area, which shall be sufficient to raise the amount required. No appropriation of state funds shall be made to any technical community college area whose mill levy is less than one mill."

The respondents contend that the property tax levies provided for in that section are in violation of Article VIII, section 1A, of the Nebraska Constitution, which prohibits the State from levying a property tax for state purposes.

It is quite obvious that the act does create a new statewide independent system of post-secondary education. It reflects a modern coordinated legislative effort to solve the problem of providing more complete educational opportunities for the citizens of Nebraska. It also embodies an entirely new and different mixture of control and operation of educational systems by state and local units of government. For that reason, extensive reliance upon past educational patterns and purposes may be treacherous. The fabric of an educational system is woven of many threads. It is impossible to separate the threads which proclaim a state purpose from those which proclaim a local purpose and difficult to pick them out or identify them in the overall pattern. It is transparently clear that the State has, and should have, an abiding purpose to further all educational opportunities for its citizens, whether the particular institution or system is controlled, operated, and financed by local units of government under the provisions of state law, or whether it is controlled, operated, and

financed directly by the state government, also under the provisions of state law.

There is little help from prior precedent on these issues when there is no historical pattern which establishes a predominant state or local purpose. This court has decided two cases involving an interpretation of Article VIII, section 1A, of the Nebraska Constitution, which prohibits the State "from levying a property tax for state purposes." Those cases are Craig v. Board of Equalization, 183 Neb. 779, 164 N. W. 2d 445; and R-R Realty Co. v. Metropolitan Utilities Dist., 184 Neb. 237, 166 N. W. 2d 746. Neither of them provides direct assistance. In the Craig case we held that a statute requiring a county to levy a property tax for purposes substantially local does not contravene the prohibition of the constitutional amendment, although the statute commingles state and local purposes. In that case the statute required each county to levy a tax to pay the expense of maintenance of its own residents in state mental hospitals and in the Beatrice State Home. In the MUD case we held that a statute authorizing or requiring a city or county to levy a property tax for local fire protection purposes does not contravene the constitutional amendment. Both cases reflect a factual situation in which the property tax levy was for purposes substantially and predominantly local.

Here the historical factual background of purposes and responsibilities is uncertain. Where state and local purposes are commingled in a statutory enactment creating a new, independent, statewide system of technical community college areas, the crucial issue of the use of property tax levies to support the system turns on a determination of whether the controlling and predominant purposes are state purposes or local purposes. The application of the constitutional amendment prohibiting the State from levying a property tax for state purposes hinges on that determination. The question of whether an act of the Legislature pertains to state

purposes or local purposes is a judicial question. There is no sure test by which state purposes may be distinguished from local. This court must consider each case as it arises and draw the line of demarcation. State ex rel. City of Grand Island v. Johnson, 175 Neb. 498, 122 N. W. 2d 240. The Legislature has the power to provide by statute for the establishment of a new post-secondary educational system which might be either state or local. Viewed from the historical perspective of educational systems previously established in Nebraska, the pattern of the statewide system here more closely fits the pattern of an independent state system such as the state college system or the state university system, than it does the pattern of a traditional local educational system.

Under the act with which we are concerned here, the State has assumed the direct control of major policy decisions which affect the operation of each of the seven community college areas, and the statute reflects a purpose to control the operation of all seven areas for the benefit of the residents of the state as a whole. The provisions requiring that the tuition in any technical community college area for any resident of the State of Nebraska shall be the same as for a resident of the particular area is a strong indication of the legislative purpose to benefit residents of the entire state as contrasted to residents of particular local areas. The direct control by the State over capital expenditures, the right to contract for acquisitions and additions, and to control and direct which facilities and training will be available in which area, together with the complete and direct control of the individual budget of each technical community college area, demonstrate the dominance of the State as opposed to the local areas in all major matters of control and operation of the statutory system. It is undoubtedly true that such direct control will result in a more efficient and coordinated operation and avoid expensive and uneconomical duplication of facilities and

services. Those particular objectives in themselves reflect the dominance of a purpose to benefit the state as a whole.

The respondents assert that the provisions of section 79-2626, R. S. Supp., 1973, with respect to the levy of a property tax, constitute a property tax levy for a state purpose, which is prohibited by Article VIII, section 1A, of the Nebraska Constitution. We have said: "The levy of a property tax by a local governmental unit should not be treated as a state levy for state purposes merely because the Legislature has authorized or required the local governmental unit to make the levy." R-R Realty Co. v. Metropolitan Utilities Dist., *supra*. The converse of that proposition is that where the Legislature has authorized and required local governmental units to make a property tax levy for state purposes, it should not be treated as a local levy for local purposes merely because it is made by a local governmental unit. To construe the constitutional amendment to prohibit only a direct statewide property tax levy by the State itself would emasculate the amendment and render it virtually meaningless and wholly ineffective.

The provisions of section 79-2626, R. S. Supp., 1973, do not require the area boards to certify a levy of one mill. Nevertheless, they effectively enforce that result by voiding any state appropriation to an area whose mill levy is less than the maximum one mill. It should be noted here also that an appropriation of state funds has already been made at the time the area board is required to certify a property tax levy. The Legislature could not and would not approve any budget or make any appropriation to any area which did not show a one mill levy in its budget request. It is wholly unrealistic to assume that any area board will set its property tax levy at any amount less than the maximum one mill when the effect of that decision is to eliminate all state financial support. For all practical purposes the statute is mandatory in requiring a one mill levy. The result is to provide for a

one mill property tax levy in every county in Nebraska to support a statewide system of technical community colleges.

We hold that where the State assumes the control and the primary burden of financial support of a statewide system of technical community college areas under the provisions of the Technical Community College Area Act, the property tax levy provided for in section 79-2626, R. S. Supp., 1973, is for a state purpose within the meaning of Article VIII, section 1A, of the Nebraska Constitution.

The act provides that a declaration of invalidity of any section or part of any section shall not affect the validity of the remaining portions thereof. The parties have limited the challenge here to those portions of section 79-2626, R. S. Supp., 1973, which provide for the partial financing of the educational system created by the act through property tax levies. Our ruling that the property tax levies provided for are unconstitutional is limited to that determination.

The judgment of the District Court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. BILLY R. TORRENCE, APPELLANT.

219 N. W. 2d 772

Filed July 5, 1974. No. 39200.

1. **Searches and Seizures: Affidavits: Criminal Law.** An affidavit for a search warrant which is based in part upon information supplied by an unidentified informant is sufficient if the affidavit contains a factual basis upon which the reliability of the informant can be determined.
2. **Searches and Seizures: Affidavits: Criminal Law: Trial.** Where the identity of an informant is not relevant or helpful to the defense against the crime charged, the trial court is not required to order the identity of the informant be disclosed.

3. **Confessions: Evidence: Criminal Law: Trial.** Volunteered statements of any kind are admissible without a prior explanation of the defendant's rights.
4. **Jury: Evidence: Criminal Law: Trial.** It is not required that jurors be totally ignorant of the facts and issues involved. It is sufficient if a juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

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

Duane L. Nelson, for appellant.

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

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

BOSLAUGH, J.

The defendant appeals from a conviction for possession of heroin with intent to distribute.

The defendant was arrested on April 6, 1973, as a result of a raid by the police at a residence at 3611 Seward Street in Omaha, Nebraska. When the police entered the house the defendant was in the living room crouching down near a davenport. There were other persons in the house but no other person was in the living room except the defendant. A large quantity of heroin was found on a table in the dining area which was a part of the living room. The defendant's jacket was on a chair beside the table. It was apparent a packaging operation had been in progress when the raid took place. Small squares of aluminum foil each containing a spoonful of diluted heroin were on the table and being folded. The defendant's fingerprint was found on a sheet of glass which was being used in the packaging operation. The evidence was clearly sufficient to sustain the finding of the jury.

The defendant's principal assignments of error relate to the validity of the search warrant which was the basis

for the raid. A motion to suppress the evidence obtained as a result of the warrant was overruled before the trial commenced.

The affidavit upon which the warrant was issued alleged the defendant had been under investigation by the narcotics unit of the Omaha police division for the past 6 months and that the police had information heroin was being diluted and packaged for distribution by the defendant at 3611 Seward Street in Omaha, Nebraska. The affidavit stated the information alleged therein had been obtained by police surveillance of the defendant, particularly within the preceding 24 hours; from a druggist who had sold large quantities of Dormin (a dilutant) to the defendant on April 4, 1973; from an agent of the Bureau of Narcotics and Dangerous Drugs; and from an unidentified informant. The information supplied by the unidentified informant related to the general method of operation of the defendant in the "cutting" or dilution of heroin as a part of the packaging and distribution process. The specific information relating to time and place came from the other sources.

The affidavit alleged the informant had a "personal relationship" with the defendant. The affidavit stated the informant had given information in a previous case which had resulted in an arrest for possession of heroin and cocaine on January 14, 1973. This was a factual basis upon which the informant's reliability could be determined. The affidavit was sufficient to support the issuance of the warrant. See, United States v. Harris, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723; State v. Rice, 188 Neb. 728, 199 N. W. 2d 480.

The defendant's pretrial motion to disclose the name of the unidentified informant was overruled. Where the identity of an informer is relevant and helpful to the defense, disclosure may be compelled. Because of the nature of the evidence used by the State, the identity of the informer was not relevant to the defense against the

charge of possession of heroin with intent to distribute. The trial court was not required to order a disclosure of the identity of the informant. See, McCray v. Illinois, 386 U. S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62; United States v. Harris, *supra*.

After the defendant had been arrested and handcuffed, but before he had been removed from the house at 3611 Seward Street, he was struck on the head by an officer using a nightstick. The striking was not necessary to subdue or control the defendant who had been cooperative, and apparently was the result of a misunderstanding by the officer involved. Shortly thereafter Officer Parker said to the defendant: "Billy, I have been trying to get you for three years and I think I got you." The defendant replied: "You got me good, Mr. Parker." The defendant contends the statement was not admissible in the absence of a prior explanation of his right to remain silent.

In Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, the United States Supreme Court held specifically that volunteered statements of any kind are admissible without prior explanation of the defendant's rights. The defendant's reply was equivocal, but in any event it was spontaneous and voluntary in nature and not the result of interrogation. The objection was properly overruled.

On redirect examination the State was allowed to ask Officer Miller, over objection, why the police had not used their radio. Officer Miller answered: "Well, I received information from a party that worked on the North Side that Mr. Torrence had a Police monitor and did receive our radio calls." A motion to strike the answer was sustained and the jury was directed to disregard the statement. A motion for a mistrial was overruled. Striking the answer from the record and admonishing the jury was sufficient. The defendant was not entitled to a mistrial.

The defendant further contends he should have been granted a change of venue because pretrial publicity prevented him from having a fair trial. The voir dire examination of the jury showed that of the jurors selected to try the case, most had not been exposed to pretrial publicity to any appreciable extent. Of the jurors selected, all declared under oath they would not be influenced by what they had read or heard and would base their verdict solely on the evidence.

It is not required that jurors be totally ignorant of the facts and issues involved. It is sufficient if a juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. See Irvin v. Dowd, 366 U. S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751.

We have examined the other assignments of error and find them to be without merit. The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT ELLIOTT, APPELLANT.

219 N. W. 2d 775

Filed July 5, 1974. No. 39221.

Post Conviction: Records: Guilty Plea. A state may, in a post conviction hearing, cure otherwise defective plea-taking transcript to show that a plea of nolo contendere or guilty was entered voluntarily and intelligently.

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

Alan Saltzman, for appellant.

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

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

NEWTON, J.

This is a post-conviction proceeding. Defendant, appearing with counsel, pled no contest to assault with intent to rob and using a firearm in the commission of an assault with intent to rob. The record fails to affirmatively reflect that the court, in accepting defendant's plea of no contest, complied with the criteria set forth in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763. It is therein stated: "Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea." Such examination is essential to a determination of whether or not a plea is voluntary and intelligently entered.

We do not vacate the plea of no contest and the sentence imposed but remand this cause for an evidentiary hearing on the issue of whether or not the plea was in fact voluntarily and intelligently entered. In Todd v. Lockhart, 490 F. 2d 626 (8th Cir., 1974), it is stated: "Since we believe that as a constitutional matter the question is whether the plea was voluntary and intelligent, we agree with a number of other courts which have held that a state may, in a state post-conviction hearing, McChesney v. Henderson, 482 F. 2d 1101, 1109 (5th Cir. 1973), or in a federal post-conviction hearing, Walker v. Caldwell, 476 F. 2d 213, 215-216 n. 1 (5th Cir. 1973), cure the otherwise defective plea-taking transcript. See also Turner v. Haynes, 485 F. 2d 183, 184 (4th Cir. 1973); Mountjoy v. Swenson, 306 F. Supp. 379, 384-385 (W. D. Mo. 1969); State v. Darling, 109 Ariz. 148, 506 P. 2d 1042, 1046 (1973); Merrill v. State, 206 N. W. 2d 828, 830-831 (S. D. 1973). In so doing we do not return to the pre-Boykin practice of assuming that a defendant represented by counsel has entered a voluntary and intelligent plea. Rather, we hold that once a state prisoner has demonstrated that the plea taking was not conducted in accordance with Boykin, the state may, if it affirmatively proves

in a post-conviction hearing that the plea was voluntary and intelligent, obviate the necessity of vacating the plea."

The record in this case does reflect that defendant was probably fully apprised of the situation he faced and of his rights by his counsel. It may be that defendant, at the time of entering his plea, had the requisite knowledge of all elements essential to an intelligent and voluntary plea. If so, this should be reflected in the record.

The judgment of the District Court in this post conviction proceeding is reversed and the cause remanded for an evidentiary hearing.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. RUDOLPH W. KLATT, APPELLANT.

219 N. W. 2d 761

Filed July 5, 1974. No. 39237.

Criminal Law: Jury: Waiver: Attorney and Client. A written waiver of jury trial signed by defense counsel and acquiesced in by the defendant is sufficient to constitute a valid waiver of a criminal defendant's right to a jury trial.

Appeal from the District Court for Custer County: WILLIAM F. MANASIL, Judge. Affirmed.

Paul E. Watts, J. Joseph McQuillan, Gerald E. Moran, and George R. Sornberger, for appellant.

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

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

BRODKEY, J.

This is the second appearance of this case in this court. The defendant, Rudolph Klatt, was originally charged

with murder in the first degree. Before being tried on that charge, however, he was found incompetent to stand trial and spent more than 2 years being treated in the Lincoln State Hospital. Following his release, he was on July 27, 1970, tried on that charge to the court, his counsel prior thereto having stipulated to a waiver of trial by jury, and having filed with the court a document entitled "Waiver of Jury Trial," signed by one of his counsel as permitted by the Nebraska statutes. See § 25-1126, R. R. S. 1943. Defendant was found guilty of murder in the second degree and sentenced to life imprisonment. He appealed that conviction and sentence to this court, which affirmed the judgment of the District Court. See State v. Klatt, 187 Neb. 274, 188 N. W. 2d 821 (1971).

This appeal involves a motion to vacate and set aside his conviction under the Nebraska Post Conviction Act, the defendant alleging as grounds therefor that he was denied effective assistance of counsel and his right to a jury trial. An evidentiary hearing was thereafter held on that motion, and evidence received, following which the District Court denied said motion. Defendant now appeals that ruling to this court.

In this appeal defendant assigns as error that he never knowingly and intelligently waived his constitutional right to a jury trial, and that the trial court erred in denying his motion to vacate and set aside his conviction and sentence. He contends that the trial court did not advise him of his right to a jury trial nor did he personally waive his right to a trial by jury in writing or in open court for the record. He further argues that there was no valid waiver of his right to a jury trial, and that the subsequent trial to the court without a jury constituted reversible error. It is probably true that the trial court did not independently advise the defendant of his constitutional right to a trial by jury, a waiver of said jury trial having previously been filed

with the court by stipulation of defendant's counsel, said waiver being signed by one of defendant's attorneys, as previously stated. The issue to be decided in this case is as to the sufficiency of the procedure adopted to constitute a waiver of defendant's right to a jury trial; and whether defendant's constitutional rights were violated thereby, entitling him to relief under the Nebraska Post Conviction Act.

The United States Supreme Court has thus far refused to impose a hard and fast procedural rule on state courts relative to the waiver of a trial by jury, noting only that: "* * * whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend on the unique circumstances of each case." Adams v. United States ex rel. McCann, 317 U. S. 269, 63 S. Ct. 236, 87 L. Ed. 268, 143 A. L. R. 435 (1942). We have discovered no case, and defendant has suggested none, which would constitutionally require the procedure requested by defendant. A similar procedure to that suggested by defendant has been adopted in the federal courts under Federal Rules of Criminal Procedure, Rule 23 (a), and also some states have statutory provisions requiring that a waiver of jury trial be made in open court in writing signed by the defendant. In Nebraska, however, there presently is neither statutory nor case law delineating the exact requirements for a valid waiver of jury trial. Defendant urges upon the court that we adopt, as the standards for such a waiver, section 1.2 (b) of the ABA Standards Relating to Trial by Jury, which reads as follows: "(b) The court should not accept a waiver unless the defendant, after being advised by the court of his right to trial by jury, personally waives his right to trial by jury, either by writing or in open court for the record." However in the Commentary to the above section the following appears: "Although written waiver is a commendable

procedure, and a necessary one when a record of the proceedings is not maintained, the standard would permit waiver by an oral statement for the record. Such a record, which is deemed adequate when the defendant has waived trial altogether by pleading guilty, will also suffice for waiver of a jury.

"Of course, it does not follow that failure of the court to advise the defendant of his right to jury trial will always require a finding that there has not been an effective waiver of jury trial. Sometimes the sequence of events will sufficiently establish that a voluntary and knowing waiver has occurred."

It is clear from the record that from the very beginning of this case, the defendant was advised and consulted with by all his various attorneys as to his constitutional right to a jury trial, and it further clearly appears that the decision of his counsel to try the case, which involved the defense of "not guilty by reason of insanity," to the court rather than to the jury, was a tactical decision; and that the defendant, although originally objecting thereto, did agree to a trial to the court, and partook in the trial without any objection as to the fact it was not being tried to a jury. Defendant claims in his brief that any conversations of his attorneys with him regarding his constitutional right to a jury trial which preceded the defendant's commitment to the Lincoln State Hospital in 1967 is entitled to no weight whatsoever in determining whether he knowingly and intelligently waived his right to a jury trial. He further claims that it was the duty of his two court-appointed counsel to start ab initio, in late 1969 after he had been released from the Lincoln State Hospital, to ascertain his wishes and consult with him regarding any possible waiver of constitutional rights. Assuming, without deciding, that defendant is correct in that contention, it is clear from the testimony of one of his cocounsel, Thomas L. Anderson, given at the

evidentiary hearing in this matter, that the defendant was indeed apprised of his constitutional right to a jury trial and agreed to waive it. Mr. Anderson testified that the first time he contacted Mr. Klatt was on or about January 2, 1970, and that he had occasion to contact him after that date on many occasions, almost on a daily basis after he was transferred to the Hall County jail. The following verbatim transcript of the questions and answers on this matter is illuminating:

"Q. During your employment by Mr. Klatt, did you discuss with him the right to trial by jury in this case? A. Yes, I did. Q. And do you recall when and maybe how many times you have consulted with him in this regard? A. We discussed that on numerous occasions, practically from the very beginning. At first I was not entirely acquainted with the factual background on the charge pending on Mr. Klatt and at first he was extremely anxious to have his case tried to a Jury and originally we discussed the diffuculties (sic) of handling a fair Jury or a Jury that we felt we could work with in Custer County. As I became more familiar with the case and as I talked with the psychiatrist and the psychologist who were involved in the case it became apparent to me that we had a primary defense of insanity.

"At first in discussing this with Mr. Klatt he was not in favor of this particular defense and still at that time preferred to have his case tried to a Jury on other issues but through the process of almost daily meetings over a period of time I guess I conveyed to Mr. Klatt my optimism of the prospects of being acquitted—being found not guilty by reason of insanity.

"I was confident as I prepared the case that he had an excellent defense, that being the defense of insanity and as we discused the matter and as we discussed how we felt we could prove this case, what we felt the State

could prove and could not prove, he came to agree that this was the proper way to proceed in his defense."

There seems to be no question from a review of the testimony of the evidentiary hearing in the record but that the defendant was, indeed, fully aware of his constitutional right to a jury trial and waived that right, although the actual written waiver was signed by his counsel and not by him personally. That being so, it would seem that the statement contained in the Commentary to section 1.2 (b) of the ABA Standards Relating to Trial by Jury would apply and that the "sequence of events * * * establishes that a voluntary and knowing waiver has occurred" is certainly true in this case. See, also, 47 Am. Jur. 2d, Jury, § 63, p. 681; 21 Am. Jur. 2d, Criminal Law, § 282, p. 314; State v. Jelks, 105 Ariz. 175, 461 P. 2d 473 (1969).

We point out, moreover, that the foregoing standards were not on the date of the trial in question adopted by this court, nor have they to the present date been adopted; but that even if they were to be adopted at some time in the future, they would avail the defendant nothing in this proceeding for the reason that they would not at that time have constituted a violation or a deprivation of his constitutional rights, as required for relief under the Nebraska Post Conviction Act. We also add that as of this date, the procedure set out in section 1.2 (b) of the aforesaid ABA Standards is not constitutionally required.

The action of the District Court in denying defendant's motion to vacate and set aside his conviction was correct, and we affirm.

AFFIRMED.

WILLIS KUCHAR, APPELLEE, V. HENRY BERNSTRAUCH, DOING BUSINESS AS BERNSTRAUCH WRECKER SERVICE, APPELLANT.

219 N. W. 2d 764

Filed July 5, 1974. No. 39298.

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

Vincent J. Kirby, for appellant.

Mueting & DeLay, for appellee.

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

MCCOWN, J.

This is a replevin action for the recovery of possesion of an automobile and damages for its wrongful detention. The case was originally filed in the county court which found for the defendant and dismissed the action. Upon appeal to the District Court, that court found generally for the plaintiff as to the right of possession and damages and remanded the cause to the county court for determination of the amount of damages. The defendant has appealed from the judgment of the District Court.

Plaintiff's automobile was seized and impounded by the State Patrol on January 1, 1973, on suspicion that it was being used to transport marijuana. The officers placed the automobile in storage at the defendant's fenced lot. No proceeding for condemnation and forfeiture of the car under section 28-4,135, R. S. Supp., 1972, was ever filed in the District Court. There was apparently a criminal case filed in the county court of Madison County against one of the occupants of the car, entitled State of Nebraska v. LuAnn Kuchar. There is no showing as to any disposition of that case. No showing has ever been made in any court that any controlled substance was ever found in the plaintiff's car.

The plaintiff here made application in the case of State of Nebraska v. LuAnn Kuchar in the county court of

Madison County to receive possession and custody of his automobile from the State of Nebraska pursuant to section 28-4,135, R. S. Supp., 1972. It was stipulated and agreed at the hearing that the plaintiff was the owner of record of the automobile, and that he had no knowledge that such automobile was allegedly being used in violation of any provision of the Controlled Substances Act. On March 1, 1973, the county court entered its order and adjudged and decreed "that possession and custody of said automobile should be and hereby is placed in Willis Kuchar." The county court made no provision in the order for payment of storage charges by the State as it might have done.

The plaintiff presented the court order for possession of the car to the defendant on March 1, 1973. The defendant refused to release the automobile until the plaintiff paid the storage costs. The plaintiff then brought this action in replevin to recover possession of the car and damages for its wrongful detention.

The defendant's theory is that he had a lien on the automobile for the storage under section 28-4,135, R. S. Supp., 1972, which provides in part: "When a decree of condemnation is entered against any conveyance. court costs and fees and storage and other proper expenses shall be charged against the person, if any, intervening as claimant of the conveyance."

No decree of condemnation was ever entered in this case. In fact, no condemnation and forfeiture action was ever filed in the District Court as provided by the statute. The case is simply one in which an automobile was seized and impounded by the State and delivered to the defendant who held it merely as an agent of the State. Since no forfeiture action was ever filed in the District Court, the plaintiff quite properly filed his application for release in the criminal case in county court. When the county court ordered the release of the automobile to the plaintiff, any costs, fees, and storage charges should have

been assessed against the State. The order terminated any proceeding against the car which might have previously prevented a replevin action. The defendant was merely the agent of the State and as the person in possession of the property sought to be replevined was the proper and only necessary party defendant. See Coomes v. Drinkwalter, 183 Neb. 564, 162 N. W. 2d 533.

The defendant's refusal to deliver the automobile to the plaintiff on order of the county court was wrongful and willful. He had no lien on the automobile although he had a claim against the State for his storage charges. An agent is personally liable to third persons for his own misfeasances and positive wrongs. Wilson v. Thayer County Agricultural Society, 115 Neb. 579, 213 N. W. 2d 966.

The plaintiff was entitled to possession of the automobile on March 1, 1973, and for damages for its wrongful detention thereafter. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

IN RE FREEHOLDER'S PETITION. WALTER A. FRIESEN, APPELLANT, V. REGINA D. CLARK, APPELLEE.
220 N. W. 2d 12

Filed July 5, 1974. No. 39326.

1. **Schools and School Districts: Appeal and Error.** The action of the board under section 79-403, R. R. S. 1943, is an exercise of a quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action.
2. **Schools and School Districts: Statutes: Words and Phrases.** "The best interest of the petitioner or petitioners" as used in section 79-403, R. R. S. 1943, means the best educative interest of petitioner or petitioners and not the best noneducative interest of petitioner or petitioners.

3. **Schools and School Districts: Statutes: Evidence.** A freeholder's petition under section 79-403, R. R. S. 1943, must be supported by an adequate showing that the purposed transfer of land is justified in relation to the controlling educational factors regarding the convenience, necessity, or welfare of the pupil or pupils involved. Such a showing must include a demonstration of significant differences in the class, accreditation, leadership, management, curricula, and/or efficiency of the schools involved.

Appeal from the District Court for York County: JOHN D. ZEILINGER, Judge. Reversed and remanded with directions.

John R. Brogan and Joseph P. McCluskey, for appellant.

Barlow, Watson & Johnson and James J. DeMars, for appellee.

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

BRODKEY, J.

A freeholder's petition was filed by appellant, Walter A. Friesen, pursuant to section 79-403 (1), R. R. S. 1943, requesting that an 80 acre tract of land be set off from McCool School District No. 83, York County, and attached to Henderson School District No. 95, York County, Nebraska. Objections to the petition were filed by appellee, Regina D. Clark. Thereafter a board consisting of the county superintendent, county clerk, and the county treasurer of York County, appointed pursuant to the requirements of section 79-403 (1), R. R. S. 1943, held a hearing and authorized a transfer of the tract in question from the McCool School District to the Henderson School District. Appeal was then taken to the District Court for York County, which court, after hearing, entered a judgment denying the change of boundaries sought by the appellant. Appellant then appealed to this court. We reverse the judgment of the District

Court, and remand the cause with instructions to grant the requested transfer.

We have previously held that the action of the board under section 79-403, R. R. S. 1943, is an exercise of a quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action. Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N. W. 2d 119 (1957); McDonald v. Rentfrow, 176 Neb. 796, 127 N. W. 2d 480 (1964).

The requirements for transferring and attaching the property in question as requested in the freeholder's petition are set out in section 79-403, R. R. S. 1943. We shall not recite these requirements in detail at this point. Suffice it to say the parties concede that all the statutory prerequisites for maintaining this action have been satisfied and that the only issue involved in this appeal is whether or not there was sufficient showing under the foregoing statute that the transfer would be in the best *educative* interests of the petitioner. The part of the foregoing statute directly involved in this endeavor to change the school district boundaries provides as follows: "The board may, after a public hearing on the petition, thereupon change the boundaries of the districts so as to set off the land described in the petition and attach it to such adjoining district as is called for in the petition whenever they deem it just and proper and *for the best interest of the petitioner or petitioners* so to do." (Emphasis supplied.) This court has on prior occasions defined the phrase "the best interest of the petitioner or petitioners," as used in the foregoing statute, to mean the best educative interest of petitioner or petitioners and not the best noneducative interest of petitioner or petitioners. Roy v. Bladen School Dist. No. R-31, *supra;* McDonald v. Rentfrow, *supra.* The cases have made it clear that the

board in making such determinations should predicate its decision upon the educative interest of the petitioner or petitioners and not on their mere personal preference or convenience based upon noneducational reasons. This court has indicated certain matters which we deemed not to be in the best educative interest of the petitioners. For example in Roy v. Bladen School Dist. No. R-31, *supra,* the court stated: "* * * we conclude that the Legislature did not intend, in this modern highway and transportation age, to enact a statute concerned with schools, distances, and education of pupils for the sole purpose of making convenient allocations of land to school districts based upon individual preferences or secular business reasons of owners having nothing to do with educational efficiency." See, also, McDonald v. Rentfrow, *supra.*

It is true that in the trial of this matter in the District Court, evidence was adduced and received with reference to certain matters which were clearly not connected with the educative interests of the petitioner. This evidence will not be considered in this appeal. We must, however, determine the positive aspects of the problem, that is to say, what facts or elements may and should be considered in making the final determination in that regard. Of course, whether or not the respective schools are accredited is a relevant factor. Pribil v. French, 179 Neb. 602, 139 N. W. 2d 356 (1966); § 79-1108, R. R. S. 1943. However, it appears from the record that both the Henderson School District and the McCool School District are fully accredited, and thus this element is not determinative in this case.

In Roy v. Bladen School Dist. No. R-31, *supra,* the court indicated that "educational efficiency" is a matter to be considered; and the court made special note of the fact that none of the witnesses had "criticized the leadership, management, curricula, or efficiency of the Bladen Schools." In Johnson v. School Dist. of Wakefield, 181 Neb. 372, 148 N. W. 2d 592 (1967), the court specifically

held that: "* * * the size of a school or minor differences in extracurricular activities are not important considerations" and the court further emphasized that the evidence demonstrated "that both schools are good schools of equal class, with equal accreditation, and with practically the same curricula, and that no valid complaint can be made of the educational efficiency of either school." It appears therefore that so far as we are given any help or guidance by the cases referred to above, a freeholder's petition under section 79-403, R. R. S. 1943, must be supported by an adequate showing that the purposed transfer of land is justified in relation to the controlling educational factors regarding the convenience, necessity, or welfare of the pupil or pupils involved. Such a showing must include a demonstration of significant differences in the class, accreditation, leadership, management, curricula, and/or efficiency of the schools involved. Other factors such as the size of the schools involved or minor differences in extracurricular activities offered, although they may properly be considered in ruling on such a petition, are not alone enough to justify a transfer of land under that statute.

A review of the record in this case reveals that although both school districts offer a reasonably good program of education, there are certain considerations which lead us to the conclusion that the appellant should prevail on his petition and that the transfer of land sought by him should be granted.

In support of his petition appellant points out the fact that the Henderson School District offers a 4-year course of education in vocational agriculture, whereas the McCool School District offers no such course, and he argues that such a difference in the curricula of the two schools relates significantly to the educative interests of the child of school age residing on the land in question. Appellee argues on the other hand that it is speculative to suppose that the student involved, who is presently too young to enroll in the vocational agri-

culture course, will in the future have any interest in that course; and she further suggests that by the time the student involved is old enough to enroll in vocational agriculture, the McCool School District may possibly offer that course. We are not convinced by the arguments of the appellee. The fact that the student involved is not presently ready to take the course in vocational agriculture is not significant. What is significant is that by attending the school in the Henderson School District, the child will have the option to enroll in vocational agriculture if he so chooses. No such option is available if the child is required to attend school in the McCool School District. It would seem, if there is any speculation involved in this determination, it would be that speculation which foresees the distant possibility the McCool School District may in the future offer a course in vocational agriculture. We cannot indulge in this speculation. We believe that the fact the vocational agriculture course is available in the Henderson School District and not in the McCool School District is a significant educational factor relating to the welfare of the pupil involved in this case.

Perhaps of even greater significance herein, however, is the evidence concerning the relative makeup and quality of the staffs of the schools involved. It appears that the Henderson School District has a total of 33 staff teachers, 13 of whom have Masters Degrees or better. In contrast to this, the McCool District has 18 staff teachers, only 1 of whom has a Masters Degree. We believe that this great difference in the credentials of the teachers comprising the staff of the respective schools clearly indicates the significant strength of the Henderson program over that available in the McCool School District. For that reason, we conclude that an education in the Henderson School District in all probability would be more in the educative interests of the child residing on the land involved than would be an education in the McCool School District; and we reach this conclusion

notwithstanding the fact that it appears from the record that the Henderson School District may have a higher student-to-teacher ratio than the McCool School District. Obviously in making a judgment as to which of the two schools would be more for the educative interests of the petitioner, a balancing of strengths and weaknesses is necessary. We have done so in this case.

Finally, appellee points out that the Henderson School District is a Class III school (district population of 1,000 to 50,000), while the McCool School District is a Class II school (district population of 1,000 or less). See § 79-102, R. R. S. 1943. From this observation, appellee argues that the loss of one student and the loss of 80 acres of land will have a greater impact upon the McCool School District than upon the Henderson School District, and that such an event may actually pose a threat of dismemberment to the McCool School District. This suggestion of the appellee may or may not be accurate, but we point out that our sole concern under the law of this state is a determination of what would be in the best educative interests of the child whose future is involved in this case. Whether or not the transfer of land requested is to the advantage or the disadvantage of the school districts involved is not the deciding issue.

As a result of our examination of the record in this case, we have concluded that the transfer of land requested would be in the best educative interests of the child residing upon that land. For that reason, we conclude the judgment of the District Court should be reversed and the cause remanded with directions to grant the transfer of the land requested.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, C. J., dissenting.

I agree with the majority that the sole issue involved in this appeal is whether or not there was a sufficient showing, under section 79-403, R. R. S. 1943, that the transfer of land would be in the best educative interests of the student. However, I believe that the petitioner

did not meet his burden of proof by a preponderance of the evidence. The raison d'etre of this petition appears to be the personal convenience of the parents and the grandparents of the student, which is an impermissible justification for a transfer of land under section 79-403, R. R. S. 1943, as clarified in Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N. W. 2d 119. The petitioner's legitimate contentions, regarding the better quality of education to be had in the Henderson School District are inconclusive, and are offset by advantages at the McCool Junction public schools. The evidence affirmatively shows that the two school districts are functionally equivalent, and there is no sufficient educational reason why the transfer of land should be granted here. Consequently, I would affirm the District Court's judgment denying this transfer of land and I dissent from the majority opinion in this case.

It is abundantly clear, from a reading of the record, that it would serve the personal convenience of the petitioner and his family to have the child attend the Henderson public schools. The petitioner grandfather and other members of his family and friends are all "Henderson oriented." It would suit their family welfare, enjoyment, and social contacts to have their grandchildren attend school there. Secondly, the son and the wife are not available to greet the child after school for 3 to 5 weeks during fall harvesting. The petitioner grandfather lives near Henderson, and it is urged that the child could wait with his grandparents until his parents could pick him up. No similar situation is available in McCool. This factor is said to justify the transfer of land in this case. The petitioner is really asking us to conclude that the personal convenience of the parents is sufficient to grant a freeholder's petition. This has never been the position of this court. The Legislature did not intend to enact a statute concerned with schools, distances, and education of pupils for the sole purpose of making convenient allocations of land

to school districts based upon individual preferences or secular business reasons of owners having nothing to do with educational efficiency. See, Roy v. Bladen School Dist. No. R-31, *supra;* McDonald v. Rentfrow, 176 Neb. 796, 127 N. W. 2d 480. The petitioner cannot sustain his burden of proof by a mere showing of the personal inconvenience of the parents.

The petitioner also claims that it is in the best educative interests of the prospective student that he be educated in the Henderson School District because it offers a 4-year course in vocational agriculture, whereas the McCool School District offers no such course. I feel that this factor is too speculative to justify equitable relief. We are here dealing with the interests of a child entering kindergarten. It is entirely possible that the child will have no interest in vocational agriculture whatsoever. Additionally, this court has previously announced that the size of a school or minor differences in available extracurricular activities is not an important factor in determining if a freeholder's petition should be granted. Johnson v. School Dist. of Wakefield, 181 Neb. 372, 148 N. W. 2d 592 (1967).

The petitioner further urges that it is advantageous for the child to attend the Henderson school because the teaching staff there has better credentials than the McCool staff. More specifically, the Henderson School District has a total of 33 staff teachers, 13 of whom have Master's Degrees or better, while the McCool School District has 18 staff teachers, only one of whom has a Master's Degree. While a more highly educated staff is desirable, I believe that such an advantage is offset by the more favorable student-teacher ratio which is to be obtained in the McCool School District. The student-teacher ratio in the elementary classes is 13.3 to 1 in the McCool School District, while in the Henderson School District the same ratio is 22 to 1. The child involved here is a kindergarten student. Individual attention is considered by many to be particularly im-

portant to children in the lower grades. If a differential is to be made between the two schools with reference to this boy, it would seem to me that this would be in favor of the McCool School District.

This is not a case of a request for a detachment from a poor, fading school district with a substandard program in teaching. Both the child's father and grandfather testified at trial that they had no objections to the educational program or administration of the McCool School District. Both schools are fully accredited, adequately staffed, and progressive. The only difference is that one is somewhat larger than the other. To permit detachment when both schools are relatively equal and of high grade would be to permit, at the whimsy of a school district resident, a destruction and downgrading of the educational interests and facilities of one school with no comparable improvement in the educational interests of the other.

In summary, I believe the petitioner has not sustained his burden of proof that the transfer of land from the McCool School District to the Henderson School District would be in the best educative interests of the child, and accordingly, I dissent.

NEWTON and CLINTON, JJ., join in this dissent.

LEONA THOMSEN, APPELLANT, V. SEARS ROEBUCK & CO., APPELLEE.

219 N. W. 2d 746

Filed July 5, 1974. No. 39333.

1. **Workmen's Compensation.** An accidental injury sustained by an employee on the premises where she is employed, during her lunch hour, in a lunchroom maintained by and under the control of the employer, for the exclusive use of its employees, is an injury arising out of and in the course of her employment.
2. ———. The Workmen's Compensation Act should be liberally

construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded for further proceedings.

Matthews, Kelley, Cannon & Carpenter, for appellant.

Douglas Marti, for appellee.

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

MCCOWN, J.

This is a workmen's compensation case. The one-judge Workmen's Compensation Court found for the plaintiff. A divided three-judge court reversed and dismissed, and the District Court affirmed the dismissal.

The plaintiff was employed as a salesperson in the defendant's store. She had been an employee for approximately 9 years. On November 30, 1971, plaintiff was scheduled to work from 9 a.m. until 6 p.m. She was required to punch a timeclock at the beginning of her scheduled hours of work and at the end of the workday. She had 1 hour allotted for lunch, to be taken at any time she wished so long as the sales floor was adequately covered by other personnel. Her pay was computed on the basis that she took the required 1 hour for lunch sometime during the scheduled workday. She was not required to punch the timeclock at the lunch break.

The defendant's store premises included a cafeteria open to the public and a separate lunchroom open only to employees. Employees were not required to eat lunch in the employees' lunchroom but were free to go where they pleased. From January 1 of each year until approximately Thanksgiving the employees' lunchroom had only vending machines which dispensed cold food and assorted beverages. A "hot line" was put in service during the Thanksgiving-Christmas rush season. Daily announce-

ments during the rush season reminded the employees of the availability of the employees' lunchroom for hot as well as cold food service. The convenience and quickness of utilizing this facility was emphasized. Food prices in the employees' lunchroom were generally the same as in the public cafeteria except that coffee was 5 cents less. All revenue from sale of the hot food line and a percentage of revenue from vending machines was received by the defendant. The operating superintendent testified that the lunchroom was intended for the convenience of the employees and that it helped to build good morale among them. Persons other than employees were prohibited from entering or using the lunchroom.

On November 30, 1971, the plaintiff left her sales department shortly before noon and went to the employees' lunchroom in the defendant's store for lunch. She had brought a sandwich from home and she purchased a salad and coffee in the lunchroom. After she had eaten and visited with friends for awhile, someone came in and informed her that her son had come for the car keys. She got up to leave the lunchroom, fell, and broke her hip.

The one-judge Workmen's Compensation Court held that the accident and injury arose "out of and in the course of her employment." One judge of the three-judge Workmen's Compensation Court on appeal concluded that plaintiff's accident and injury arose out of and in the course of her employment and was compensable. The other two judges held "that injuries occurring to employees at the lunch hour do not arise out of and in the course of the employment unless the employer requires the employees to eat their lunch and spend the lunch hour on the defendant's premises; * * *." The District Court affirmed the judgment of dismissal entered by the Workmen's Compensation Court.

The sole issue on appeal is whether under the facts here, the accident and injury to the plaintiff, during her

lunch hour and on the premises of the employer, arose out of and in the course of her employment. The most important and pivotal fact here is that the accident and injury occurred on the premises of the employer within the scheduled hours of employment. This court has been committed to the rule that an employee injured on the premises of the employer, where he works, while coming to work or leaving after work is within the course of his employment under the Nebraska Workmen's Compensation Act. McDonald v. Richardson County, 135 Neb. 150, 280 N. W. 456; Acton v. Wymore School Dist. No. 114, 172 Neb. 609, 111 N. W. 2d 368.

We have also held that when an employee was assaulted and injured while eating lunch on the premises of his employer where the meal was furnished as a part of his wages, the injury was sustained in the course of his employment. Miller v. Reisch Co., 132 Neb. 338, 271 N. W. 853.

In Berry v. School Dist. of Omaha, 154 Neb. 787, 49 N. W. 2d 617, we held that when an employee, who is employed to work at specific fixed premises, is injured while absent from those premises for the purpose of eating lunch during a lunch hour, the injury does not arise out of and in the course of the employment. In that case, a teacher was eating lunch at another school building where she had no services to perform in her employment, although the same school district was the owner of both buildings.

We have been cited to no Nebraska case which passes directly upon the specific issues involved here. Although this case on its facts is one of first impression in this State, the issues have been determined in many cases from other jurisdictions. The general rule is stated in 1 Larson, Workmen's Compensation Law, § 21.21(a): "Injuries occurring *on the premises* during a regular lunch hour arise in the course of employment, even though the interval is technically outside the regular

hours of employment in the sense that the worker receives no pay for that time and is in no degree under the control of the employer, being free to go where he pleases.

"There are at least four situations in which the course of employment goes beyond an employee's fixed hours of work: the time spent going and coming on the premises; an interval before working hours while waiting to begin or making preparations, and a similar interval after hours; regular unpaid rest periods taken on the premises, and unpaid lunch hours on the premises. A definite pattern can be discerned here. In each instance the time, although strictly outside the fixed working hours, is closely contiguous to them; the activity to which that time is devoted is related to the employment, whether it takes the form of going or coming, preparing for work, or ministering to personal necessities such as food and rest; and, above all, the employee is within the spatial limits of his employment. * * *

"In any case, most courts have concluded that the unpaid lunch hour on the premises should be deemed to fall within the course of employment."

Numerous cases in support of these propositions are cited. We think it necessary to refer to only a few. The closest in a factual comparison is the case of Dyer v. Sears, Roebuck & Co., 350 Mich. 92, 85 N. W. 2d 152. That case arose in Michigan where a statute created the presumption that employees going to or from work while on the premises where work is to be performed and within a reasonable time before and after working hours are in the course of employment. The statute reflected the earlier case law of Michigan and that case law reflects the Nebraska case law. The Dyer case held that an employee who was allowed an hour a day to eat lunch at any place she pleased, but who ate in her employer's third floor lunchroom and then slipped and fell on the stairs of the employer's building while on her way toward the street to pay a personal bill off the premises before re-

turning to work at the end of her lunch hour, had sustained an injury arising out of and in the course of employment.

In Industrial Commission v. Golden Cycle Corp., 126 Colo. 68, 246 P. 2d 902, an employee was injured by a cave-in as he sat under a bank on the employer's premises to eat his lunch. The Colorado Court said: "Courts generally have been liberal in protecting workers during the noon hour if the injury occurs while the worker is doing what a man may reasonably do within a time during which he is employed and at a place where he may reasonably be at that time. The claimant here, in the matter of eating his lunch at the time designated for that purpose on the premises of the employer, was doing so in the course of his employment."

In Askren v. Industrial Commission, 15 Utah 2d 275, 391 P. 2d 302, an employee was injured in a fall in a cafeteria located in the employer's building where she worked. The cafeteria area was leased by the employer to an operator under arrangements so that the lessee was, in effect, operating the cafeteria for the employer. Employees were not required to eat there but had the privilege of doing so if they desired. The employee fell in the cafeteria during her lunch period. The Utah Court held the injury to be compensable under the Workmen's Compensation Act upon the basis that the operation of the cafeteria was of benefit and advantage both to the employer and the employees. The court quoted from a prior Utah case involving lunch hour shopping to take advantage of an employee's discount, and approved the reasoning that the employee was participating in an activity encouraged by the employer on company premises which was an advantage to the employer and quoted the following language from that case: "(S)uch benefits are considered to be helpful in employer-employee relations, and most of the decided cases hold that the servant has the protection of compensation acts if injured while attempt-

ing to take advantage of such privileges during the lunch hour and while on the employer's premises." See Wilson v. Sears, Roebuck & Co, 14 Utah 2d 360, 384 P. 2d 400. On the same general issues see, also, Thompson v. Otis Elevator Co., 324 S. W. 2d 755 (Mo. App.); Henry v. Lit Brothers, Inc., 193 Pa. Super. 543, 165 A. 2d 406.

The great weight of modern authority supports the view that under the facts of this case the injuries sustained by the plaintiff arose out of and in the course of her employment. Under the facts here, an accidental injury sustained by an employee on the premises where she is employed, during her lunch hour, in a lunchroom maintained by and under the control of the employer for the exclusive use of its employees, is an injury arising out of and in the course of her employment. At the time of the injury she was using the lunchroom for the specific purposes for which the employer had provided it, namely to eat her lunch. The fact that she intended to undertake a personal errand on the premises after leaving the lunchroom is wholly immaterial.

Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved. Oline v. Nebraska Nat. Gas Co., 177 Neb. 851, 131 N. W. 2d 410.

Where the injury to an employee occurs on the premises of the employer, but at a time when he is not directly performing his work, the question is whether the employee's conduct is reasonably incident to the employment or is a deviation so substantial as to constitute a break in the employment and to create a formidable independent hazard. In employee actions against employers for injuries sustained on the premises while not actually working, the dividing line between the right to a cause of action for negligence and an action for workmen's compensation is a very nebulous one. Rules and principles which may clarify that demarcation line should

be considered in the light most favorable to workmen's compensation.

"This court has said many times that the Workmen's Compensation Act should be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation." Runyan v. State, 179 Neb. 371, 138 N. W. 2d 484.

Under the facts here, plaintiff's injuries arose out of and in the course of her employment. The judgment of the District Court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

L. G. HARRISON, AS ADMINISTRATOR OF THE ESTATE OF RUTH B. GRIZZARD, DECEASED, APPELLANT, V. JAMES E. GRIZZARD, APPELLEE.

219 N. W. 2d 766

Filed July 5, 1974. No. 39340.

1. **Divorce: Alimony: Witnesses: Words and Phrases.** The payment of money by a divorced husband directly to his ex-wife is a "transaction" within the meaning of the dead man's statute, section 25-1202, R. S. Supp., 1972, and a divorced husband is a person having a direct legal interest in the result of proceedings to revive judgment as to unpaid installments of child support vested in the deceased ex-wife.
2. **Judgments: Pleading.** A judgment must be supported by the pleadings.

Appeal from the District Court for Douglas County: LAWRENCE C. KRELL, Judge. Reversed and remanded with directions.

Ledwith & Shokes, for appellant.

No appearance for appellee.

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

WHITE, C. J.

The District Court, in this ancillary proceeding, brought in the divorce action by the administrator of the deceased wife's estate to determine the amount of accrued child support due, entered a decree, so far as pertinent here, finding a balance of $9,375.71 due, and directing that out of this sum the Douglas County welfare department should be reimbursed, without interest, for the amounts that it had paid the wife for the support of the children. On appeal by the administrator, asserting error in the amount of credits allowed the defendant, and in requiring reimbursement to the Douglas County welfare department, we reverse the judgment and remand the cause to the District Court with directions.

The plaintiff contends that the trial court was in error in giving the defendant credit in the sum of $500 for payments made direct to decedent by way of money order and cash. Over objection, based upon the dead man's statute, section 25-1202, R. S. Supp., 1972, the defendant identified certain money order receipts in the aggregate sum of $230 and testified that he delivered the money orders to the plaintiff's decedent. He also testified that he made other payments direct to the plaintiff's decedent but was unable to produce any evidence of such payments or the amounts. His own counsel stated that he was not trying to establish by this testimony the amount, but "just the fact that he made some periodic payments." The divorce decree provided, pursuant to section 42-318, R. R. S. 1943, that these payments be made direct to the clerk of the District Court. It is clear that the payment of money by a divorced husband directly to his ex-wife and in violation of the statutory and decree direction, is a "transaction" within the meaning of the dead man's statute, section 25-1202, R. S. Supp., 1972, and that a divorced husband is a person having a direct legal interest in the

result of proceedings to revive a judgment and to determine unpaid installments of child support vested in the plaintiff's decedent. Martin v. Scott, 12 Neb. 42, 10 N. W. 532; In re Estate of Holloway, 89 Neb. 403, 131 N. W. 606. See, also, Ruehle v. Ruehle, 161 Neb. 691, 74 N. W. 2d 689, 169 Neb. 23, 97 N. W. 2d 868. The oral testimony as to delivery of the money orders and the cash payments was incompetent and inadmissible. Consequently, the finding and judgment of credit due the defendant in the sum of $500 was in error and should be restored to the judgment on remand.

The basic contention of the plaintiff is the entry of a decree of the court sua sponte, providing for reimbursement and restitution to the Douglas County welfare department of the amounts that it had advanced or paid the plaintiff's decedent for the support of her children during the period of default of the defendant in making his child support payments. The record shows that the Douglas County welfare department at no time was made a party to these proceedings, nor are there any pleadings raising or asserting any issue with reference to the liability or reimbursement to the welfare department. The record affirmatively indicates that the Douglas County welfare department was notified by the court of these proceedings, but failed to respond in any nature whatsoever by way of pleadings, attempt to join in the action, or the assertion of any rights of restitution or reimbursement. We know of no statutes or court decisions that require or authorize such a judgment or order. It is elementary that a judgment must be supported by the pleadings. The pleadings here raise no issues except in the determination of the amounts due under the decree of divorce for child support.

The determinations we have made herein make it unnecessary to discuss or decide the other assignments of error or discussion of possible issues raised in the plaintiff's brief.

The judgment of the District Court is reversed and the cause remanded with directions to enter a decree in conformity with the opinion herein.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DANA C. JACOBS, APPELLANT.

219 N. W. 2d 768

Filed July 5, 1974. No. 39387.

1. **Criminal Law: Robbery: Assault and Battery.** The crime of assault and battery is a lesser included offense within a charge of robbery with force and violence.
2. **Criminal Law: Trial: Instructions.** When the defendant requests the trial court to submit a lesser included offense in the instructions, the trial court must submit all included offenses as to which the evidence is sufficient to support a verdict.
3. ———: ———: ———. The refusal to instruct upon a lesser included offense after request by the defense is reversible error.
4. **Criminal Law: Trial: Evidence: Confessions.** Where voluntary statements or confessions are not offered or received in evidence, testimony by a police officer that the defendant had been advised of his constitutional rights and refused to waive them is improper.

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

G. Randolph Reed, for appellant.

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

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

MCCOWN, J.

The defendant was charged with robbery "forcibly and by violence." He was found guilty by a jury and sentenced to 3 years imprisonment.

Paul Garcher was a 59-year-old traveling salesman who was in the Scottsbluff area and registered at the Quality Courts Motel on the evening of June 28, 1973. After dinner at the Flame Lounge, he met two young men, the defendant, Dana Jacobs, and Levi Messman, outside a bar in Scottsbluff. After spending some time in that bar, they proceeded to another bar. At the bar Garcher asked for help in securing girls. The evidence indicates that the defendant and Messman both attempted to "get some women" for Garcher but were unsuccessful. The clear implication from the evidence is that all three men had consumed substantial quantities of alcohol during the evening and may have been intoxicated. Garcher finally went to his motel at about 12:30 or 1 o'clock a.m., and went to bed. Around 2:30 a.m., Messman knocked on the door of Garcher's motel room and said that he had two girls and indicated that Garcher should come out. As Garcher stepped out, Jacobs shoved him and Jacobs and Messman attacked him and choked, struck, and beat him. Garcher testified that during the struggle he felt his wallet taken off his person by one of the two men. Evidence by the State established that the assault and battery took place in the motel parking lot that night and that Garcher suffered abrasions and contusions. The defendant admitted the attack on Garcher but testified that he and Messman only went to the motel to rough Garcher up because of his conduct earlier in the evening, and that they had no knowledge of his billfold, did not see it, and did not know where it went. It might be noted here that the defendant's evidence was that Garcher had dropped his billfold on at least two occasions in a bar earlier that evening.

The primary assignment of error involves the court's refusal to grant a request to instruct on the lesser included offenses of assault and battery. The court refused such an instruction "for the reason that the Court

feels that the same is not an includable offense." The court offered to instruct on assault with intent to commit robbery as a lesser includable offense if requested to do so, but that instruction was not requested and the court instructed the jury only on the offense of robbery. The jury found the defendant guilty of robbery as charged.

Unless this court elects to overrule it, this case is controlled by the case of State v. McClarity, 180 Neb. 246, 142 N. W. 2d 152. That case specifically held that the crimes of assault with intent to commit robbery and assault and battery are included within a charge of robbery. We also held that when the defendant requests the trial court to submit a lesser included offense in the instructions, the trial court must submit all included offenses as to which the evidence is sufficient to support a verdict. Here the evidence of the defendant established the assault and battery, and the State's evidence, if believed by the jury, was clearly sufficient to convict for the crime charged as well as the lesser included offenses. The refusal to instruct upon a lesser included offense, after request by the defense, is reversible error.

The State contends that although typically all necessary elements of assault and battery are embraced within an information for robbery, all the *potential* elements are not embraced within the information against the defendant. The argument has been rejected by this court and by the federal courts. See, Joyner v. United States, 320 F. 2d 798 (D.C. Cir.); Crosby v. United States, 339 F. 2d 743 (D.C. Cir.); 4 Wharton, Criminal Law and Procedure, § 1888, p. 754. The fact that the information specifically charged that the robbery was committed "forcibly and by violence" destroys the State's argument that robbery may potentially also be committed by "putting in fear."

The failure to instruct on the lesser included offense

of assault and battery, after request by the defendant, was error which requires reversal of the conviction here.

The defendant also assigns as error the admission of the testimony of a police officer that the defendant's accomplice, Messman, who did not testify here, was taken to the police station, given his "rights advisory" and gave "a statement in reference to this incident." An objection to the reference to any statement made or not made by Messman was overruled after a statement by the prosecutor that there was no intention of going into the substance. In answer to the next question as to what they did with reference to the defendant "following the taking of the statement," the officer testified that "with the information received" they proceeded to the Messman residence, picked up the defendant "and transported him to the police station, at which time he was given the rights advisory form, read in its entirety including the waiver of rights and the Defendant refused to waive his rights." An objection to any reference being made as to whether the defendant did or did not make any statement was sustained and the jury was instructed to disregard "the last statement made by the witness."

The State contends that because the substance of Messman's statement was not revealed, the rule of Bruton v. United States, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476, was not violated. The only plausible and reasonable interpretation of the officer's testimony is that Messman's statement implicated the defendant and they immediately arrested him. There is no doubt that it is error of constitutional dimensions to admit a statement of a codefendant who does not testify, when the statement inculpates the accused, notwithstanding instructions to the jury to disregard the statement. Whether or not the error, under the circumstances here, was or was not harmless need not be decided here. The testimony as to what was done by the officers with

reference to Messman, and whether or not he made or did not make a statement to the police was wholly improper in this case, where Messman did not testify, and the court had already overruled a motion by the State to consolidate the trials of the defendant and Messman.

The defendant also asserts that the eliciting of improper and prejudicial testimony that the defendant had been advised of his constitutional rights, but had refused to waive them, was not cured by sustaining an objection and instructing the jury to "disregard the last statement made by the witness."

In State v. Brown, 185 Neb. 389, 176 N. W. 2d 16, we specifically held that testimony by a police officer that the defendant had been advised of his constitutional rights and refused to answer any questions in regard to the incident was improperly admitted over objection and constituted prejudicial error. Here the court attempted to cure the error by instructing the jury to disregard it. It should be noted that an error of constitutional dimensions may not be so harmless as to be subject to curing by an instruction to the jury to disregard it. Mr. Justice Jackson's statement in Krulewitch v. United States, 336 U. S. 440, 69 S. Ct. 716, 93 L. Ed. 790, is appropriate: "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction * * *." Prosecuting attorneys must assume the responsibility for deliberate introduction of such testimony, and witnesses should be cautioned that such evidence is improper.

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

REVERSED AND REMANDED.

GEORGE W. VERSCH, JR., APPELLEE AND CROSS-APPELLANT, v. JAMES J. TICHOTA ET AL., APPELLEES AND CROSS-APPELLEES, IMPLEADED WITH CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE.

220 N. W. 2d 8

Filed July 5, 1974. No. 39405.

1. **Notice: Employer and Employee.** Under section 48-118, R. R. S. 1943, a strict compliance with the provisions requiring notice to the employer is not mandatory and jurisdictional.
2. ———: ———. The purpose of the notice requirements of section 48-118, R. R. S. 1943, is to give the employer or other party interested an opportunity to join in the action.
3. ———: ———. Under section 48-118, R. R. S. 1943, substantial rather than literal compliance with the notice provisions is sufficient.
4. **New Trial: Judgments: Appeal and Error.** When a motion for a new trial is seasonably filed and pending, the cause remains in the District Court so long as the motion is undisposed of and there can be no final judgment until its disposition.
5. ———: ———: ———. An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory.

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

Herbert M. Fitle, James E. Fellows, and George S. Selders, Jr., for appellant.

Jack L. Spence, for appellee Versch.

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

WHITE, C. J.

This is an action for the allowance for attorney's fees in a subrogation case. After settlement of the original claim for damages, and subsequent allocation of the proceeds between the plaintiff-employee Versch, and the defendant-employer City of Omaha (hereinafter referred to as the "City"), as subrogee, the plaintiff's

attorney made application for attorney's fees in the amount of one-third of the fund recovered by the City, $2,250. The trial court approved the application but modified the amount of fees due to one-fifth, $1,350. From this ruling, the City appeals and the plaintiff cross-appeals. We affirm the judgment of the District Court.

In December 1969, the plaintiff Versch filed a petition for damages against the defendants, Tichota and McCann Concrete Company. The City was joined as an additional party to determine its subrogation rights and it entered a voluntary appearance on the same date. On November 18, 1971, the plaintiff and defendants, Tichota and McCann, settled in the amount of $15,000. The City and the plaintiff were unable to agree as to the distribution of the proceeds. The court ordered distribution to the plaintiff in the amount of $8,250 and to the City in the amount of $6,750. Motions for new trials were then filed by both the plaintiff and the City on November 29, 1971. An attorney's lien was filed and recorded by the plaintiff's attorney on the same date. On April 5, 1972, a joint motion by both the City and the plaintiff to withdraw the motions for a new trial was filed. On the same day, the motion was granted and the judgment of November 18, 1971, was confirmed and the clerk was authorized to make distribution of the fund.

On April 11, 1972, the plaintiff's attorney filed an application for attorney's fees from the fund recovered by the City in the amount of $2,250. It was argued on October 4, 1973, and taken under advisement. On November 28, 1973, the court granted the application but modified the amount of attorney's fees to $1,350. From this judgment, the appeal and cross-appeal have been prosecuted.

The City contends that under section 48-118, R. R. S. 1943, the failure of the plaintiff to give notice 30 days prior to making the claim or bringing the suit disallows any reimbursement for attorney's fees from the fund payable to the City. We believe that the interpretation

of the statute as found in Gillotte v. Omaha Public Power Dist., 189 Neb. 444, 203 N. W. 2d 163 (1973), is controlling. The facts of Gillotte show that prior to the making of the claim, the workmen's compensation carrier of the employer had sufficient prior knowledge of the upcoming suit. The employer was then joined as a subrogated defendant. A year and a half after the filing of the petition and the employer's appearance in the action, the action was tried by the jury. In the instant action, it cannot be determined from the record whether the City had prior notice of the filing of the claim. However, 23 months elapsed from the day that the City voluntarily appeared, the same day the petition was filed by the plaintiff, until the cause came to trial. In Gillotte v. Omaha Public Power Dist., *supra,* we stated: "A reading of the entire statute makes it quite clear that a strict compliance with the written, certified, or registered mail notice provision was not intended to be mandatory and jurisdictional. The basic purpose was to give notice to the other party." It is stated in the statute that the notice requirement was meant to give the other party the opportunity to join in the action. The purpose was then met when the City was joined in the action and made its *voluntary appearance.* There can be no doubt that the City had actual notice of the making of the claim and the bringing and prosecution of the action. Under the provisions of section 48-118, R. R. S. 1943, substantial rather than literal compliance is sufficient. Gillotte v. Omaha Public Power Dist., *supra.* Furthermore, notice may be waived in writing or may be implied from unequivocal conduct. In this case, the *voluntary appearance* by the City at the filing of the petition is such an unequivocal waiver.

The City next contends that after final adjournment of the term of the court at which a judgment has been rendered, the court has no authority or power to modify the judgment except for the reasons stated and within the time limited by section 25-2001, R. R. S. 1943. Al-

though this statement of the law is correct, it is not applicable to the present situation. We have consistently held when a motion for a new trial is seasonably filed and pending, the cause remains in the trial court so long as the motion is undisposed of and there can be no final judgment until its disposition. No appealable order is considered as having been rendered while the motions for a new trial pend. Harkness v. Central Nebraska Public Power & Irr. Dist., 154 Neb. 463, 48 N. W. 2d 385 (1951); Brasier v. Cribbett, 166 Neb. 145, 88 N. W. 2d 235 (1958); Skag-Way Department Stores, Inc. v. City of Grand Island, 176 Neb. 169, 125 N. W. 2d 529 (1964). As a general principle, an order or judgment, if interlocutory, is not a final judgment. In applying these principles to the facts, we find that on November 18, 1971, a judgment was rendered as to the defendants Tichota and McCann and as to allocation of the fund. On November 29, 1971, both the plaintiff and the City moved for a new trial. The motions were then argued on December 3, 1971. On April 5, 1972, a joint motion to withdraw the motions for a new trial was granted, and the order of November 18, 1971, was confirmed. Thus, as the City concedes a final judgment, an appealable order was rendered on April 5, 1972. On April 11, 1972, the plaintiff's attorney filed an application for attorney's fees from the fund recovered by the City. At this point, the matter of the division of the substantive recovery between the parties was finally determined. The final determination of the amount of recovery was highly relevant and important to the fixing of the amount of attorney's fees to be allowed. The statute, section 48-118, R. R. S. 1943, does not require a simultaneous fixing of the division and the amount of attorney's fees. Such an interpretation of the statute would be unreasonable since it might effectively prohibit counsel for both parties to make an appropriate showing and record as to the proportionate value of the services rendered in the trial of the case on its

merits. By its terms, section 48-118, R. R. S. 1943, contemplates a supplementary and subsequent proceeding to determine the question of attorney's fees. Under the statute, section 48-118, R. R. S. 1943, the adjudication of expenses and attorney's fees becomes one of the issues to be determined by the court in a final adjudication of the whole case.

We, therefore, hold that the filing of the post-judgment application for the determination of attorney's fees was timely. This application, timely filed, was not disposed of at the adjournment of the term of the District Court in which it was filed, and the District Court had jurisdiction in the subsequent term to make a final determination of the issue. Section 25-2001, R. R. S. 1943, has no application to subsequent proceedings authorized by statute that relate to the division, disposition, and enforcement of the previous judgment entered on the merits of the case. The contention of the City is without merit.

By cross-appeal the plaintiff contends that the award of attorney's fees in the sum of $1,350 was inadequate. The thrust of the plaintiff's contention is that the award of attorney's fees should have corresponded with the contingent fee contract with the plaintiff. While this may be a proper factor that rests in the court's consideration, there are many other factors involved. Furthermore, the proportionate value of the services of counsel is a special factor, under this particular statute, addressed to the sound discretion of the court. The record shows that the District Court carefully separated for consideration the issue of attorney's fees, and we can find no abuse of discretion or error in the awarding of $1,350 as attorney's fees to counsel for the plaintiff in the recovery by the City in the amount of $6,750.

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

AFFIRMED.

CLAUD HALL, APPELLANT, V. ABEL INVESTMENT COMPANY ET AL., APPELLEES.

219 N. W. 2d 760

Filed July 5, 1974. No. 39406.

1. **Common Law: Torts: Municipal Corporations.** The common law rule of governmental immunity has not been completely abrogated in Nebraska.
2. **Fraud: Torts: Municipal Corporations: Damages.** An action for damages against a political subdivision for misrepresentation and deceit is barred by the Political Subdivisions Tort Claims Act.

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

A. James McArthur, for appellant.

Richard R. Wood, Charles D. Humble, Jack G. Wolfe, Alan A. Schroder, and Flavel A. Wright, for appellees.

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

BOSLAUGH, J.

This is an action for damages arising out of a conveyance of land by the plaintiff to the City of Lincoln, Nebraska. A demurrer of the city was sustained, and the plaintiff elected to stand on his amended petition. The plaintiff appeals from an order dismissing the action as to the city.

The amended petition alleged the city falsely represented to the plaintiff that it required 6 lots owned by him for the purpose of constructing an arterial street, known as the Northeast Radial, and a paving repair facility; that in fact the city did not intend to construct a paving repair facility upon the land to be obtained from him but intended to locate the proposed paving repair facility on other property; that the city wanted a part of his property for the purpose of exchanging it for other land owned by the Abel Investment Company and the

Omaha, Lincoln & Beatrice Railway Company; that as a result of the false representations of the city the plaintiff believed the city could acquire his property by eminent domain; and for that reason the plaintiff sold his land to the city, of which 15,930 square feet was to be used for the paving repair facility. The amended petition further alleged the plaintiff would not have sold the property if he had known the city could not acquire it by eminent domain; that the value of the 15,930 square feet to the Abel Investment Company and the Omaha, Lincoln & Beatrice Railway Company was $44,444.70 more than the $3,345.30 paid to him by the city; and that he had been damaged in that amount.

The amended petition alleged a transaction which had been induced by fraud. The plaintiff did not seek rescission but prayed for damages. Such an action against a city is barred by the Political Subdivisions Tort Claims Act.

The common law rule of governmental immunity has not been completely abrogated in Nebraska. Webber v. Andersen, 187 Neb. 9, 187 N. W. 2d 290. The Political Subdivisions Tort Claims Act limits the tort actions which may be brought against political subdivisions. § 23-2401, R. R. S. 1943; Webber v. Andersen, *supra*. It excludes actions for misrepresentation and deceit. § 23-2409 (5), R. R. S. 1943. See, also, Jones v. United States, 207 F. 2d 563; United States v. Neustadt, 366 U. S. 696, 81 S. Ct. 1294, 6 L. Ed. 2d 614.

The demurrer was properly sustained. The judgment of the District Court is affirmed.

AFFIRMED.

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

If the allegations of the plaintiff's amended petition are true, as they must be assumed to be for the purposes of the demurrer, then he is entitled to some relief even though it is not the relief for which he prays. The City of Lincoln concedes in its brief that if he proves the al-

legations of his petition he would be entitled to have the conveyance set aside because it was obtained by reason of a misrepresentation that the property was being acquired for public use when in fact it was being acquired for private use. The City argues merely that the plaintiff is not entitled to the relief for which he prays, that is, damages. The City points out that the request for damages in the form of additional compensation for the property conveyed amounts to an affirmance of the contract, whereas his remedy is to have the conveyance set aside. Rankin v. Bigger, 128 Neb. 800, 260 N. W. 202. The City's position correctly recognizes the fundamental principle that the power of eminent domain may not be exercised to permit the taking of private property for private use and that any action to do so is unconstitutional. Moritz v. Buglewicz, 187 Neb. 819, 194 N. W. 2d 215; Burger v. City of Beatrice, 181 Neb. 213, 147 N. W. 2d 784.

I would remand the cause with leave to the plaintiff to amend his prayer to ask to have the conveyance set aside and to pray for any consequential damages he may have suffered. This he is entitled to do under the provisions of section 25-854, R. R. S. 1943. If he declines to do so then his petition should be dismissed.

HERMAN BROTHERS, INC., OF OMAHA, NEBRASKA, APPELLEE, v. HENNIS FREIGHT LINES, INC., OF NEBRASKA, APPELLANT.
220 N. W. 2d 230

Filed July 11, 1974. No. 39198.

1. **Public Service Commissions: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.
2. **Public Service Commissions: Motor Carriers: Words and Phrases.** The term "willful failure" as used in the statute giving the Nebraska Public Service Commission jurisdiction and authority

to suspend, change, or revoke a certificate of public convenience and necessity for failure to comply with the provisions of the Motor Carrier Act is such behavior through acts of commission or omission which justifies a belief that there was an intent entered into and characterizing the failure complained of.

Appeal from the Nebraska Public Service Commission. Reversed with directions.

Rodney Peake and Marti, Dalton, Bruckner, O'Gara & Keating, for appellant.

Robert A. Skochdopole and Kennedy, Holland, DeLacy & Svoboda, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and COLWELL and WARREN, District Judges.

COLWELL, District Judge.

Hennis Freight Lines, Inc., of Nebraska, hereafter called Hennis, appeals from an order of the Nebraska Public Service Commission modifying its authorized service for the irregular route operations under certificate of public convenience and necessity No. M-10634, supplement No. 4, last issued on January 8, 1971, which then provided:

"SERVICE AUTHORIZED: Commodities generally (including perishables requiring refrigeration), except (1) livestock and (2) liquid petroleum products by tank vehicles. ROUTE OR TERRITORY AUTHORIZED: * * * Irregular Route Operations: Between all points in Nebraska over irregular routes."

These proceedings began by the Nebraska Public Service Commission, hereafter called Commission, filing its complaint, No. 1408, against Hennis and issuing an order to show cause on January 28, 1972, pursuant to section 75-315, R. R. S. 1943, alleging in substance that Hennis *willfully abandoned* its *regular route* operations under its certificate and allowed those operations to become *dormant* in violation of section 75-315, R. R. S. 1943.

On October 5, 1972, Herman Brothers, Inc., of Omaha, hereafter called Herman, filed its formal complaint No. 1076 with the Commission pursuant to section 75-315, R. R. S. 1943, alleging that Hennis had *willfully abandoned* its *regular route* operations under its certificate in violation of section 75-315, R. R. S. 1943, and further that Hennis had *willfully abandoned* its *irregular route* operations, particularly, that portion thereof which authorizes it to haul commodities requiring special equipment, and it allowed these operations to become *dormant* in violation of section 75-315, R. R. S. 1943.

Section 75-315, R. R. S. 1943, provides in part: "Any such permit or certificate may, upon application of the holder thereof, in the discretion of the commission, be revoked or may, upon complaint or on the commission's own initiative, after notice and hearing, be suspended, changed or revoked in whole or in part, for willful failure to comply with any of the provisions of sections 75-101 to 75-801, or with any lawful order, rule or regulation of the commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate."

The Rules and Regulations of the Commission alleged to have been violated are: Motor Carriers, Chapter III, Article 1, Section 1.2, "Unauthorized Operations. No carrier, without first obtaining Commission approval shall (a) fail to operate over its entire certificated route, (b) discontinue in any part service authorized, * * *."

Although the Herman complaint uses the language "willfully abandoned" and dormant" it is clear the parties understood that Herman had the burden to prove its complaint in the statutory terms of "willful failure." The parties agree that the main issue was the authority of Hennis to transport cement in bulk over irregular routes in Nebraska, which service requires special equipment.

The two complaints were consolidated for trial. In summary, the evidence was that Hennis is related to a

parent corporation, Hennis Freight Lines, Inc., of Winston-Salem, North Carolina. They have a mutual main office, terminal and loading dock in Omaha, Nebraska, where both interstate and intrastate operations are conducted. Their mutual terminal in Lincoln, Nebraska, was closed and not used at some time subsequent to January 7, 1971. Hennis has failed to continue and serve its regular route service west of Lincoln, Nebraska. Their employees, trucks, equipment, and facilities are used by both corporate owners. Hennis leases some trucks from Hennis Freight Lines, Inc. Hennis has 15 employees, 5 straight trucks owned or leased, and it has other equipment and facilities available to perform the services required in its irregular route certificate. Hennis owned no special equipment to haul cement either in bulk or in bag. It did have a lease contract with Ruan Transport, Inc., Omaha, Nebraska, to lease special equipment from Ruan to haul bulk cement. This leased equipment included 13 tractors and 27 trailers. The lease was filed and conditionally approved by the Commission on August 16, 1972. The special equipment was available on call; however, it was physically maintained in the Ruan Omaha yard, and Hennis failed to issue a receipt to Ruan for possession of the leased equipment as provided in Commission Rules, Motor Carriers, Chapter III, Article 7, Sections 2.1(f) and 2.2. Hennis used the Ruan leased equipment on October 10 and 11, 1972, for four separate cement shipments, receiving a net sum of $5 for each load hauled as provided in the lease contract. There is no evidence of any other cement hauling service by Hennis, or a request of Hennis for such service. Hennis kept its insurance premiums in force on all equipment, trucks, and personnel. It obtained such "R.C." plates as required by the Commission as necessary for the trucks owned and leased by it; and it conducted a limited general advertising program through truck directories,

telephone directories, free telephone call service, scratch pad and match cover advertising, and through sales personnel. After the Herman complaint was filed Hennis conducted a limited direct mail circular advertising campaign soliciting cement business. Hennis represented itself to the general public as being a motor carrier offering service pursuant to its certificate. Its advertising made no particular reference to either irregular routes or regular routes. All customer requests for irregular route service tendered to Hennis were satisfied and performed, and at the time of the hearing Hennis was providing the same service under its irregular route certificate as it provided when the certificate was last issued on January 8, 1971. Since 1966, Herman has been one of the two recognized leaders in the field of hauling cement in both bulk and bag from the three main Nebraska sources located at Omaha, Louisville, and Superior, Nebraska. Herman's equipment includes 182 Pneumatic semi-trailers, 25 flatbed trucks for bag cement, 31 cement storage siloes, 18 pumpers, and 288 motor tractors. Its equipment investment is sizeable.

The order of the Commission was entered on May 14, 1973; it modified the regular route operations of Hennis from which no appeal was taken; the order also modified the irregular route operations of Hennis as follows:

"SERVICE AUTHORIZED: Commodities generally, except those requiring special equipment.

"ROUTE OR TERRITORY AUTHORIZED: * * * Irregular Route Operations: Between all points in Nebraska, over irregular routes."

A part of the Commission's findings include: "The primary issue for determination in the Formal Complaint No. 1076 is whether or not the Defendant has *willfully abandoned* his irregular route operations, and in particular that portion thereof which authorizes the

Defendant to haul commodities generally requiring special equipment. * * * The record is devoid of any evidence indicating that the Defendant, Hennis Freight Lines, Inc. of Nebraska, performed any operations which required the use of 'special equipment' until after the Formal Complaint was filed. * * * 'Willful failure' has been defined by the Nebraska Supreme Court in the case of Union Transfer Co. v. Bee Line Motor Freight, 150 Nebr. at 284 (1948) as follows: * * * 'Willful failure as used in Section 75-238, R. S. 1943 (since revised), is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of. A failure to perform an act for a long period of time, which is required by law to be performed, generally constitutes a willful failure to perform.' * * * *the Defendant was required to conduct operations hauling commodities which require special equipment and failed to perform said services for a long period of time, and this constitutes a willful failure to perform.* That portion of the Defendant's authority which authorizes the transporting of commodities, which requires special equipment over irregular routes in the State of Nebraska is found to be *dormant.*" (Emphasis supplied.)

The issues here are limited to the strict application of section 75-315, R. R. S. 1943, to an existing irregular route certificate without the usual coordinate proceedings of a certificate holder's application to alter a route or service, or for the sale, transfer, lease, or consolidation of properties and certificates under section 75-318, R. R. S. 1943. We consider the first assignment of error, that the Commission erred in finding that Hennis willfully failed to comply with the Nebraska statutes and the Rules of the Commission.

"On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission, adminis-

trative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. * * * The prime object and real purpose of Nebraska State Railway Commission control is to secure adequate sustained service for the public at minimum cost and to protect and conserve investments already made for that purpose, and in doing so primary consideration must be given to the public rather than to individuals." Houk v. Peake, 162 Neb. 717, 77 N. W. 2d 310. See, also, § 75-301, R. R. S. 1943.

The Commission's Rules, Motor Carriers, Chapter III, Article 2, Section 2.4(c), provides in part: "Irregular route operations. Irregular route operations are characterized by: (1) Operations conducted strictly on a call and demand basis, (2) The movement of truckload lots or other substantial shipments, * * *."

"The Nebraska State Railway Commission is without power to revoke a certificate of convenience and necessity in the absence of evidence of a willful failure of the holder thereof to observe and comply with the Motor Carrier Act or any lawful order or regulation of the commission or any term, condition, or limitation of the certificate." Caudill v. Lysinger, 161 Neb. 235, 72 N. W. 2d 684.

The term "willful failure" as used in the statute giving the Nebraska Public Service Commission jurisdiction and authority to suspend, change, or revoke a certificate of public convenience and necessity for failure to comply with the provisions of the Motor Carrier Act is such behavior through acts of commission or omission which justifies a belief that there was an intent entered into and characterizing the failure complained of. Schmunk v. West Nebraska Express, Inc., 159 Neb. 134, 65 N. W. 2d 386.

Although the Commission in its order did correctly

quote from Union Transfer Co. v. Bee Line Motor Freight, 150 Neb. 280, 34 N. W. 2d 363, its definition of "willful failure" as applied to this case was in error.

The violation by Hennis of Commission Rules as to the possession of leased trucks was not a part of the Commission findings and it is not presented here. A violation of a Commission Rule is not of itself a willful failure. See In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418.

Hennis has continued to generally conduct its irregular route business in the same manner as existed at the time the certificate was last issued on January 8, 1971. It held itself out to render the authorized service; it owned, leased, and operated adequate terminal facilities and motor truck equipment, including special bulk cement equipment; it solicited business and performed satisfactory service in the territory assigned; it served all business tendered; and all insurance coverage and "R.C." permits required were obtained. Hennis was required to do no more. There was a paucity of bulk cement hauling business. There is no question that Herman established by the evidence that Hennis was an ineffective competitor for the bulk cement hauling business, but this does not meet the test of willful failure under section 75-315, R. R. S. 1943, as applied to this proceeding.

The order of the Commission was unreasonable and arbitrary and is reversed with directions to dismiss the Herman complaint No. 1076 at Herman's costs and to reinstate the Hennis certificate No. M-10634, supplement No. 4, for the irregular route service authorized as of January 8, 1971.

REVERSED WITH DIRECTIONS.

KATHLEEN L. LEWIS, APPELLANT, V. STEPHEN K. LEWIS, APPELLEE.

219 N. W. 2d 910

Filed July 11, 1974. No. 39281.

1. **Divorce: Infants: Parent and Child.** The controlling consideration in determining custody of minor children in a divorce proceeding is the best interests and welfare of the children.
2. ———: ———: ———. The findings of the trial court both as to an evaluation of the evidence and as to the matter of custody will not be disturbed on appeal in the absence of a clear abuse of discretion.

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

Thomas J. Walsh of Walsh, Walentine & Miles, for appellant.

Richard M. Fellman, for appellee.

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

BOSLAUGH, J.

This is an appeal in a divorce proceeding. The trial court dissolved the marriage, made a division of the property, awarded custody of the minor children to the respondent with visitation rights in the petitioner, and ordered each party to pay his own costs and attorney's fees. The issues on appeal relate to the custody of the children and the petitioner's request for attorney's fees.

The petitioner was a student at the University of Michigan, 17 years of age, when she met the respondent who was then 25 years of age and a graduate student at Eastern Michigan University. They lived together for a year before their marriage in 1968. Their children are Misha Ellen, born May 9, 1970; and Amy Lynn, born September 1, 1971. After living in Carbondale, Illinois, and Tuskegee, Alabama, the parties moved to Nebraska in 1971. The petitioner completed premedical

studies and was admitted to medical school. The respondent was employed as an instructor and continued his work toward a doctorate degree. The action for dissolution of the marriage was filed January 26, 1973.

The controlling consideration in determining custody of minor children in a divorce proceeding is the best interests and welfare of the children. Erks v. Erks, 191 Neb. 603, 216 N. W. 2d 742. The findings of the trial court both as to an evaluation of the evidence and as to the matter of custody will not be disturbed on appeal in the absence of a clear abuse of discretion. Kockrow v. Kockrow, 191 Neb. 657, 217 N. W. 2d 89.

The evidence in this case, much of which was in conflict, tended to show that both parties lacked maturity and emotional stability. To the extent the evidence was in conflict, we give weight to the fact the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Seybold v. Seybold, 191 Neb. 480, 216 N. W. 2d 179.

There are some facts which are undisputed. The petitioner is in medical school and has little time which could be devoted to the care of the children. The respondent has been caring for the children for some time and has been doing so in a satisfactory manner. Since the separation of the parties the petitioner has been living with a male medical student. This environment would be a most unsatisfactory home for the children.

The evidence established that the custody of the children was properly awarded to the respondent. However, in view of the age of the children and the evidence relating to the past conduct of the parties, the decree should be modified to provide that the custody of the children shall be under the supervision of the Douglas County department of public welfare.

We find no error in the judgment of the District Court

with regard to visitation rights or the denial of attorney's fees to the petitioner.

The judgment of the District Court, as modified, is affirmed.

AFFIRMED AS MODIFIED.

EILEEN M. ROACH, APPELLEE AND CROSS-APPELLANT, V. RICHARD W. ROACH, APPELLANT AND CROSS-APPELLEE.
220 N. W. 2d 27

Filed July 11, 1974. No. 39299.

Divorce: Judgments: Alimony: Parent and Child. The District Court has inherent power and retains a continuing jurisdiction to determine the amounts due and to enforce the judgments for alimony and child support.

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

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

Hotz, Byam & Kellogg, for appellee.

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

WHITE, C. J.

This is an action for alimony and child support due for the year 1971. The trial court awarded the plaintiff-wife $7,000 and other relief. The defendant-husband appeals on the theory that no relief should have been granted. The plaintiff-wife cross-appealed on the ground that the amount determined by the trial judge was insufficient and unsupported by the evidence. We hold that the trial court acted within its authority and was correct in making a determination of the amount of support due for 1971. However, we agree with the cross-appellant that the determination so made was incorrect. Accordingly, we affirm the trial court's asser-

tion of jurisdiction to determine support, but modify the amount of support granted for 1971 to $18,003.83.

This case, in its present posture, arises out of a divorce decree entered in 1961. Under that decree, the husband was to pay support money for a term of years and each year's payments were to consist of one-half of the husband's adjusted gross income. After several years had gone by, the wife suspected that she was not getting all to which she was entitled from the defendant. Thus, in 1971, she filed a motion asking that the defendant comply with certain orders to produce his tax returns for specified years, or be held in contempt. The defendant filed an answer and a cross-application in 1971 seeking a modification of the decree regarding alimony and child support to commence January 1, 1972. In 1972, the trial judge ruled that the defendant owed the plaintiff $56,000 for the years ending December 31, 1970. He also set forth new support provisions which were to commence January 1, 1972. Neither of these two orders are at issue in this action; both are now final and unappealable. The omission of the year 1971 in the order left confusion as to what amount the defendant owed for 1971, and the plaintiff sought to clarify the situation by bringing the instant action to determine the amount of support due her for 1971.

The defendant resisted all attempts to impose alimony and child support liability on him for 1971. His theory was that the modification of the support decree, which commenced January 1, 1972, encompassed the payments due for the year 1971 and constituted a final adjudication such as would bar the plaintiff from raising the issue of support for 1971 in this subsequent action. The trial judge ruled adversely to the defendant on this issue. He held that the amount due the plaintiff for 1971 had not been awarded in either the first ruling, which determined the amounts due up to December 31, 1970, or in the second ruling, which modified the support

provisions commencing January 1, 1972. Therefore, the plaintiff was entitled to an award, to be determined by reference to the defendant's adjusted gross income for 1971.

The only question presented by this appeal is whether the plaintiff was barred from bringing this action in 1973 for a determination of alimony and child support due for the year 1971, because of the earlier determination of amounts due and modification of child support rendered in 1972 now unappealable. The defendant's position is that the earlier determination of past-due support and the modification of future support rendered in 1972 encompassed amounts due in 1971 and constituted a final adjudication which operates to bar the plaintiff from raising the issue of 1971 support in this supplementary action. The original application specifically asked only for a determination of the amount of child support due *to December 31, 1970.* The District Court's judgment and order, unappealed from, determined only the issue presented by the pleadings, and determined the amount due through December 31, 1970. The defendant's answer and cross-petition to this application only sought a modification of the amounts of alimony and child support beginning January 1, 1972. Consequently, the amounts due the plaintiff for child support accrued and became vested in the year 1971. The District Court had no issue presented to it considering the amounts due in 1971. Its decree left the "gap" between December 31, 1970, and January 1, 1972, open and undecided. Consequently, the present application under review for the first time presented this issue for the court's determination. The argument of the defendant under res judicata is not applicable. No problem of res judicata or subsequent modification of a final order is present. There has been no splitting of a cause of action, nor has the issue of 1971 support been previously decided. The trial court at all times retained jurisdiction to determine the amounts due and enforce

its judgment rendered in 1961. It has inherent power to do so. See, Lippincott v. Lippincott, 152 Neb. 374, 41 N. W. 2d 232 (1950); Miller v. Miller, 160 Neb. 766, 71 N. W. 2d 478 (1955); 27B C. J. S., Divorce, § 254, p. 82. Included in this power to enforce its judgment was power to determine any amounts due the plaintiff under the 1961 decree. The 1961 judgment was in force until January 1, 1972, when it was modified, and it clearly included the year 1971. Thus we hold that the plaintiff is entitled to alimony and child support for the year 1971, and that the trial judge was correct in allowing the plaintiff to bring this subsequent application for a determination of the amount due.

The plaintiff-wife, on cross-appeal, raises the second issue, whether the trial judge arrived at the correct amount of alimony and child support due for 1971. The 1961 divorce decree provided that support payments should equal one-half of the defendant's adjusted gross income. This decree was in effect until it was modified commencing January 1, 1972. The plaintiff presented evidence consisting of copies of the defendant's tax returns and the testimony of a certified public accountant as to the defendant's income for 1971. The accountant testified that the defendant's adjusted gross income for 1971 was either $56,645.34 or $56,007.66, depending on which accounting method is used. The plaintiff accepts the smaller amount as being correct. It is her contention that one-half of $56,007.66 is $28,003.83. She testified that she received $10,000 from the defendant during 1971. After crediting the defendant with this $10,000, a balance is left of $18,003.83 due for the year 1971. As noted above, the trial judge awarded the plaintiff $7,000 for 1971, plus other relief not relevant here. The reasons for the trial judge's award of $7,000 are not clear either in the order or in the bill of exceptions. As we read the record, the accountant's testimony is essentially undisputed, and nothing appears to controvert it. We can see no reason why his assessment should not stand. Con-

sequently, we modify the trial court's order and hold that the amount due the plaintiff-wife for 1971 is $18,003.83.

AFFIRMED AS MODIFIED.

BURROUGHS CORPORATION, A CORPORATION, APPELLEE, V. JAMES E. SIMON CONSTRUCTION CO., A CORPORATION, APPELLANT.

220 N. W. 2d 225

Filed July 11, 1974. No. 39308.

1. **Courts: Jurisdiction: Appeal and Error: Motions, Rules, and Orders.** Generally, the Supreme Court's jurisdiction over appeals is based on final judgments or orders.
2. **Jurisdiction: Appeal and Error: Motions, Rules, and Orders.** An order is final only when no further action is required to dispose of the cause pending, but when the cause is retained for further action the order is interlocutory.
3. **Courts: Jurisdiction: Trial: Motions, Rules, and Orders.** The Summary Judgment Act, by its terms grants to the District Court the power to enter interlocutory orders eliminating issues upon which no genuine issue of fact is presented and contemplates and requires a trial and final order or judgment upon the material facts that are actually and in good faith controverted.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Appeal dismissed.

Kelley & Wallace, for appellant.

Murphy, Pederson & Piccolo and LeRoy Anderson, for appellee.

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

WHITE, C. J.

This is an action brought to recover a money judgment arising from an insurance clause in an equipment sale contract between the parties. The plaintiff, Burroughs Corporation, and the defendant James E. Simon Con-

struction Co., entered into a contract for the purchase of a computer system on which the defendant made a down-payment. In the contract the defendant as purchaser agreed to: "* * * insure the equipment for the benefit of Seller against loss or damage of any kind, shall be absolutely responsible for the equipment from the time of delivery at Purchaser's building and thereafter until paid for in full * * *." Certain equipment was delivered to the defendant. The parties designate and treat the delivered property as "hardware" and as "software." Subsequent to the delivery, the equipment was damaged by a fire. The defendant denied that any "application software" was damaged or destroyed by the fire. It further denied that any amount was due the plaintiff as a result of the above insurance clause. After interrogatories and other evidence were introduced in the hearing on the motion for a summary judgment, the District Court granted a partial summary judgment for the plaintiff based on the agreement by the defendant to insure the equipment for the benefit of the plaintiff. The partial summary judgment related only to the "hardware" portion of the equipment. The court specifically reserved for trial the issues regarding the damage, if any, to the "application software" and a second cause of action concerning goods allegedly delivered but not listed in the aforementioned insurance contract. In the light of our decision herein, the precise wording and nature of the partial summary judgment order is important. It is:

"IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment with respect to the hardware consisting of a Burroughs Electronic Billing Computer, a tape reader, tape punch and other hardware features described in the Equipment Sale Contract marked 'Exhibit A' and attached to plaintiff's second amended petition and other documents be and the same is hereby sustained and in that regard, the plaintiff have and recover from defendant the sum of $12,545.45.

"IT IS FURTHER ORDERED that plaintiff's motion for summary judgment with respect to the application software in the amount of $3,000.00 referred to in 'Exhibit A' and the issue raised in plaintiff's second cause of action of plaintiff's second amended petition be and the same is hereby overruled."

The defendant appeals from this order partially sustaining the motion for summary judgment. We dismiss the appeal as being premature.

The plaintiff asserts that the appeal is premature and should be dismissed because a partial summary judgment, being in the nature of an interlocutory order, is not a final order or judgment which is appealable. It is fundamental that our jurisdiction over appeals is based on final judgments or orders. Grantham v. General Telephone Co., 187 Neb. 647, 193 N. W. 2d 449 (1972); Hart v. Ronspies, 181 Neb. 38, 146 N. W. 2d 795 (1966); § 25-1911, R. R. S. 1943. Sometimes the best answer to a case is simply to state it. That would almost appear to be true here. Generally, and almost universally, this court has held that an order is final only when no further action is required to dispose of the cause pending, but when the cause is retained for further action the order is interlocutory. Otteman v. Interstate Fire & Casualty Co., Inc., 171 Neb. 148, 105 N. W. 2d 583 (1960); Merle & Heaney Manuf. Co. v. Wallace, 48 Neb. 886, 67 N. W. 883; Continental Trust Co. v. Peterson, 76 Neb. 411, 107 N. W. 786, on rehearing, 76 Neb. 417, 110 N. W. 316; Wunrath v. Peoples Furniture & Carpet Co., 98 Neb. 342, 152 N. W. 736; Barry v. Wolf, 148 Neb. 27, 26 N. W. 2d 303; Miller v. Schlereth, 151 Neb. 33, 36 N. W. 2d 497; Koehn v. Union Fire Ins. Co., 151 Neb. 859, 39 N. W. 2d 808; Harkness v. Central Nebraska Public Power & Irr. Dist., 154 Neb. 463, 48 N. W. 2d 385. The purpose of the statute, and our decisions construing it, is to prevent repetitious and vexatious appeals, avoid jurisdictional conflicts between this court and the District Court in the decisional

process, and to prevent delay by expediting the trial and the appellate judicial process.

The general rule eliminating appeals from interlocutory orders, has been given specific application to the summary judgment procedure in the enactment, in 1951, of section 25-1333, R. R. S. 1943, which provides in part: "If on motion under sections 25-1330 to 25-1336 judgment is not rendered upon the *whole* case or for *all* the relief asked and a *trial is necessary,* the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actully and in good faith controverted. *It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial* of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly." (Emphasis supplied.) In construing this statute we have stated: "It is observable that the section twice by inference indicates that the portion of the action which may be disposed of by summary action is not done so by a trial and twice declares specifically that the portion which may not be so disposed of *must* be submitted at a trial." (Emphasis supplied.) Otteman v. Interstate Fire & Casualty Co., Inc., *supra.*

We have quoted the exact order of the District Court. The District Court in entering this order, sustained partially the motion for summary judgment and only as to the defendant's liability for certain "hardware" equipment under the insurance clause of the equipment sale contract. It specifically retained for further trial the issues regarding the defendant's liability for the "application software" under the first cause of action based

upon the insurance clause, and all the plaintiff's second cause of action in its second amended petition. By its terms, the statute, section 25-1333, R. R. S. 1943, authorizes the court to eliminate issues on which there is no genuine issue of fact, by interlocutory orders, and the District Court's order comes squarely within the language commanding it to make an order specifying the facts that appear without substantial controversy, *including the extent to which the amount of damages or other relief is not in controversy,* and directing such further proceedings in the action as are just. The statute also contemplates, by its terms, that the whole case shall proceed to trial and disposition by the entry of a final judgment adjudicating all the issues in the case. In conclusion, the partial summary judgment entered herein was clearly interlocutory in nature, and not a final or appealable order. To hold otherwise would emasculate the purpose of the Summary Judgment Act and destroy its purpose of expediting trials by the elimination of unnecessary issues, by permitting piecemeal appeals, delaying the final disposition of the whole case in the trial court, and the acquisition of complete jurisdiction of the whole cause on appeal to this court.

Consequently, the contention that this appeal is premature is sustained and the appeal should be and is hereby dismissed.

APPEAL DISMISSED.

BOSLAUGH, J., concurring.

I concur in the opinion of the court dismissing the appeal as premature.

The test of finality is the substance of the decision rather than its form. See 4 Am. Jur. 2d, Appeal and Error, § 51, p. 573. However, it is sometimes difficult to determine whether a decision is interlocutory or final. Some difficulty might be avoided in partial summary judgments if phraseology were used which clearly expressed

the interlocutory nature of the decision and avoided the implication that a judgment subject to execution had been entered.

SO SOO FEED & SUPPLY CO., A CORPORATION, DOING BUSINESS AS SO SOO FEED & SUPPLY, APPELLANT, V. MAX MORGAN ET AL., APPELLEES.

220 N. W. 2d 25

Filed July 11, 1974. No. 39323.

1. **Evidence: Trial.** Circumstantial evidence alone 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 reasonably be drawn therefrom.
2. ———: ———. 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 the other.

Appeal from the District Court for Thurston County: WALTER G. HUBER, Judge. Reversed and remanded with directions to dismiss.

Smith, Smith & Boyd, for appellant.

Roy I. Anderson, for appellees Morgan.

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

CLINTON, J.

This cause commenced as an action by the plaintiff to foreclose a contractor and materialman's lien arising out of the sale and erection of a grain drying bin. The defendant purchaser, Max Morgan, answered alleging, among other things, breach of implied warranty of fitness and, in the first cause of action of a cross-petition, claimed damages in the sum of $2,500 to a quantity of milo stored in the dryer bin. The defendant alleged: "k. The drying unit was defective causing a fire in

the structure which overheated approximately 4,000 bushels of milo resulting in damage to the milo and grain bin structure." The trial court entered judgment for the plaintiff in the foreclosure action and rendered judgment for the defendant on the cross-petition in the amount claimed. No appeal is taken on the foreclosure decree. Plaintiff has appealed from the judgment on the cross-petition.

The issue which is determinative on this appeal is the sufficiency of the evidence to show that a defect in the drying unit caused the fire and the claimed consequential damage to the milo.

The evidence shows the following. The plaintiff, pursuant to a contract with the defendant, furnished and erected the foundation, the bin, floor supports, and a drying unit. The defendant furnished the electrical installation through a third party and also furnished and had installed and connected to the dryer the propane fuel supply system which consisted of a fuel tank, pressure regulator, pipes, and fittings. The dryer did not function to the defendant's satisfaction. He made numerous complaints. He testified: "They just couldn't get the thing to burn right. It was throwing yellow flame, and it just wouldn't operate. It would go out occasionally." The plaintiff, because of the complaints, worked on the unit. The plaintiff suggested that the defendant make wiring changes. The defendant contacted his electrician and his rural electric company. The latter made some changes; the electrician did not. Defendant was still not satisfied with the operation. One of the plaintiff's representatives suggested to him that the fuel installation should be modified to feed to the burner liquid propane rather than vapor. This was then done by the defendant's fuel supplier apparently a few days before the fire.

On the evening before the fire a representative of the plaintiff came to the farm. The defendant testified that this representative "messed with the wiring." After

the representative left, the defendant inspected the dryer. He testified: "Q. Did you go out to see the drying unit after he left? A. Yes, I believe I did go see if it was running. Q. Was it working or not? A. It was working correct. It had the pressure, or what I call correct. It was burning. Q. Then what happened next? A. Well, that night it burnt all the gas out and caught on fire underneath. A. Did you see the fire? When did you know about it? A. I actually never saw the fire. My wife smelled the fire and told me. She said, 'I can smell something burning.' Q. When was that? A. When she told me? I believe in the evening, and I crawled in the bin and sure enough it was so hot you couldn't hardly get in the bin. And the gas had all—was all gone. Q. Did you have to have the fire department? A. No, I never had the fire department. I contacted Jackson. I was not sure that it had burned. I mean I never saw no fire, and the fan was running, which I never shut it off to look. And so I contacted them and said, 'This thing is just overly hot.' " Four of the 2 x 12 wooden floor supports were burned and charred. These were replaced by the plaintiff with metal supports pursuant to the original contract and a prior agreement made during installation at which time metal supports had not been available. The dryer and power units except for smoke stains were not damaged. The defendant had the electric motor cleaned after the fire.

On cross-examination the defendant testified: "Q. Are you claiming that the fact that he messed around with the wires, that this caused the fire? A. I'm not saying that caused a fire, but I know he messed with the wires. Q. You don't really know what did cause the fire, do you? A. Right, I don't know."

The record is devoid as to any explanation as to what defects in the drying unit could cause the fire. There is no testimony by anyone as to how the unit functions. If the burning unit flared, as seems likely, was this

caused by the unit, or by a defective gas pressure regulator in the propane system which was furnished by the defendant and installed by a third party? There is no evidence that either the dryer or the fuel system were inspected after the fire for defects or lack of defect. As above noted, the defendant seems to imply that the "messing with the wires" caused the fire. There is no evidence to show the fire originated in the wiring, or it was even damaged in the fire, or that it required replacement. No expert testimony was adduced.

The cause of a fire may sometimes, of course, be proved by circumstantial evidence. Sometimes other evidence, including perhaps expert testimony, may be required. Whether an expert opinion is necessary or permissible to establish the cause of a fire depends upon the nature of the case. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc., 189 Neb. 247, 202 N. W. 2d 191. See, also, Bayse v. Tri-County Feeds, Inc., 189 Neb. 458, 203 N. W. 2d 171. Expert testimony may be required where the circumstances and nature of the fire are such that the trier of the fact could not readily infer the cause unaided by expert testimony. 32 C. J. S., Evidence, § 546(82), p. 309. Circumstantial evidence alone 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 reasonably be drawn therefrom. Barkalow Bros. Co. v. Floor-Brite, Inc., 188 Neb. 568, 198 N. W. 2d 329. 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 the other. Barkalow Bros. Co. v. Floor-Brite, Inc., *supra.*

The finding of the trial court was clearly wrong and the judgment against the plaintiff on the defendant's cross-petition is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. LARRY KNOWLES, APPELLANT.

220 N. W. 2d 30

Filed July 11, 1974. No. 39346.

1. **New Trial: Instructions: Appeal and Error.** The correctness of a ruling of the District Court in giving or refusing instructions cannot be considered by the Supreme Court unless such ruling is first challenged in the District Court by a motion for new trial.
2. **Constitutional Law: Appeal and Error.** For a question of constitutionality to be considered in this court, it must be previously raised in the trial court. If it is not raised in the trial court it may not be considered in this court.

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

Frank B. Morrison, Sr., and Bennett G. Hornstein, for appellant.

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

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

NEWTON, J.

Defendant was convicted of receiving stolen property, to-wit: A Scott four channel amplifier. He complains of an instruction given relative to a presumption of knowledge that the property had been stolen arising from the fact of possession. We affirm the judgment of the District Court.

The amplifier was stolen in March 1972. On February 20, 1973, it was pawned by defendant and never reclaimed. When pawned, defendant remarked he had purchased it in California for a sum in excess of $500. At the time it was pawned, the amplifier had a value of $200 to $250. The defendant rested at the conclusion of the State's case without offering further evidence explaining his possession of the amplifier. Both counsel

examined the instructions prepared by the court. Defendant's counsel stated: "Anyway, also, we have the Defendant, and the Defendant has no objections to any of the instructions." A motion for new trial was not filed.

The court instructed that, among other elements, the State had to prove beyond a reasonable doubt that the defendant received the amplifier knowing it had been stolen and with the intent to defraud the owner. The usual instructions on the presumption of innocence, reasonable doubt, and intent were also given. At defendant's request two instructions were given, to-wit: "Instruction No. 11 Guilty knowledge on the part of the accused that the property received is stolen cannot rest on mere supposition.

"Instruction No. 12 The mere possession of stolen goods does not in and of itself establish guilty knowledge, but is a circumstance to be considered with all the other evidence bearing upon such issue."

Instruction No. 13 given by the court is as follows: "Possession of recently stolen property ^ is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

"The term 'recently' is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time

since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession."

Defendant now asserts that there was a violation of due process in that the court failed to qualify the instruction by inserting the words "when such possession is unexplained," at the ^ checkmark noted.

Under all the circumstances, we do not believe the situation is one of plain error. Under the instructions given, the jury necessarily found beyond a reasonable doubt that defendant knew the property had been stolen and in so finding necessarily discounted his statement that it had been bought in California. It may be noted that his statement that he paid over $500 for such a second-hand item strains credulity and he failed to offer any evidence whatever to corroborate his statement about the California purchase. We nevertheless condemn the practice of omitting the language mentioned from the instruction.

The defendant did not object to the instruction at the conference on instructions. Neither has he filed a motion for new trial. The correctness of a ruling of the District Court in giving or refusing instructions cannot be considered by the Supreme Court unless such ruling is first challenged in the District Court by a motion for new trial. See State v. Middleton, 187 Neb. 821, 194 N. W. 2d 568.

"For a question of constitutionality to be considered in this court, it must be previously raised in the trial court. If it is not raised in the trial court it may not be considered in this court." State v. Mayes, 183 Neb. 165, 159 N. W. 2d 203.

Defendant also assigns as error the failure of the trial court to direct a verdict for defendant. The assignment is without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

BRODKEY, J., not participating.

McCOWN, J., dissenting.

In refusing to consider plain error in instruction No. 13, the majority opinion goes further than our cases have gone before. It refuses to acknowledge that an instruction is erroneous if it allows possession of recently stolen property, standing alone, to be treated by inference as prima facie evidence of guilt of a defendant charged with receiving stolen property. The opinion reaches that result by saying that the jury must have discounted the defendant's uncontradicted explanation. This merely emphasizes the fact that the instruction permitted the jury to find the defendant guilty of receiving stolen property by inference from the bare fact that he was found in possession of the stolen goods. The result is that the defendant has the burden of proving lack of guilty knowledge and the State is relieved of its obligation to prove that the defendant knew the property was stolen.

The Pennsylvania Supreme Court recently overruled a long line of its cases which permitted a jury to infer a defendant's guilt of possession of stolen goods from his recent unexplained possession of them. See Commonwealth v. Owens, 441 Pa. 318, 271 A. 2d 230 (1970). Cited as ground for that overruling were Leary v. United States, 395 U. S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57; and Turner v. United States, 396 U. S. 398, 90 S. Ct. 642, 24 L. Ed. 2d 610.

The possession of recently stolen property, when coupled with a lack of satisfactory explanation, or a false explanation or other incriminating circumstances or conduct, is sufficient to support a verdict of guilty. See, State v. Solano, 181 Neb. 716, 150 N. W. 2d 585; State v. Perez, 182 Neb. 680, 157 N. W. 2d 162; State v. Henry, 174 Neb. 432, 118 N. W. 2d 335; State v. Oltjenbruns, 187 Neb. 694, 193 N. W. 2d 744. This court has been and should remain committed to the rule that un-

explained possession of recently stolen goods can be used in conjunction with other evidence to infer guilty knowledge, but standing alone it will not support an inference of guilty knowledge nor authorize conviction. That is the modern rule in the great majority of jurisdictions. It should be reaffirmed here.

BOSLAUGH, J., dissenting.

In my opinion instruction No. 13 conflicted with instruction No. 12 and was erroneous.

STATE OF NEBRASKA, APPELLEE, V. JON R. AMBROSE, APPELLANT.

220 N. W. 2d 18

Filed July 11, 1974. No. 39354.

1. **Controlled Substances: Evidence.** Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found.
2. **Criminal Law: Trial.** Section 29-2025, R. R. S. 1943, provides that upon an indictment for any offense the jury may find the defendant not guilty of the offense but guilty of an attempt to commit the same, where such an attempt is an offense.
3. **Trial: Instructions.** In considering the impact of instructions, they must be viewed as a whole.
4. **Criminal Law: Statutes: Sentences.** Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Affirmed in part, and in part reversed and remanded.

Kelly & Kelly, for appellant.

Clarence A. H. Meyer, Attorney General, and Steven C. Smith, for appellee.

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

WHITE, C. J.

This is a criminal case in which the defendant was charged with the distribution and sale of cocaine; two counts of possession of cocaine; the distribution of fiorinal, a controlled substance; and possession of fiorinal. A jury found the defendant guilty on all counts. The District Court sentenced the defendant to a 5-year prison term on the count involving the distribution and sale of cocaine. On the other counts, lesser sentences were imposed, with all the sentences to run concurrently. The defendant appeals, asserting the insufficiency of the evidence to sustain the conviction, error in certain instructions to the jury and error in the imposition of his sentence. On appeal, we hold that the judgment of conviction is correct and is affirmed but remand the cause for resentencing under the applicable statute.

The evidence is clearly sufficient to sustain the conviction. David G. Kolar, a special employee of the Nebraska State Patrol, was working as an undercover agent during January 1973. Kolar testified that on the evening of January 9, 1973, he met the defendant Jon Ambrose and two others in the Brick Bar in Grand Island, Nebraska. It was at this time that the defendant Ambrose gave the fiorinal to Kolar. At the same time Ambrose made plans with Kolar for a sale of cocaine. These plans involved some rather complicated arrangements and trips not necessary to recite in this opinion. These arrangements and trips were completed, and Kolar bought a packet from Ambrose. There appears to have been a slight problem with this buy as Kolar apparently spilled some of it; however, there was sufficient powder remaining in the packet to be positively identified by a State chemist as cocaine. The buy was made at the home of an acquaintance of defendant on January 9, 1973. Kolar testified concerning a conversa-

tion at the home as follows: "Q. While you were there did you have any conversation with the defendant, Jon Ambrose? A. Yes, I had asked if he had the cocaine. * * * Q. Would you tell the court and jury what, if anything, Jon Ambrose said, Bieber said, and what if anything you said during the fifteen or so minutes of time you were with them? A. At first I asked if they had got the cocaine, to which Jon Ambrose said they had. I asked if he would sell it to me. At the time they said they didn't have a dime packet. Q. Who said that? A. Jon Ambrose. Q. Did you have any further conversation then? A. I asked how much in the packets that were sitting near the scale. They said sixty dollar bags. * * * Q. What, if anything, did Jon Ambrose say? A. Then I asked Jon if he'd sell the coke again. He said he would. He had John Bieber measure it out. * * * Q. What did Mr. Bieber do at that point? A. At that point he went to the canister of white powder substance and with a small knife proceeded to measure what he thought would be a dime bag of cocaine. Q. What if anything did he do next? A. He placed it on a sort of blue-colored piece of paper, folded it and left it on the table while he went to heat up some more cocaine for Jon. Q. Who put it on the table? A. Bieber did. Q. Then Bieber left the table? A. He didn't leave the table or the room. I gave Jon the money. Q. You gave Jon who the money? A. Jon Ambrose. Q. Where was he at that time? A. He was sitting on the couch."

This testimony is contradicted, of course, by the defendant, but it is clear that it is ample to sustain the conviction. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found. State v. Faircloth, 181 Neb. 333, 148 N. W. 2d 187. Additional factors besides mere presence abound, even from the

partial recital of the record given above. The cocaine was present in a canister on a table 3 or 4 feet from the defendant Ambrose. The transaction was completed solely with Ambrose except that John Bieber had measured the substance and had laid it on the table. The defendant Ambrose pocketed the money which was paid for the packet. It requires no further discussion to support the conclusion that this evidence was more than sufficient to sustain the charge against the defendant of possession and distribution. It demonstrated a participation in a criminal act beyond mere presence or acquiescence. There is no merit to the contention as to insufficiency of the evidence.

The defendant contends that the District Court failed to instruct the jury as to the "necessary knowledge and intent" required for the possession counts. This contention is totally without merit. The statute, section 28-4,125 (3), R. S. Supp., 1972, provides for criminal liability for "a person knowingly or intentionally possessing a controlled substance." Intent is not required, but is a permissive element. It is enough that the person is charged with knowingly possessing the substance. The record clearly reflects that the jury was correctly instructed as to each of the statutory elements of the three "possession" charges. The element of knowledge was specifically included and separately set out in instruction No. 6, instruction No. 8, and instruction No. 9. There is no merit to this contention.

The defendant next contends that instruction No. 4 entitled "APPLICABLE STATUTES" is in error. While it is true that the defendant was charged only with the violation of section 28-4,125, R. S. Supp., 1972, the other statutes recited in instruction No. 4 are clearly also "applicable" statutes and were necessary for the jury's information. The defendant argues that it was error to instruct the jury on "attempt" since the defendant was not formally charged with attempt. The statute, section 29-2025, R. R. S. 1943, provides that upon an

indictment for any offense the jury may find the defendant not guilty of the offense but guilty of an attempt to commit the same, where such an attempt is an offense. Section 28-4,129, R. S. Supp., 1972, included in the court's instruction No. 4, provides that the attempt to commit any offense under section 28-4,125, R. S. Supp., 1972, is likewise punishable. There was, therefore, no error in the recital of this statute in the instruction, and there could be no error in this particular case because of the fact that the defendant was not found guilty of an attempt. There is no merit to this contention.

The defendant next objects to certain instructions relating to cocaine because these instructions failed to state that cocaine does *not* include de-cocainized coca leaves or extractions which do not contain cocaine or ecogine. First, there was no evidence at all presented at the trial that the substances involved or testified to were anything but cocaine. The jury would have had to indulge in speculation and conjecture in basing judgment on an instruction not related to any evidence in the case. Furthermore, instructions must be considered as a whole, and in instruction No. 4 the District Court in this case stated specifically that "the substances do not include de-cocainized coca leaves or extractions which do not contain cocaine or ecogine." There is no merit to this contention.

The defendant makes several other technical objections to the organization of the instructions. We have examined these contentions and they are without merit. In a general instruction with relation to the function of the judge and the jury and the general presumption of innocence the court inadvertently and inaccurately inserted the numbered references to other instructions. But it is clear from reading all the instructions that the jury could not have been misled and that the numbering error, if anything, was favorable to the defendant. These contentions are without merit.

The defendant contends that he was erroneously

sentenced. The offense for which the defendant was sentenced to 5 years imprisonment occurred on January 9, 1973. At that time, section 28-4,125 (2) (a), R. S. Supp., 1972, provided for a minimum punishment of 5 years. After the commission of the crimes, but before final judgment, the Legislature amended this statute to provide for a less severe minimum sentence. See § 28-4,125 (2) (a), R. S. Supp., 1973. Applicable here is this court's statement in State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225: "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." See, also, State v. Waldrop, 191 Neb. 434, 215 N. W. 2d 633; State v. White, 191 Neb. 772, 217 N. W. 2d 916. This court has no original power to impose a sentence. That is exclusively a function of the District Court, reviewable for excessiveness in this court. Nothing that is said in this opinion is indicative of the fixing of the defendant's term. We do observe that the trial court sentenced the defendant to the minimum of 5 years as prescribed by the statute in effect at the time the offense was committed. It would therefore appear from the record that the sentence imposed upon the defendant was responsive to the statute in effect at the time the offense was committed. The statute now provides for a minimum sentence of 1 year. Under these circumstances, we hold that whatever sentences imposed by the District Court must be made in consideration of the applicable statute at the time the sentence and judgment were entered.

The judgment of conviction is affirmed. The defendant's sentence of 5 years is set aside and the cause is remanded for resentencing under the applicable statute.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

EARL SELDERS AND ILA SELDERS, ADMINISTRATOR AND ADMINISTRATRIX OF THE ESTATES OF MARCELLA, DOUREEN, AND GARY SELDERS, DECEASED, APPELLANTS, V. CHARLES DALE ARMENTROUT ET AL., APPELLEES.

220 N. W. 2d 222

Filed July 11, 1974. No. 39374.

1. **Death: Damages.** The amount of damages accruing to a next of kin because of the wrongful death of a minor child is difficult to estimate. Such damages are peculiarly within the province of the jury to determine and, unless clearly wrong, a reviewing court will not interfere with the verdict.
2. **Jury: Waiver.** The right to challenge a juror for cause may be waived or lost by a lack of diligence.
3. **Jury: Trial: Affidavits.** Affidavits or other sworn statements of jurors will not be received to impeach or explain a verdict, to show on what grounds it was rendered, to show a mistake in it, to show the jurors misunderstood the charge of the court, or to show they mistook the law or the result of the finding because such matters inhere in the verdict.

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

Moyer & Moyer and George H. Moyer, Jr., for appellants.

Deutsch & Hagen and Hutton & Garden, for appellees.

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

BOSLAUGH, J.

This is an action for damages for the wrongful death of Marcella Selders, Doureen Selders, and Gary Selders, minor children of Earl Selders and Ila Selters. The children died as a result of injuries sustained in an automobile accident on February 3, 1967.

The issue of the defendants' liability was determined in a previous trial. See Selders v. Armentrout, 190 Neb. 275, 207 N. W. 2d 686. The sole issue tried in the lower court was the amount of damages which the

plaintiffs should recover. The jury returned verdicts for the plaintiffs in the amount of $1,500 on each cause of action. The plaintiffs appeal, contending the verdicts were inadequate; the trial court erred in the admission of evidence; and the verdicts should have been set aside because of alleged misconduct of the jurors.

At the time of the accident which resulted in the death of the children the plaintiffs were separated. A decree of divorce had been entered on October 10, 1966. The custody of the children had been awarded to Mrs. Selders, and they were living with her.

The verdicts included all pecuniary loss sustained by the plaintiffs including medical, hospital, and funeral expenses. Doureen was killed instantly in the accident. The medical and hospital expenses for Marcella and Gary amounted to $297.10. The funeral expenses for the three children amounted to $3,395. It was a question for the jury whether the funeral expense was reasonable in view of the ages of the children and all the facts and circumstances.

Marcella was 15 years of age, Doureen was 13, and Gary was 9. The evidence showed the deceased children had made no contribution of earnings other than to their own support. The evidence concerning the two other children in the family who were not involved in the accident showed they had left home when they became self-supporting and had contributed very little of a pecuniary nature to their parents.

The amount which should be awarded in any wrongful death case is incapable of computation and is largely a matter for the jury. As stated in Dorsey v. Yost, 151 Neb. 66, 36 N. W. 2d 574, 14 A. L. R. 2d 544: "The amount to which a parent is entitled cannot be accurately determined because of the numerous contingencies involved. The amount being very problematical, it is peculiarly for the jury to determine, after hearing all the evidence bearing upon the situation, including the parent's position in life, the physical and mental condi-

tion of the child, his surroundings and prospects, and any other matter that sheds light upon the subject. Members of juries generally have children of their own and have information as to the pecuniary value of children's services and the expense involved in their care and education. A jury is peculiarly fitted to determine the loss sustained by a parent in such a case. At best, the verdict can only be an approximation as no yardstick exists by which the correct answer can be found with exactness."

The evidence in this case was such that the jury could have concluded the pecuniary loss to the parents, including the value of society and companionship, was relatively small. We are unable to say under all the facts and circumstances the verdicts were inadequate.

The plaintiffs contend the trial court erred in receiving in evidence, over objection, a copy of the petition and an affidavit and motion for citation for contempt filed in the divorce proceedings. The exhibits had some relevancy in that they tended to rebut testimony by the plaintiffs concerning their conduct and the family relationships. The ruling was within the discretion of the trial court.

On voir dire examination the trial court questioned the jurors as to whether they were acquainted with any of the lawyers and whether any of the lawyers were handling or had handled any business for them. After one had been excused for cause, the juror called to replace the juror who had been excused was asked if he had heard the questions asked of the other jurors. After an affirmative answer he was asked if he would have answered any of the questions in the affirmative. His reply was: "I know all the lawyers." The attorneys for the plaintiffs made no further inquiry along this line but subsequently discovered that the juror had been represented by the attorneys for one of the defendants. The reply by the juror that he knew all the lawyers was sufficient to put counsel on notice that

further inquiry should be made. The right to challenge a juror for cause may be waived or lost by a lack of diligence. Killion v. Dinklage, 121 Neb. 322, 236 N. W. 757. See, also, Medley v. State, 156 Neb. 25, 54 N. W. 2d 233; Young v. State, 133 Neb. 644, 276 N. W. 387; Flannigan v. State, 124 Neb. 748, 248 N. W. 92. The failure to make further inquiry waived any objections that could have been based on facts that might have been disclosed by such inquiry.

After the verdict had been returned the plaintiffs filed a motion for new trial and requested a continuance for the purpose of interviewing the jurors. Both motions were overruled and thereafter the plaintiffs moved for reconsideration of the ruling on the motion for new trial based upon affidavits obtained from two jurors. The affidavits stated in substance that during their deliberation the members of the jury considered the amount of life insurance the members of the jury carried upon their minor children, and that the average did not exceed $2,000.

The general rule is that affidavits or other sworn statements of jurors will not be received to impeach or explain a verdict, to show on what grounds it was rendered, to show a mistake in it, to show the jurors misunderstood the charge of the court, or to show they mistook the law or the result of the finding because such matters inhere in the verdict. Carpenter v. Sun Indemnity Co., 138 Neb. 552, 293 N. W. 400. See, also, Kohrt v. Hammond, 160 Neb. 347, 70 N. W. 2d 102; Frank's Plastering Co. v. Koenig, 227 F. Supp. 849, affirmed 341 F. 2d 257.

As pointed out in the Kohrt case, it is impossible to exclude from discussion by jurors matters of which they have some personal information. If there was discussion by the jurors in this case concerning insurance which they carried on their own minor children, it was a matter which inhered in the verdicts and was not a basis upon which the verdicts could be set aside.

The judgment of the District Court is affirmed.

AFFIRMED.

PATRICIA BARNES, APPELLANT, V. JACKSON BARNES, APPELLEE.

220 N. W. 2d 22

Filed July 11, 1974. No. 39407.

1. **Divorce: Appeal and Error.** In an appeal of an action for the dissolution of marriage, the Supreme Court is required to try the case de novo and to reach independent conclusions on the issues presented by the appeal without reference to the conclusion or judgment reached in the District Court.
2. **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.
3. **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.

Appeal from the District Court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Norman Denenberg, for appellant.

David S. Lathrop of Lathrop, Albracht & Dolan, for appellee.

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

BRODKEY, J.

This appeal arises out of an action for the dissolution of marriage brought by the appellant, Patricia Barnes. The marriage involved was one of relatively short duration. No interests of minor children are involved. The

District Court entered a decree finding that reasonable efforts of reconciliation having been made, the marriage of the appellant and appellee was irretrievably broken. Therefore, the District Court ordered that the marriage should be dissolved. The court further ordered the appellee to pay the appellant $500 within 10 days and to pay alimony in the amount of $100 per month for a period of 6 months and thereafter $75 per month for a period of 20 months, for a total of $2,600. The court also awarded the appellant $350 as attorney's fees in addition to $150 temporary attorney's fees that had previously been allowed. Subsequently, this appeal was brought, the appellant asserting that the awards of alimony and of attorney's fees were insufficient. We affirm.

The standard of review that must be applied in this case is clear. In an appeal of an action for the dissolution of marriage, the Supreme Court is required to try the case de novo and reach independent conclusions on the issues presented by the appeal without reference to the conclusion or judgment reached in the District Court. § 25-1925, R. R. S. 1943; Lienemann v. Lienemann, 189 Neb. 626, 204 N. W. 2d 170 (1973); Hassler v. Hassler, 190 Neb. 86, 206 N. W. 2d 40 (1973); Christensen v. Christensen, 191 Neb. 355, 215 N. W. 2d 111 (1974); Seybold v. Seybold, 191 Neb. 480, 216 N. W. 2d 179 (1974). Thus, the determination of the issues of alimony and attorney's fees will be made by this court de novo.

We address ourselves first to the issue of attorney's 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. Seybold v. Seybold, *supra;* Junker v. Junker, 188

Neb. 555, 198 N. W. 2d 189 (1972). The appellant in this case was awarded a total of $500 as attorney's fees by the District Court, which amount included $150 as temporary attorney's fees. Upon consideration of the material factors in relation to this case, we have concluded that $500 is a reasonable attorney's fee for the services of the appellant's counsel in the District Court.

With respect to the issue of alimony, the appellant cites the cases of Peterson v. Peterson, 152 Neb. 571, 41 N. W. 2d 847 (1950), and Pasko v. Trela, 153 Neb. 759, 46 N. W. 2d 139 (1951), as controlling. Those opinions, both handed down prior to the adoption of the Nebraska no fault divorce law, set forth several factors which were to be considered in determining how much alimony should be awarded in a particular case. The appellant asserts that under those guidelines, the award of alimony in this case should exceed the amount awarded by the District Court. The primary thrust of appellant's argument is that the award of alimony should be higher in light of the financial condition of the appellee. We do not agree.

The appellant, Patricia Barnes, and the appellee, Jackson Barnes, were married on December 22, 1972. By the beginning of May 1973, their marriage had already deteriorated substantially. On July 10, 1973, the appellant filed her petition for dissolution of the marriage. The appellant was 35 years of age at the time of her marriage to the appellee. The appellant has engaged in compensatory employment at previous times of her life and immediately prior to the marriage in question was an employee of the appellee.

It is clear that this court is not necessarily bound by the authority of cases not decided under the divorce statute now in effect in this state. Under the statutes relating to dissolution of marriage presently in effect in Nebraska, 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. § 42-365, R. S. Supp., 1972; Albrecht v. Albrecht, 190 Neb. 392, 208 N. W. 2d 669 (1973). The marriage involved in this case was of a very short duration. The appellant is relatively young, in good health, and apparently quite able to engage in gainful employment. Under these circumstances, we believe that the amount of alimony awarded by the District Court was adequate.

Appellee contends that credit should be given him for payments on the court's order for temporary allowances during appeal, stating that the trial court limited such payments to 13 months so they would not more than consume the alimony awarded. There is nothing in the record in this case indicating any such intention on the part of the trial judge, and we therefore find against appellee on this claim.

However, we conclude there was reasonable justification for the position taken by appellant in this appeal, and we therefore award an additional $350 for the services of her attorney in this court.

AFFIRMED.

BEVERLY J. HALE, APPELLANT, V. HAROLD TAYLOR, APPELLEE.
220 N. W. 2d 378

Filed July 18, 1974. No. 39139.

1. **Constitutional Law: Statutes: Waiver.** The constitutionality of a legislative act must be raised at the earliest opportunity consistent with good pleading and orderly procedure, or it will be considered as waived.
2. **Summary Judgments.** A summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.
3. **Motor Vehicles: Negligence: Private Roads.** The motor vehicle guest statute, section 39-740, R. R. S. 1943, is applicable to

the operation of a motor vehicle upon private property as well as upon public highways.

4. **Motor Vehicles: Negligence: Trial.** The question of whether a person attempting to enter a motor vehicle is a guest within the meaning of section 39-740, R. R. S. 1943, is generally one for determination in each individual case. If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Richard D. Myers of Matthews, Kelley, Cannon & Carpenter, for appellant.

Wayne J. Mark of Fraser, Stryker, Veach, Vaughn & Muesey, for appellee.

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

ZEILINGER, District Judge.

Plaintiff brought suit for personal injuries allegedly sustained as a result of defendant's negligent operation of a motor vehicle. Defendant moved for a summary judgment contending that plaintiff was a guest passenger within the meaning of section 39-740, R. R. S. 1943, and that, therefore, defendant was entitled to judgment as a matter of law. The District Court held that as a matter of law plaintiff was a guest passenger and could not recover against defendant for defendant's simple negligence because of the motor vehicle guest statute, section 39-740, R. R. S. 1943. The District Court found there were no issues of fact for determination by trial and granted defendant's motion for summary judgment. Plaintiff filed a motion for a new trial contending that the decision and judgment were contrary to the evidence and contrary to law and including for the first time in

the case the contention that section 39-740, R. R. S. 1943, violates the Constitutions of the United States and the State of Nebraska. Plaintiff appeals from the overruling of her motion for new trial. Plaintiff contends that the District Court erred in finding that there were no material issues of fact to be determined; in finding that plaintiff was, as a matter of law, a guest passenger; in determining that section 39-740, R. R. S. 1943, was applicable to the facts before the court; and in failing to hold section 39-740, R. R. S. 1943, to be unconstitutional. In her amended petition plaintiff did not allege that the negligence of defendant was gross.

The undisputed evidence consists of plaintiff's deposition testimony which is in substance as follows:

On November 1, 1970, the plaintiff, Beverly J. Hale, was injured in Omaha, Douglas County, Nebraska, when she was struck by a vehicle being operated by defendant, Harold Taylor. Plaintiff was the natural daughter of defendant's wife. Plaintiff, defendant, and defendant's wife had made plans to dine together on the evening of November 1, 1970. Defendant and defendant's wife drove to plaintiff's home at 1138 South 30th Avenue in Omaha, Nebraska, for the purpose of picking up and transporting plaintiff to dinner. Defendant at that time was operating a motor vehicle owned by him. Defendant drove his automobile into plaintiff's driveway, parked his vehicle, and honked the horn. Plaintiff heard the horn honking and walked out of her residence. Plaintiff observed defendant behind the steering wheel of the vehicle and defendant's wife seated to the right of the defendant in the front seat. Plaintiff went to the right rear of defendant's vehicle, which was a four-door vehicle, and plaintiff saw that the right rear seat was occupied by tools and equipment. Plaintiff walked around behind the vehicle to the left rear door. Plaintiff opened the left rear door of defendant's vehicle to some degree and while her feet were both on the ground defendant's ve-

hicle was backed up in a sudden and jerking motion, knocking plaintiff to the ground, and resulting in injuries to plaintiff.

Plaintiff attempted to raise the constitutionality of the guest statute by an amendment to her motion for new trial. No allegation of unconstitutionality appears in the amended petition. Defendant definitely relied on the guest statute in his answer. Plaintiff's reply simply denies that plaintiff was a guest passenger and does not allege unconstitutionality of the statute. No issue of unconstitutionality was before the District Court when the motion for summary judgment was presented and determined. Section 25-1142, R. R. S. 1943, provides for motions for new trial and its first sentence reads: "A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or decision by the court." Plaintiff's motion for new trial asked the District Court to determine a new issue rather than to reexamine an issue previously decided. A new issue is not a ground for the granting of a motion for new trial. § 25-1142, R. R. S. 1943. In Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N. W. 2d 626, the court said: "It is a general rule that the constitutionality of a legislative act must be raised at the earliest opportunity consistent with good pleading and orderly procedure, or it will be considered as waived." In Norlanco, Inc. v. County of Madison, 186 Neb. 100, 181 N. W. 2d 119, the court quoted with approval from Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834, as follows: "No procedural principal is more familiar to this court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." In Consumers Public Power Dist. v. City of Sidney, 144 Neb. 6, 12 N. W. 2d 104, the court said: "The question of constitutionality not being an issue under the pleadings filed, this court may

not properly pass upon it." In Rhodes v. Continental Ins. Co., 180 Neb. 794, 146 N. W. 2d 66, appellant contended that he had raised the issue of the constitutionality of a statute in his oral argument on a demurrer although it was not reflected in the pleadings or the record. The court refused to consider the constitutional question, stating: "This is a court of review. The rule that the unconstitutionality of a statute cannot be raised for the first time in this court requires that the issue be apparent from the pleadings or be evident from the record made in the trial court. If the plaintiff wished to inject the unconstitutionality of section 44-501, R. R. S. 1943, the proper procedure would have been to have amended his petition after the demurrers were sustained." In the instant case plaintiff did not ask leave to amend. The question of the unconstitutionality of the guest statute is not properly before us on the record in this case. In addition there has been no compliance with Rule 18 of the 1971 Revised Rules of this court requiring that a party presenting a case involving the constitutionality of a statute must file a written notice thereof with the Clerk of this court at the time of filing his brief and serve a copy of the brief on the Attorney General within 5 days of the filing of the brief with this court.

Section 25-1332, R. R. S. 1943, provides that a summary judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Plaintiff submits that there is an issue of fact as to whether plaintiff was riding in the vehicle at the time of the injury, and that, therefore, summary judgment should not have been granted to defendant. In Sunderman v. Wardlaw, 170 Neb. 70, 101 N. W. 2d 848, one question presented was whether plaintiff was a passenger or a guest. The trial court ruled as a matter of law that plaintiff was a guest

and submitted the case to the jury accordingly. Plaintiff appealed from an adverse verdict contending that her status was a question of fact for the jury. In discussing this question this court quoted from Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451, as follows: " 'If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case.' " Then the court stated: "Here the evidence on this material issue is not in dispute and clearly presents an issue for decision by the court as a matter of law."

In the instant case the evidence was not disputed and there was no genuine issue of material fact to be resolved. A proper case for summary judgment was presented.

Plaintiff contends that the guest statute has no application to the facts in this case because this accident occurred on private property and the guest statute is a regulation governing the use of public roads. The guest statute does not limit itself to public roads. It does not make any mention of where the damages it covers must occur. The statute is concerned only with relationship, not physical location of an occurrence. Section 49-802 (8), R. R. S. 1943, provides that title heads, chapter heads, section and subsection heads or titles, and explanatory notes and cross-references, in the statutes, supplied in compilation, do not constitute any part of the law. Regarding the applicability of guest statutes where the motor vehicle accident occurs on private property the annotation at 64 A. L. R. 2d 694, states: "The question has ordinarily been treated purely as one of statutory construction, and in most of the few cases which have discussed the matter, the courts, finding nothing in the statute to indicate any intention to restrict its operation to the public highways, have held that it applied." The

guest statute is applicable to the operation of a motor vehicle upon private property.

Plaintiff contends that the guest statute does not apply to the facts in this case because she was merely attempting to enter the motor vehicle at the time of the accident and had not yet become a guest. Section 39-740, R. R. S. 1943, reads in part as follows: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the . . . gross negligence of the owner or operator in the operation of such motor vehicle. For the purpose of this section, the term guest is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor, ..."

In its opinion in Van Auker v. Steckley's Hybrid Seed Corn Co., *supra,* this court in construing the predecessor of section 39-740, R. R. S. 1943, stated: "In construing a statute, it is the duty of this court to discover, if possible, the legislative intent from the language of the act and give effect thereto. Hansen v. Dakota County, 135 Neb. 582, 283 N. W. 217."

In 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 471, p. 36, the rationale and proper construction of guest statutes is stated to be as follows: "These statutes are designed to relieve the owners or operators of motor vehicles who without any benefit to themselves transport another from the consequences of ordinary negligence causing injury to such a person. Another purpose is to prevent fraud and collusion between gratuitous guests and the owners or operators of motor vehicles resulting in unjust charges to automobile liability insurers for injury to, or death of, a guest.

"Guest statutes should be construed to effectuate their purpose, but, being in derogation of the common law and the rights of those who may be injured by the negligent operation of a motor vehicle while being transported

therein, their general provisions must be strictly construed. They should not be extended by construction beyond the correction of the evils and attainment of the objects sought by them, although they should not be so restricted as to defeat or impair those objects."

The courts are about equally divided on the question whether the guest-host relationship has commenced with regard to a person attempting to enter a motor vehicle. In Tallios v. Tallios, 350 Ill. App. 299, 112 N. E. 2d 723, the Illinois court held that the guest-host relationship had commenced and stated: "A narrow or literal interpretation of the words 'person riding in a motor vehicle as a guest, without payment for such ride,' limiting the effect of the statute to accidents occurring when a guest is seated in an automobile in motion, would defeat, or at least impair, the purpose of the legislation. To give full effect to the legislative intent a generous owner or operator must be protected at all times that the relation of host and guest exists in connection with the free ride. The beginning and end of that relation is not unlike the beginning and end of the relation of carrier and passenger for hire in a public conveyance. In the latter case the relation begins with the attempt of the passenger to enter the conveyance and ends when he has alighted in safety on completion of the journey. . . . So, the relation of host and guest between automobile owner or driver and a passenger riding without payment of compensation begins when the guest attempts to enter the automobile, and ends only when he has safely alighted at the end of the ride."

In Kaplan v. Taub (Fla. App.), 104 So. 2d 882, the court said: ". . . the real test . . . is to determine whether a gratuitous undertaking of the automobile operator had begun when the injury occurred. Illustrative of the application of the test and factually in point is the case of Head v. Morton, 1939, 302 Mass. 273, 19 N. E. 2d 22, 25. . . . The appellant had her hand on the door of appellee's

automobile as an act preparatory to entering the vehicle. The appellee was at the steering wheel of his vehicle awaiting the appellant's entry therein and that his act of releasing the brake and starting the automobile was in furtherance of his prior gratuitous undertaking."

In Head v. Morton, 302 Mass. 273, 19 N. E. 2d 22, the court said: "'. . . it must be clear that the degree of the defendant's duty does not depend upon the physical position of the plaintiff at the moment of the accident, or upon whether she was then in the defendant's automobile or outside of it, or upon whether in everyday language she would be described as a guest. The degree of the defendant's duty depends upon whether the act of the defendant claimed to be negligent was an act performed in the course of carrying out the gratuitous undertaking which the defendant has assumed.' . . . The real test is to determine whether a gratuitous undertaking of the defendant had begun when the plaintiff was injured." See, also, Dunakin v. Thomas, 141 F. Supp. 377, under a New Mexico statute, and Rainsbarger v. Shepard, 254 Iowa 486, 118 N. W. 2d 41, 1 A. L. R. 3d 1074. The cases in which contrary conclusions were reached include Smith v. Pope, 53 Cal. App. 2d 43, 127 P. 2d 292; Clinger v. Duncan, 166 Ohio St. 216, 141 N. E. 2d 156; and Chapman v. Parker, 203 Kan. 440, 454 P. 2d 506, in which the courts found that under strict construction of their statutes the plaintiffs were not physically "in" or "being transported in" the vehicles.

It seems to us that a proper construction of our statute requires us to hold that even though the guest was not yet physically in the host's motor vehicle, if the acts immediately preceding or occurring at the time of the injury were incidental to the transportation, the guest statute applies and that entering a vehicle in preparation for transportation is incidental to the actual transportation. The District Court's ruling that plaintiff was a guest within the meaning of the guest statute at the time of her in-

jury was correct and the judgment should be affirmed.

AFFIRMED.

McCOWN, J., dissenting.

I agree that the issue of the constitutionality of the guest statute was not raised in time and is not directly at issue in this case. Nevertheless, cases declaring similar guest statutes unconstitutional such as Brown v. Merlo, 8 Cal. 3d 855, 106 Cal. Rptr. 388, 506 P. 2d 212 (1973), and Henry v. Bauder (Kan., 1974), 518 P. 2d 362, make it clear that the underpinnings which formerly supported the philosophy of guest statutes have been factually and legally eroded. Experience with modern concepts of liability and fault ought to dictate strict limitation of the statute to the narrowest terms possible, rather than the broad and inclusive interpretation adopted by the majority opinion.

Where no-fault insurance laws are being adopted in many states and are being considered in this state, the Legislature's attention should be drawn also to a reconsideration of the guest statute. The guest statute in Nebraska was enacted in 1931. Guest statutes have been adopted in slightly more than half the states, but more significantly, no state has enacted a guest statute since 1939. Several states have repealed guest statutes, most recently Florida in 1972.

The guest statute in Nebraska is contained in Chapter 39, article 7, Regulations Governing the Use of Public Roads. The accident here occurred on a private driveway and certainly in the absence of a specific reference, rules of the road are not applicable to private roads and driveways. In addition, the plaintiff had not yet entered the automobile and should not be treated as a passenger or rider in the vehicle simply because she had previously agreed to accept a ride, and was intending to become a passenger. The Nebraska statute, by its terms, applies only to "any *passenger* or person *riding in* such motor

vehicle as a guest." It ought not to be extended by implication.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH PATTERSON, ALSO KNOWN AS JOE THOMAS, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. CHARLES WALKER, APPELLANT.

220 N. W. 2d 235

Filed July 18, 1974. Nos. 39182, 39205.

1. **Searches and Seizures: Constitutional Law: Probable Cause.** A search of a place of residence without a warrant is not justified under the Fourth Amendment to the Constitution of the United States except for probable cause and the existence of exigent circumstances or other recognized exception.
2. **Searches and Seizures: Probable Cause.** Where the information in the possession of the officers leads to the conclusion that the place of residence is the scene where a felony is being committed and they have evidence which indicates that this is the fact and where there is great likelihood that the evidence will be destroyed or removed before a warrant can be obtained, then exigent circumstances may be said to exist.
3. **Searches and Seizures.** Search pursuant to warrant is to be much preferred to search without a warrant and ordinarily a warrant should be obtained.

Appeals from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed in part, and in part reversed and remanded.

J. Bruce Teichman, for appellants.

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

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

CLINTON, J.

The principal question involved on these appeals is whether without a warrant the entry and search of an apartment where the crime of possessing a controlled

substance, heroin, with intent to deliver, distribute, or dispense, was being committed and where the arrests on the charge took place, were lawful because justified by the circumstances and therefore not unreasonable. Upon this determination rests the correctness of the decision of the lower court in denying suppression of the physical evidence seized during the search.

On March 27, 1973, about 2 o'clock p.m., pursuant to information received by telephone from the owner of the building in question, officers of the Omaha police department made an investigation of the exterior of the premises, including driveway and trash cans, and there found a large quantity (two or three hundred) of empty red capsules of the type in which dosages of medicine are enclosed, as well as a number of broken and empty, unbroken bottles (72-capsule size) bearing Dormin labels, an empty aluminum foil box and spool, some squares of aluminum foil of about 2-inch by 2-inch dimension, and a brown paper sack containing traces of white powder, preliminary test of which was positive for heroin. Dormin is a nonprescription sleeping tablet and police officers knew from their previous experience that the substance is used by dealers in illegal drugs as a cutting and diluting agent for heroin. Information received from the landlord indicated that the building (formerly a large, one family residence) contained five apartments. One of these apartments, No. 4, had been leased to Pamela Chatmon on March 21, 1973. The officers knew Pamela Chatmon as one involved in drug-related activities. The landlord attributed to the occupant or occupants of apartment No. 4 the items the officers had found because he had not observed such items on the premises except after March 21, 1973.

Apartment No. 5 of the building was empty. It was adjacent to apartment No. 4 and there was a wall common to both apartments. The police department then leased apartment No. 5 and began a surveillance of

apartment No. 4 by listening to the noises and conversations. No listening devices were used. This surveillance began some time in the afternoon of March 27, 1973, and continued until about 2:30 p.m. on March 28th when apartment No. 4 was entered by police officers and the two defendants herein, Patterson (alias Thomas) and Walker, were arrested along with seven other persons. Seized were 1,005 "hits" of heroin, packaged and bagged, and certain other physical evidence used in the preparational process. With the use of this evidence and the testimony of one of the arrestees, the two defendants were found guilty by a jury and sentenced to terms of 15 and 10 years, respectively, in the Nebraska Penal and Correctional Complex.

During the course of the surveillance some of the officers periodically left the apartment and made telephone reports to the officer supervising the investigation. The first hours of surveillance yielded no information. Apparently there was no one in apartment No. 4. At about 1:30 a.m. on March 28, 1973, some persons entered the apartment and the officers, basing their judgment on the voices heard, determined the persons to be both male and female and in number about five. The parties appeared to be playing a game such as scrabble. At about 2:30 a.m. one of the males left, stating that he was going to find out "whats coming off." Thereafter fragments of conversation between one man and two women were heard. The names Howard, Joe, and Violet, apparently referring to persons not present, were used. Joe apparently was a main subject of conversation and concern was expressed about the manner in which he was conducting his business. It was apparent from the conversation that he was expected to show up at the apartment but had not done so. At about 3:30 a.m. the remaining male left the apartment. After this one of the women was heard to say: "If Joe don't show up pretty soon we gonna

have to clean his stuff off the table before the telephone man comes."

The name, Joe, led police to believe that the defendant Thomas was referred to. He was thought by police, based upon previous information which they had, to be a person responsible for bringing heroin into Omaha. The name, Howard, was believed to refer to a person of that name who was a "bag man" for "Glasses" Jones, a convicted drug dealer who was free pending an appeal of his conviction in the federal court. At about 9 a.m. on March 28, 1973, Jones' car was observed parked in the immediate neighborhood.

At about 9 o'clock a.m. also, a police officer at police headquarters, furnished with the information thus far gathered and using background information from the police files, began preparing an affidavit for a search warrant. At about 11 a.m. the officers in apartment No. 5 overheard a male voice saying: " 'Joe told me to stop over, he's on his — he's going to go find Glasses.' " The police, because of their knowledge of Joe and Glasses, believed that one of them would deliver heroin to the apartment to be mixed, measured into hits, packaged, and then bagged. At about this same time there was conversation concerning Dormin and sounds which the officer interpreted as being those of the process of Dormin being prepared for mixing. At this time those supervising the investigation and the officers conducting the surveillance apparently had no reason to believe that Joe or Glasses were in the apartment or that heroin had already been delivered.

At police headquarters the affidavit was being drafted and between 12 and 12:30 p.m. there was a conference with one of the staff of the county attorney's office relative to the sufficiency of the information therein contained. No definitive stand was taken by either the county attorney's office or the police department, but

apparently it was thought that they needed some evidence that the drug itself was in the apartment.

At about 2 o'clock p.m. the officers in apartment No. 5 heard: "Look at all the dope on the table," and "Let's get to bagging up." Other scraps of conversation were heard which indicated to officers that the persons in the apartment were getting ready to depart.

The above developments led the officers in apartment No. 5 and the officer in charge of the investigation to whom the information had been relayed at about 2:15 p.m., that at that time, contrary to their previous expectations, the heroin was there; that the mixing of the heroin and Dormin, its division into hits, and its packaging had already taken place; and that all that remained to be done was the bagging which would not take very long.

The latest information had not yet been incorporated in the affidavit and it was estimated it would take 1 hour and 15 minutes to get the warrant. The officer in charge made the decision to enter the premises without a warrant while the apartment was still occupied.

The position of the defendants is that the State had ample time to procure a warrant prior to the entry and search because as much as 24 hours prior to the search they had probable cause to obtain a warrant and could easily have done so. They further assert that in any event the State had sufficient probable cause to obtain a warrant at about noon the day following when the officers heard noises which they interpreted as being part of the preparation process. They argue, therefore, that any exigent circumstances which arose were the creation of the officers and the prosecutors themselves in not analyzing their information more quickly and acting more efficiently in the preparation of the affidavit for the warrant. They cite Chimel v. California, 395 U. S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685; United States v. Ventresca, 380 U. S. 102, 85 S.

Ct. 741, 13 L. Ed. 2d 684; Rugendorf v. United States, 376 U. S. 528, 84 S. Ct. 825, 11 L. Ed. 2d 887; United States v. Harris, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723; McDonald v. United States, 335 U. S. 451, 69 S. Ct. 191, 93 L. Ed. 153; and Vale v. Louisiana, 399 U. S. 30, 90 S. Ct. 1969, 26 L. Ed. 2d 409.

From the standpoint of legal theory, the defendants take the position that where it is possible to get a warrant no circumstance can justify a search without one. This position essentially states one side of a controversy which has long raged over the meaning of the Fourth Amendment and which the Supreme Court of the United States has itself been unable to decisively resolve. That court has recently summarized that controversy in the case of Coolidge v. New Hampshire, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564, in the following language: "Much the most important part of the conflict that has been so notable in this Court's attempts over a hundred years to develop a coherent body of Fourth Amendment law has been caused by disagreement over the importance of requiring law enforcement officers to secure warrants. Some have argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. Others have argued with equal force that a test of reasonableness, applied after the fact of search or seizure when the police attempt to introduce the fruits in evidence, affords ample safeguard for the rights in question, so that '[t]he relevant test is not whether it is reasonable to procure a search warrent, but whether the search was reasonable.'

"Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere. It is accepted, at least as a

matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.' "

The power to search without a warrant is rooted in the common law. Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652. A tracing of the history of the development of the law through the irregular traverses of the opinions of the Supreme Court of the United States demonstrates the difficulty of drawing any sharply defined and regular line and of placing a given set of facts on one side or the other of that line. The recent history may be traced in the following cases. Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927); United States v. Lefkowitz, 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877 (1932); Harris v. United States, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947); Trupiano v. United States, 334 U. S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663 (1948); United States v. Rabinowitz, 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653 (1950), overruling Trupiano; Kremen v. United States, 353 U. S. 346, 77 S. Ct. 828, 1 L. Ed. 2d 876 (1957); Abel v. United States, 362 U. S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960); Chapman v. United States, 365 U. S. 610, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961); Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963); James v. Louisiana, 382 U. S. 36, 86 S. Ct. 151, 15 L. Ed. 2d 30 (1965); Shipley v. California, 395 U. S. 818, 89 S. Ct. 2053, 23 L. Ed. 2d 732 (1969); Warden v. Hayden, 387 U. S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967); Chimel v. California, *supra* (1969); Vale v. Louisiana, *supra* (1970).

The position of the defendants overlooks the obvious fact that if an entry had been made, even with a warrant, prior to the time the heroin was on the premises the whole operation would have been fruitless as far

as law enforcement is concerned. The police were fully justified in waiting until they had information which indicated the heroin was on the premises before they completed the affidavit. The fact that when that information was obtained, contrary to the prior expectations of the police, it also developed that the packaging process was practically complete and the occupants were preparing to depart and that it still would take about 1 hour and 15 minutes to obtain the warrant did not materially change the officers' position as far as the applicable rules are concerned. It seems clear to us that exigent circumstances did then exist and that these justified the entry without a warrant. Those circumstances were not rendered less exigent by the fact that the officers could have been less exacting in the preparation of the affidavit or that a skilled stenographer might have been used to type the affidavit rather than a police officer.

The exigency arose because of the probability of the destruction of the evidence before the warrant could have been obtained. The officers could not count on the possibility that all the occupants would leave the premises at one time so that they could be arrested en masse outside the premises. If the individuals had left separately the arrest of the first would have alerted those staying behind who then could have rather readily, with the many hands available to do the work, washed the heroin down the sinks and toilet. The evidence was safe only so long as the operation remained undetected.

The above exigent circumstances accompanied by the following factors made the search reasonable: (1) The information that the officers had obtained indicated with certainty that the crime was actually in progress on the premises. (2) There existed probable cause for both arrest and search. (3) The arrest and search were substantially contemporaneous and the arrest took place

on the premises where the crime was committed, not away from it as in some of the cases cited by the defendants. (4) The evidence seized consisted solely of the contraband heroin mixture and the instrumentalities used in its preparation. (5) The search was appropriately limited and there was no general ransacking of the premises.

In arriving at our conclusions we rely upon the following authorities: Ker v. California, *supra;* Warden v. Hayden, *supra;* Abel v. United States, *supra;* James v. Louisiana, *supra;* and United States v. Rubin, 474 F. 2d 262. In the last case the Third Circuit approved a search under circumstances similar to those here involved. The circumstances in this case are almost identical with those involved in the search of the Alba residence in Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409, where the lawfulness of that particular search was not even questioned.

Without attempting to draw any precise line, we hold: (1) A search of a place of residence without a warrant is not justified under the Fourth Amendment in the absence of probable cause and exigent circumstances, or some other recognized exception. (2) Where the information in the possession of the officers leads to the conclusion that the place of residence is the scene where a felony is being committed and they have evidence which indicates that this is the fact and where there is great likelihood that the evidence will be destroyed or removed before a warrant can be obtained, then exigent circumstances may be said to exist. (3) Search pursuant to warrant is to be much preferred to search without a warrant and ordinarily a warrant should be obtained. The trial court was clearly correct in not suppressing the evidence.

With reference to the sufficiency of the evidence, it is clear the facts we have set forth and the testimony

of the accomplice directly implicating the defendants were sufficient to support the verdict.

In connection with the 15-year sentence of Patterson, another issue is raised. L.B. 261, Laws 1973, amended section 28-4,125, R. S. Supp., 1972, to reduce the penalty for the crime with which appellants were charged from a period of not less than 5 years nor more than 20 years to a period of not less than 1 year nor more than 10 years.

This sentence, of course, was proper at the time it was imposed on June 12, 1973, since L.B. 261 was not then in effect. However, this court has held in State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225, and a number of subsequent cases, that where a criminal statute is amended by mitigating the punishment, after the commission of the crime, but before final judgment, the punishment is that provided in the amendatory act unless the Legislature has specifically provided otherwise.

In light of these cases, Patterson's sentence is now excessive and he must be resentenced.

Judgment and sentence in No. 39205 are affirmed. The judgment in No. 39182 is affirmed, the 15-year sentence is vacated, and the cause remanded for resentencing.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

IRENE ANSON, ADMINISTRATRIX OF THE ESTATE OF ALBERT ANSON, DECEASED, APPELLEE, V. ABE B. FLETCHER ET AL., APPELLANTS, IMPLEADED WITH LARRY KIRSCHMER ET AL., APPELLEES.

IRENE ANSON, APPELLEE, V. ABE B. FLETCHER ET AL., APPELLANTS, IMPLEADED WITH LARRY KIRSCHMER, APPELLEE.

220 N. W. 2d 371

Filed July 18, 1974. Nos. 39254, 39255.

1. **Trial: Evidence: Waiver.** A party may, by his acts or omis-

sions, waive, or be estopped to make, objections to the admission or exclusion of evidence. Such waiver or estoppel may arise from failure to object, from acts done or omitted before the evidence is offered, as by failure to object to previous similar evidence, or from some affirmative act done after the ruling on the evidence.

2. **Trial: Evidence: Admissions.** An admission against interest is admissible when it contravenes a position taken upon trial by the party making the admission.
3. **Trial: Evidence.** It is fundamental that a trial court has broad discretion to exclude cumulative evidence.
4. **Damages: Appeal and Error.** Where recovery was not a mere matter of computation, and depends upon the intangible and subjective elements of pain and suffering and future disability, it will not be interfered with unless it is so grossly unresponsive to the evidence as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury, or unless it appears to be based upon some oversight, mistake, misconception, or misinterpretation, or a consideration of elements not within the scope of the incident.

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

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

Mattson, Ricketts, Davies, Stewart & Calkins, for appellee Anson.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, McCOWN, NEWTON, and CLINTON, JJ., and FLORY, District Judge.

WHITE, C. J.

This is an appeal from two cases, consolidated for trial, in which the plaintiffs sought damages for an assault and battery. In the first case the District Court, after a jury trial, awarded $32,000 to the administratrix of the estate of the decedent, Albert Anson. Anson died after the suit was filed but before trial began. No wrongful death action was brought. In the second case, the District Court awarded Mrs. Irene Anson, the decedent's wife, $10,000 for loss of consortium. The

defendants Fletcher appeal, assigning error in the exclusion of evidence and that the jury verdicts were excessive. We affirm the judgments of the District Court.

The facts are as follows: On January 24, 1971, Glen Fletcher, one of the defendants in this action, was married, and a wedding party was held at the Two Rivers Steak House in Ewing, Nebraska. Present at the party were, among others, Abe B. Fletcher, the patriarch of the clan, Robin Fletcher, Glen's son, and Clarence and Edward Fletcher, Glen's brothers. All are defendants in this action. Members of the wedding party began drinking around 4:30 p.m. A small disturbance broke out among the guests before dinner, and a more major altercation erupted during the dinner at which time the proprietors of the steak house, Alex and Mark Thramer, attempted to evict Robin Fletcher. This triggered a brawl in which the Fletchers and other members of the wedding party attempted to prevent the eviction by assaulting the Thramer brothers. A call was placed to Albert Anson, marshal of Ewing.

Anson proceeded to the steak house and announced that he was the law and that he wanted some order. Glen Fletcher began to strike Anson at which point Anson attempted to place him under arrest. As Anson was trying to take Glen Fletcher away, Abe B., Clarence, and Edward Fletcher started to attack Anson. Clarence Fletcher put his arm around Anson's neck and pulled him backwards. Meanwhile Glen, Edward, and Robin Fletcher struck Anson. Abe B. Fletcher announced that no "tin badge" was going to tell him what to do and was heard to say, "Go get him (Anson), boys." Abe B. Fletcher not only incited the other defendants to beat up on Anson, but the evidence also shows that he struck Anson himself.

Glen and Robin Fletcher got Anson down on the ground and continued to hit and kick him. On two occasions Robin Fletcher climbed onto a car and from there jumped on Anson's back. When Anson was able

to regain his feet, he sprayed mace on Robin Fletcher and Larry Kirschmer, another assailant, whereupon Robin Fletcher got up and struck him again. At one point during the fracas, the Thramer brothers attempted to rescue Anson by pulling him away toward the steak house and standing in front of him. Glen and Robin Fletcher followed and attacked again, striking Anson and Alex Thramer. Shortly thereafter the fire whistle blew, the fire department arrived, and the crowd broke up. The assault lasted over a period of at least 20 minutes. Anson was beaten bloody and had to be taken away from the scene in an ambulance.

For their first error on appeal, the defendants Fletcher assert that evidence which constituted an admission by the plaintiff was improperly and prejudicially excluded by the trial court. The defendants Fletcher attempted to introduce into evidence certain testimony given by Anson at the preliminary hearing in the case of State v. Kirschmer. Specifically, the evidence offered from the record of the previous criminal hearing consisted of the following testimony:

"Q. Now, did you, in your testimony, you pointed at some marks on your face that you think that Larry did?

"A. I definitely know he hit me in the mouth where I have that scar.

"Q. How do you know that?

"A. Because he was the only guy that ever hit me in the mouth.

"Q. You can distinctly remember that?

"A. I can.

"Q. Even though you were on the ground?

"A. I was standing up.

"Q. Prior to this, you were on the ground, and people were kicking you in the head, is that right?

"A. On the side of my head.

"Q. And it went back and forth?

"A. To the side.

"Q. And to this day you can identify one mark on your face as coming from that — coming from one particular —

"A. It hurt the worst of any fist that hit me.

"Q. Harder than when you were kicked in the head?

"A. No, I would say the fist.

"Q. Okay. Who else hit you with their fist?

"A. I was hit several times by the crowd, but I don't know who all, but they were all too drunk to hit too hard. I could easily hold my own as long as I could stay on my feet."

The defendants Fletcher contend that it was prejudicial error to exclude their offer of this testimony as part of their case-in-chief. The first ground for our holding that there was no prejudicial error by the District Court in excluding Anson's testimony, taken at the preliminary hearing in State v. Kirschmer, is that the defendants Fletcher waived their objection to the exclusion of most of the testimony, all except the answer to the last question, by actions later in the trial which were inconsistent with the objection. At the beginning of the trial, the plaintiff offered Anson's testimony quoted above, excluding the answer to the last question.

Counsel for both Kirschmer and the defendants Fletcher objected. The plaintiff then offered the same testimony only as against Kirschmer to which counsel for defendants Fletcher again objected. The trial court sustained both objections.

Later, during the presentation of their case, defendants Fletcher made the offer of proof in question here, the same testimony of Anson from the State v. Kirschmer preliminary hearing as offered by the plaintiff earlier. This offer, included Anson's answer to the final question: "Q. Okay, who else hit you with their fist? A. I was hit several times by the crowd, but I don't know who all, but they were all too drunk to hit too hard. I could easily hold my own as long as I could stay on my feet." Only the codefendant Kirschmer objected

to this offer of proof which was sustained by the trial court.

Subsequently, at the conclusion of the trial testimony the plaintiff reoffered the testimony of Anson given at the Kirschmer preliminary hearing. Although the record is unclear on this point, we assume that the plaintiff merely repeated her original offer and that it consisted of the above-quoted testimony, minus Anson's answer to the last question. Defendants Fletcher and Kirschmer's objections were sustained.

We hold that the defendants Fletcher waived their objection to the exclusion of Anson's testimony, except his answer to the last question, because they objected to the plaintiff's offer of proof of the identical testimony after their own offer was rejected. "A party may waive or estop himself to object to the exclusion of evidence, * * *. An exception to the exclusion of evidence is waived by action of the party, after the ruling, inconsistent with the objection." 89 C. J. S., Trial, § 662, p. 508. We approved a similar statement of the rule in In re Estate of Kaiser, 150 Neb. 295, 34 N. W. 2d 366 (1948): "As stated in 64 C. J., Trial, § 189, p. 167: 'A party may, by his acts or omission, waive, or be estopped to make, objections to the admission or exclusion of evidence. Such waiver or estoppel may arise from failure to object, from acts done or omitted before the evidence is offered, as by failure to object to previous similar evidence, or from some affirmative act done after the ruling on the evidence."

The defendants Fletcher received an unfavorable ruling on their offer of the Anson testimony. In offering the testimony they presumably desired that it be admitted into evidence. Yet, when the plaintiff reoffered the identical testimony at the close of the trial, the defendants Fletchers' objection was sustained. This objection to the plaintiff's offer constituted an affirmative inconsistent act done after the ruling on the evidence which they are now assigning as error. This act con-

stituted a waiver of their original objection, and the defendants are now estopped from claiming that the exclusion of their offer was error. When both the plaintiff and the defendant desire the same evidence to be admitted at trial, and the defendant persists in objecting to the plaintiff's offers after its own offer has been rejected, the defendant cannot assign the exclusion of the evidence in question as error on appeal.

The operation of this waiver rule, however, does not estop the defendants from assigning as error the trial court's exclusion of Anson's answer to the last question in the Kirschmer preliminary hearing testimony. Defendants Fletcher contend that this testimony constituted an admission by a party on a material issue and that its exclusion was reversible error. While we agree that admissions by a party on material issues are admissible, we are of the opinion that the testimony at issue here does not constitute an admission. "Admissions are words and conduct of a party opponent offered as evidence against him. An admission against interest is admissible when it contravenes a position taken upon trial by the party making the admission." Sheets v. Davenport, 181 Neb. 621, 150 N. W. 2d 224 (1967). The first aspect of Anson's answer to the last question, which the defendants argue contravenes plaintiff's position at the trial, is the implication that Anson could not precisely identify his attackers. The suggestion here is that others besides the defendants Fletcher participated in the beating. This, instead of contravening the plaintiff's position at the trial, appears to bolster it. The plaintiff's theory of the case was not only that the defendants Fletcher assaulted and battered Anson, but they aided and abetted others, and incited others to assault Anson. The aiding and abetting instruction was given to the jury without objection. The fact that others hit Anson tends to prove that procurement of the assault by the defendants Fletcher was successful. Since Anson's testimony did not contravene the plaintiff's

position at trial, it did not constitute an admission, and the trial court was correct in excluding it.

The second part of the offer of proof at issue here is the statement by Anson that the members of the crowd "were all too drunk to hit too hard." Again, this statement is not inconsistent with plaintiff's position at the trial. It is elementary tort law that there is a cause of action for any battery, hard or soft, and that the defendants are liable for all damages resulting therefrom. In reference to the statement in question, the defendants cite the case of Havlik v. Anderson, 130 Neb. 94, 264 N. W. 146 (1936). In that case the defendant had offered to prove that the plaintiff had made an extrajudicial statement to the effect that "he was not hurt much, but thought he ought to have a little settlement." In reversing, this court held that since the extent of the plaintiff's injuries was a material issue in the case, it was prejudicial error to exclude the evidence in question. We believe that Havlik v. Anderson, *supra,* is clearly distinguishable from the case now before us. Anson never intimated that he was hurt only slightly. The fact that Anson's attackers "were all too drunk to hit too hard" does not mean that he was not injured to the extent asserted by the plaintiff. The evidence as to Anson's injuries is undisputed and uncontradicted. Nor did the defendants challenge any of the other elements of the damages proved by the plaintiff. Furthermore, not all of Anson's injuries resulted from being hit. Evidence also showed that Robin Fletcher twice jumped from a car onto Anson's back and that Anson was thrown to the ground and kicked several times. This aspect of Anson's testimony did not contravene the plaintiff's position regarding the amount of damages due and did not constitute an admission.

Even assuming that Anson's testimony was admissible as an admission, or under some other theory (e.g. the prior reported testimony exception to the hearsay rule), its exclusion was not so prejudicial to the defendants

as to deny them a fair trial. Jim Anson, the decedent's son, and Alex and Mark Thramer, co-owners of the steak house where the beating occurred, were all eyewitnesses who testified for the plaintiff. Their testimony is substantially the same and shows conclusively that the defendants Fletcher attacked Anson and were otherwise responsible for his extensive injuries. In view of such overwhelming evidence, we cannot say that the Fletchers' defense was in any way prejudiced by the rejection of their offer of proof. At best, their offer was cumulative to all the other evidence showing that others including the Fletchers attacked Anson. It is fundamental that a trial court has broad discretion to exclude cumulative evidence. We find no abuse of discretion in the trial court's exclusion of this evidence.

For their second contention of error on appeal, the defendants claim that the verdicts here are so clearly excessive that it is the duty of this court to set aside the verdicts and order a new trial. Where recovery is to be had for such subjective elements as the mental anguish caused by a humiliating beating, and the pain and suffering resulting therefrom, an appellate court ought to be very reluctant to substitute its judgment for that of a jury whose function it is to fix recovery. "It appears from our cases that where the recovery was not a mere matter of computation, and depends upon the intangible and quite subjective elements of pain and suffering and future disability, that it will not be interfered with unless it is so grossly unresponsive to the evidence as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury, or unless it appears to be based upon some oversight, mistake, misconception, or misinterpretation, or a consideration of elements not within the scope of the accident." Stewart v. Ritz Cab Co., 185 Neb. 692, 178 N. W. 2d 577 (1970).

Albert Anson lived for 10 months after the beating. For his assault and battery cause of action, the adminis-

tratrix of his estate was awarded $32,000 in damages. The evidence suggests that lost earnings consisted of $5,000 and medical expenses totaled $1,131.35. The balance of the verdict, $25,868.65 represents compensation for the physical pain and mental distress due to the humiliating beating itself as well as the physical and mental pain and suffering over the following 10-month period.

"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." Schimonitz v. Midwest Electric Membership Corp., 182 Neb. 810, 157 N. W. 2d 548 (1968). From this perspective the evidence shows that Anson suffered the indignity of a humiliating beating inflicted by a mob of attackers that consisted of repeated assaults continuing over a period of at least 20 minutes. During each of these assaults and batteries, he was in fear of life and limb, suffering both mental anguish and physical pain. The mental anguish resulting from a humiliating assault has been specifically recognized as compensable in Flinn v. Fredrickson, 89 Neb. 563, 131 N. W. 934. See, also, Schmidt v. Richman Gordman, Inc., 191 Neb. 345, 215 N. W. 2d 105. After the attack, Anson was diagnosed as having suffered a fractured rib, pneumonitis, and aggravation of a congenital unstable lower back, as well as traumatic tendonitis and facial lacerations. He complained of pain in his chest, lower back, legs, tailbone, and buttocks many times. Medicine to combat the continuing pain was prescribed on several occasions, and his doctor testified that he suffered approximately a 20 percent disability of his body. In addition to physical suffering, the evidence shows that Anson suffered mentally and emotionally and that this suffering continued until the time of his death. His family life was radically

altered and he grew increasingly depressed and withdrawn.

We have examined the totality of the circumstances, and in view of all the evidence, we are unable to hold as a matter of law that the jury abused its discretion in awarding $32,000 to Anson's estate. This court has recognized in the past that back injuries are particularly incapacitating and deserving of greater compensation. "* * * common human experience tells us that a disability to the body as a whole, involving the back and the pain and suffering incidental to the use and motion of the back, warrants a higher recovery." Stewart v. Ritz Cab Co., *supra*. Furthermore, nowhere is it claimed that the jury was improperly instructed with respect to the issue of damages; that it misinterpreted those instructions; or that it considered elements of damage not within the scope of the cause of action. Particularly in the highly speculative area of computing compensation for mental and physical pain and suffering, this court is unwilling to substitute its personal views for those of the jury. It is the jurors' function to determine the pecuniary equivalent of the injury here. This they have done, and we cannot say they clearly erred in their judgment.

The defendants claim also that the jury's award of $10,000 to Irene Anson for loss of consortium is excessive and unsupported by the evidence. Damages for loss of consortium represent compensation due to a wife who has been deprived of rights to which she is entitled by virtue of the marriage relationship, namely, her husband's affection, companionship, comfort, assistance, and particularly his conjugal society. The evidence, taken in a light most favorable to Mrs. Anson, shows that the last months of her marriage were unhappy due to the intentional injury inflicted on her husband by the defendants. Her family life and conjugal relations with her husband suffered, and she was clearly deserving of compensation. We are unable to say that

the jury abused its discretion in fixing the amount of this compensation. See Thill v. Modern Erecting Co., 292 Minn. 80, 193 N. W. 2d 298 (1971).

In summary, we come to the conclusion that there was no prejudicial error in the trial court's exclusion of evidence under the particular facts and that the jury verdicts were not excessive. The judgments of the District Court are correct and are affirmed.

AFFIRMED.

UNITED STATES BREWERS' ASSOCIATION, INC., ET AL., APPELLANTS, V. STATE OF NEBRASKA ET AL., APPELLEES, JACK LUND DISTRIBUTING, INC., INTERVENER-APPELLEE.
JOSEPH E. SEAGRAM AND SONS, INC., ET AL., APPELLANTS, V. STATE OF NEBRASKA ET AL., APPELLEES.

220 N. W. 2d 544

Filed July 18, 1974. Nos. 39278, 39325.

1. **Statutes: Constitutional Law: Contracts.** A statute which changes the substantive rights and obligations of the parties to an otherwise valid contract violates the constitutional prohibition against impairment of obligation of contracts.
2. **Statutes: Constitutional Law: Property: Regulations.** Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. A citizen has a constitutional right to own, acquire, and sell property; and if it is apparent that a statute under the guise of a police regulation does not tend to preserve the public health, safety, or welfare but tends to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual.
3. **Statutes: Property: Regulations.** The exercise of the police power must be directed toward and have a rational relation to the basic interest of society rather than the mere advantage of particular individuals. A police regulation cannot arbitrarily invade private property or personal rights. There must be some clear and real connection between the assumed purpose of the law and its actual provisions.

4. **Statutes: Constitutional Law.** L.B. 234, Laws 1971, as amended by L.B. 66, Laws 1972, held unconstitutional.

Appeals from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded with directions.

Perry, Perry & Witthoff, Arthur A. Whitworth, Nelson, Harding, Marchetti, Leonard & Tate, and Richard H. Williams, for appellants.

Clarence A. H. Meyer, Attorney General, Robert R. Camp, and Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellees.

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

BOSLAUGH, J.

These actions were brought to determine the constitutionality of L. B. 234, Laws 1971, as amended by L. B. 66, Laws 1972. The sections involved now appear generally as sections 53-166.01 to 53-166.17, R. S. Supp., 1972.

The plaintiffs in No. 39278 are engaged in the business of manufacturing and selling beer. The plaintiffs in No. 39325 are engaged in the manufacture of alcoholic liquors. The plaintiffs in each case market their products only through distributors. The distributors in turn sell the products to retailers.

The defendants in each case are the State of Nebraska; the Governor; and the Nebraska Liquor Control Commission, its members and secretary. The Attorney General is a defendant and Jack Lund Distributing, Inc., is an intervener in No. 39278.

L. B. 234, enacted in 1971, related only to the distribution of beer in the State of Nebraska. L. B. 66, enacted in 1972, amended L. B. 234 so that its provisions were also applicable to the distribution of alcoholic liquors in the State of Nebraska. Since the cases involve identical questions of law, they will be disposed of in one opinion.

Prior to the enactment of L. B. 234 and L. B. 66, the manufacturers of beer and alcoholic liquors were free to enter into contracts with distributors concerning the distribution of their products as they saw fit. The plaintiffs had the same rights in this regard as the manufacturers of other products. See Barish v. Chrysler Corp., 141 Neb. 157, 3 N. W. 2d 91. L. B. 234 and L. B. 66 imposed a system of regulation upon the distribution of beer and alcoholic liquors in the State of Nebraska and severely restricted freedom of contract between the parties which existed prior to the enactment of the legislation.

The statute in question provides that before a manufacturer may terminate a distributorship or establish a new, replacement, or an additional distributorship in an existing sales territory, the manufacturer must file an application with the Nebraska Liquor Control Commission. § 53-166.05, R. S. Supp., 1972. At the hearing before the commission, the burden is upon the manufacturer to establish that the application should be granted. § 53-166.08, R. S. Supp., 1972. A distributorship may be terminated only upon a showing that good cause exists. § 53-166.03, R. S. Supp., 1972.

The law states what shall not constitute good cause and what shall be considered in determining whether good cause exists. The following grounds do not constitute good cause for the termination of a distributorship: The manufacturer's desire for further sales penetration of the market; the sale by the distributor of allied products, other products, or other brands of beer; change of ownership or of executive management of a distributorship unless the manufacturer proves substantial detriment to the distribution of his products in the territory; and the refusal to purchase or accept delivery of products or services not ordered by the distributor and a refusal to enter into promotional devices of the manufacturer. § 53-166.10, R. S. Supp., 1972. In determining whether good cause has been shown for terminating a distributorship,

the commission is to consider the amount of business transacted; the investment made by the distributor and the permanency of the investment; whether the distributor has adequate warehouse facilities and other equipment and personnel; and failure of the distributor to comply with the requirements of the manufacturer which the commission finds are reasonable and material. § 53-166.11, R. S. Supp., 1972.

In determining whether good cause exists for placing an additional distributorship in an existing territory, the commission is to consider the amount of business transacted by other distributorships of the same brand or brands in comparable sales territories in the state or in neighboring states; the investment made and the permanency of the investment as compared to investments of other distributorships of the same brand or brands in comparable sales territories in the state or in neighboring states; the effect on the existing distributor of adding an additional distributorship; and whether the existing distributorship is providing adequate service and maintains adequate facilities and personnel. § 53-166.12, R. S. Supp., 1972.

In the event a manufacturer establishes that good cause exists for terminating a distributorship or adding a distributorship in an existing territory, the manufacturer is further required to show that after notice of the grounds for such good cause, the distributor failed to reasonably correct the grounds within a reasonable time.

The act further provides that no manufacturer shall induce or coerce any distributor to accept delivery of any alcoholic liquor, advertisement, or other commodity not ordered by the distributor; no manufacturer shall induce or coerce any distributor to enter into any agreement to do "any other act unfair to the distributor" by threatening cancellation or additional competition in the existing sales territory; no manufacturer may cancel any distributorship "unfairly, without due regard to the equities of

the distributor"; and no manufacturer may fail or refuse to deliver any alcoholic liquor publicly advertised for immediate sale within 60 days after receiving a distributor's order. § 53-166.02, R. S. Supp., 1972.

Violation of the act is punishable by suspension or revocation of the violator's license and by fine or imprisonment. § 53-166.14, R. S. Supp., 1972; § 53-1,100, R. R. S. 1943.

The plaintiffs raise a number of objections to the validity of the statute in question. Among their principal contentions they claim the act impairs the obligation of contracts; unduly restricts the right of freedom to contract; is vague and indefinite; tends to destroy competition and foster monopolies; and bears no reasonable relation to the public health and welfare.

It is apparent that the act, if valid, and if applicable to existing contracts between the plaintiffs and their distributors, would destroy many rights which the plaintiffs otherwise would have in regard to termination of distributorships, establishing additional distributorships, and the managing of the marketing of their products. In Globe Liquor Co. v. Four Roses Distillers Co. (Del.), 281 A. 2d 19, the Supreme Court of Delaware held the Franchise Security Law of that state invalid as an impairment of the obligation of contract because of the substantive change the act made in the rights and obligations of a distributor's contract. In a case involving the South Carolina act for the "Regulation of Manufacturers, Distributors and Dealers," the act was held not applicable to existing contracts. Superior Motors, Inc. v. Winnebago Industries, Inc. (U.S.D.C.. D.S.C.), 359 F. Supp. 773. See, also, A.F.A. Distributing Co., Inc. v. Pearl Brewing Co. (C.A., 4th Cir.), 470 F. 2d 1210. A similar construction of the Nebraska law would avoid a declaration of invalidity on the ground of contract impairment. It would not answer the other contentions made by the plaintiffs.

Freedom to contract and to acquire and sell property in a lawful manner are valuable constitutional rights. The power of the Legislature to regulate and restrict the exercise of these rights is limited by the Constitution of this state and of the United States.

Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. A citizen has a constitutional right to own, acquire, and sell property; and if it is apparent that a statute under the guise of a police regulation does not tend to preserve the public health, safety, or welfare but tends to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual. Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227.

The exercise of the police power must be directed toward and have a rational relation to the basic interest of society rather than the mere advantage of particular individuals. Jewel Tea Co., Inc. v. City of Geneva, 137 Neb. 768, 291 N. W. 664. A police regulation cannot arbitrarily invade private property or personal rights. There must be some clear and real connection between the assumed purpose of the law and its actual provisions. Chicago, B. & Q. R.R. Co. v. State, 47 Neb. 549, 66 N. W. 624.

A regulatory statute adopted by virtue of the police power which has no reasonable relation to the public health, safety, and welfare is invalid. Blauvelt v. Beck, 162 Neb. 576, 76 N. W. 2d 738. The test of validity is the existence of a real and substantial relationship between the exercise of the police power and the public health, safety, and welfare. Stahla v. Board of Zoning Adjustment, 186 Neb. 219, 182 N. W. 2d 209. A statute, under the guise of a police regulation, which does not tend to preserve the public health, safety, and welfare is an unconstitutional invasion of the personal and property

rights of the individual. Golden v. Bartholomew, 140 Neb. 65, 299 N. W. 356.

The legislation in question has two declared purposes: The fostering and promoting of temperance and obedience to the law, and the protection of distributors against termination of their franchises without cause. The effect of the act upon temperance or obedience to the law is remote and speculative. It would not regulate the retail distribution of products and would have little or no effect upon consumption of the product by the public. The only possible effect of the act in this regard is that it would transfer control of the distribution of a particular product from the manufacturer of that product to the distributor. There is no reason to believe that distributors collectively desire to sell less products than do the manufacturers. There is no reasonable relationship between the act and the fostering or promoting of temperance and obedience to the law, and it cannot be justified on that ground.

With respect to the protection of distributors against termination of their franchises without cause, the act appears to go beyond any other statute of which we are aware.

The Federal Automobile Dealers Franchise Act creates a cause of action for damages for cancellation or nonrenewal of a franchise not in good faith. See 15 U.S.C.A., §§ 1221 to 1225. Lack of good faith under the federal act has been construed to mean coercion or intimidation. There must be a wrongful demand coupled with a threat of termination. See Berry Bros. Buick, Inc. v. General Motors Corp., 257 F. Supp. 542, affirmed, 377 F. 2d 552. The federal act does not prevent termination, nonrenewals, cancellations, inducements to resign distributorships, or the establishing of additional distributorships. It only protects against coercion and intimidation in termination or nonrenewal.

In contrast to the federal law the Nebraska act locks

in the present distributors and places a severe burden upon a manufacturer who wants to make any change in the distribution of his product. The act even provides for "the succession" of distributorships. Change of ownership or executive management is not good cause unless the manufacturer is able to prove to the satisfaction of the commission there will be "substantial detriment" to the distribution of his products.

The administration of the law is placed in the hands of the Nebraska Liquor Control Commission with but little in the way of standards to guide the commission. The act is replete with terminology which is vague and indefinite. The commission is to determine whether requirements set by the manufacturer are "reasonable and material." Manufacturers are prohibited from doing any act "unfair to the distributor," and from "unfairly, without due regard to the equities of the distributor" canceling or failing to renew the franchise. A Colorado statute using similar terminology was held to deny due process because it failed to provide an ascertainable standard of guilt. General Motors Corp. v. Blevins, 144 F. Supp. 381.

Assuming that good cause exists, a manufacturer may not commence proceedings under the act until after he has notified the distributor and waited "a reasonable time" to see if the distributor will fail to reasonably correct matters. Upon filing an application, a date for hearing within 90 days is to be set. Thereafter continuances for up to 180 days may be granted. A complaint against a manufacturer must be heard within 20 days.

There is a middle ground between freezing the channels of distribution and allowing a manufacturer absolute power to do as he pleases. Berry Bros. Buick, Inc. v. General Motors Corp., *supra*. We conclude that the act in question is an unreasonable invasion of the personal and property rights of the plaintiffs and must be declared unconstitutional.

The judgment of the District Court is reversed and the cause remanded with directions to enter a judgment declaring the statute unconstitutional.

REVERSED AND REMANDED WITH DIRECTIONS.

WAYNE L. CAMPBELL ET AL., APPELLANTS, V. DENNIS H. BUCKLER ET AL., APPELLEES.

220 N. W. 2d 248

Filed July 18, 1974. No. 39301.

1. **Equity: Appeal and Error.** In appeals in suits in equity, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the District Court. Such independent conclusions of fact must be determined in accordance with the ordinary rules governing the burden of proof and the competency and materiality of the evidence.
2. **Property: Quieting Title: Adverse Possession.** One who claims title to real estate by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession of the property under claim of ownership for the full period required by the statute.
3. **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.

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

Richards & Richards, for appellants.

Story & Ortman and P. J. Heaton, Jr., for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, McCOWN, NEWTON, and BRODKEY, JJ., and VAN PELT, District Judge.

BRODKEY, J.

This case involves a quiet title action, equitable in nature, brought by the plaintiffs, Wayne L. Campbell and O. Aletha Campbell, husband and wife, against the defendants herein, under the authority contained in sections 25-21,112 to 25-21,120, R. R. S. 1943. Plaintiffs claim title to the disputed strip of land involved in this action by virtue of adverse possession for the full statutory period of 10 years. Defendants filed a general denial to plaintiffs' amended petition and also filed a cross-petition against the plaintiffs seeking to recover damages for an alleged trespass by plaintiffs on the land in question, to which the defendants claimed title. Trial was had, and the premises in question were viewed by the trial judge in the presence of counsel for both parties, following which the court found generally against the plaintiffs on their petition and against the defendants on their cross-petition. In his order and judgment the court specifically found as follows: "1. The evidence fails to support the contention of the plaintiffs that the use of the property in question by plaintiffs was actual, open, hostile, and more important, exclusive and continuous for the statutory period of ten years. 2. The delineation of the property in question by plaintiffs is not sufficiently clear, taking into consideration the character of the land involved and all the circumstances of the case." Plaintiffs then appealed to this court, assigning as error the finding of the District Court that the evidence was insufficient to establish that they had acquired title to the property in question through adverse possession. We affirm.

Actions to quiet title are equitable in nature, and under the well-established rule it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the District Court. § 25-1925, R. R. S. 1943; Shirk v. Schmunk,

ante p. 25, 218 N. W. 2d 433 (1974); Walker v. Bell, 154 Neb. 221, 47 N. W. 2d 504 (1951); Eirich v. Oswald, 154 Neb. 8, 46 N. W. 2d 686 (1951). Such independent conclusions of fact must be determined by this court in accordance with the ordinary rules governing the burden of proof and the competency and materiality of the evidence. Shirk v. Schmunk, *supra;* Beckman v. Lincoln & N. W. R. R. Co., 79 Neb. 89, 112 N. W. 348 (1907). The rule is well established that one who claims title to real estate by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession of the property under claim of ownership for the full period required by statute, which in this state is 10 years. See, Shirk v. Schmunk, *supra;* § 25-202, R. R. S. 1943. Our de novo review of the record will be made in the light of these rules.

Plaintiffs and defendants own adjoining farms, and the land involved in this case is located in Section 15, Township 15 North, Range 46, in Garden County, Nebraska. The plaintiffs are the owners of record of the west one-half of that section and the southeast quarter is owned by the heirs of Everett Walsh, deceased, who are named as defendants herein. This controversy involves a determination of the exact location of the boundary line between the adjoining properties of the parties, the defendants asserting that the boundary between the properties is the north-south centerline of the section; whereas plaintiffs claim that the present boundary line is along a line located to the east of that centerline by virtue of their adverse possession of a strip of land immediately to the east of the centerline for the full period required by statute. Plaintiffs brought this action for the purpose of quieting title to the land situated between these two lines.

Plaintiff, Wayne L. Campbell, testified he purchased the west one-half of Section 15 in 1949. He started to

farm that land in the spring of 1950 and has farmed it continuously until the present date. He described a pile of rocks located on the land which he assumed marked the southeast corner of the southwest quarter of the section. Using this rock pile as a reference point, he stated that he always farmed along a line running between the rock pile and a fence located in the section immediately to the north of Section 15 and claims that that line is the boundary line between the land of the plaintiffs and that of the defendants.

A significant issue in the case involved the existence or nonexistence of what was referred to in testimony as a "ridge line," "farm ridge," or "plow ridge." Wayne Campbell described that "ridge line" as "a deep ridge raised in the ground" and testified that he always assumed that line to be the boundary line between his property and the property adjoining on the east. Other witnesses for the plaintiff also testified in relation to the "ridge line." Eugene Bond testified that he was familiar with the land in question, having worked on that land with Wayne Campbell in the years 1964 through 1967. According to Bond, there was a distinct "farm ridge" forming the eastern boundary of the plaintiffs' property in 1965. Duane Bondegard also testified that he was familiar with the land in question, having owned farm land in the section immediately to the south of Section 15 since approximately 1962. Bondegard stated that he had noticed the "farm ridge" between the properties of the plaintiffs and the defendants, and that the ridge had been there as long as he had been farming the land immediately to the south. Another witness for the plaintiffs, Edward Schmid, testified that he was acquainted with the land in question, and that to the best of his knowledge, there had been a farm line there for 30 years.

The existence of the alleged "ridge line" is important because the plaintiffs now assert that it formed a clear

line of demarcation between the land farmed by them over the years and that farmed by the defendants. The apparent location of that line was also important to the plaintiffs in 1965, when an irrigation well was drilled on their property. In conjunction with the drilling of that well, several power poles were erected by the Wheat Belt Public Power District. Wayne Campbell testified that he himself directed the placement of those poles and that in so doing he caused the poles to follow the "ridge line" through the section, each of the poles being placed approximately 3 feet west of that line. According to Campbell, it was this placement of the poles in 1965 that initiated the dispute over the ownership of the land upon which the poles were located, and that up to that time there had been no dispute between the parties over the ownership of the strip in question. In any event, it appears that in 1965 William Keefover, county surveyor for Garden County, conducted a survey at the request of Everett Walsh to determine the exact location of the north-south centerline of Section 15. Keefover testified that he found each of the power poles to be located east of the north-south centerline of Section 15. Specifically, he found that the center of the first pole, beginning on the south, was 2.80 feet east of the centerline; the center of the second pole was 6.05 feet east of the centerline; the center of the third pole was 9.31 feet east of the centerline; and the center of the fourth and last pole was 12.45 feet east of the centerline of the section. In spite of this encroachment across the centerline Keefover determined that the well itself was 2.96 feet *west* of the line, and was clearly located upon the land of the plaintiffs. Thus, the power poles, although situated to the east of the centerline of the section, are located west of the alleged "ridge line" and, therefore, upon the land to which the plaintiffs now claim title through adverse possession.

Much of the evidence adduced by the defendants was in direct conflict with the evidence presented by the plaintiffs. Daniel Walsh, a son of Everett Walsh, and one of the defendants in this case, testified that he was not familiar with any particular "ridge line" upon the land. He explained, however, that every time someone plowed there would be a "dead furrow" between the fields, the location of which would depend upon wherever the plow had been on that particular occasion. He admitted that in some years there would be a "space" between his father's crops and those of the plaintiffs. He also asserted that even prior to the erection of the power poles in 1965 there was a dispute as to the exact location of the boundary line and that, as a result, his father would farm west of the boundary line established by Campbell and up to the point where he believed the true boundary line to be located. Richard Walsh, also a defendant and son of Everett Walsh, testified that there is not presently a discernible "ridge line" on the land. He supported his brother's testimony that they had always farmed the land according to their own belief regarding the location of the boundary line. Defendant Mary Walsh, widow of Everett Walsh, testified that when her husband first started to farm the land in Section 15 there was a grassy area between their field and that of the plaintiffs. She asserted, however, that there was no discernible "ridge line" between the fields. She also indicated that her husband had always farmed the land west of where the power poles are presently located, and the following verbatim transcript of her testimony is significant:

"Q. Did you farm that land prior to 1965?

A. Yes, we did.

Q. And you're still farming it?

A. Yes, we are.

Q. Is it true, as Mr. Campbell testified, that you folks have been crossing over on each other?

A. Yes, we have.

Q. How many years has that been going on?

A. Well, to my knowledge, since '65, when the REA poles were in.

Q. But you are farming now the exact land that you farmed before '65?

A. *Yes, since we were married in 1934, in 1943, excuse me.*

Q. Since 1943?

A. Yes.

Q. Even if Mr. Campbell has been farming there, you go over and farm back on it?

A. Yes, we do." (Emphasis supplied.)

After having examined the testimony and the exhibits made a part of the record in this case, we have concluded that the judgment of the District Court must be affirmed. We agree with the specific findings of the trial court that the plaintiffs have failed to prove that their possession of the land in dispute was both *exclusive* and *continuous*. This determination is, we believe, justified in light of the evidence tending to show that in certain seasons Everett Walsh actually farmed upon the land in dispute. While the testimony of his sons Daniel and Richard as to that particular fact may be somewhat suspect because of their age during the critical years of plaintiffs' alleged adverse possession, nevertheless there is basic credibility to that part of the testimony of his widow, Mary Walsh, wherein she indicated that her husband had carried out farming activities upon the land in dispute long before the power poles were erected in 1965, in fact, as early as 1943. While it is true that the testimony of Mary Walsh is in direct conflict with the testimony of certain of plaintiffs' witnesses, nevertheless this court in evaluating the testimony of Mary Welsh, must give weight to the rule that on an 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. State v. Cheyenne County, 123 Neb. 1, 241 N. W. 747 (1932); Shirk v. Schmunk, *supra*.

We believe there is ample evidence in this case to establish the fact that the plaintiffs' possession of the land in question was not exclusive or continuous. Furthermore, in light of the fact that the land in dispute was not enclosed, which would have been of assistance in determining the precise boundaries of the disputed property, we believe, and the record confirms the belief, that the farming activities of the parties fluctuated back and forth across the land in dispute over the years. We conclude, therefore, that the plaintiffs in this case failed to meet their burden of proving that their possession of the land in dispute was exclusive and continuous, and therefore the judgment of the District Court must be affirmed.

AFFIRMED.

IN RE APPLICATION OF RUAN TRANSPORT CORPORATION, DES MOINES, IOWA.

RUAN TRANSPORT CORPORATION, DES MOINES, IOWA, APPELLANT, V. HERMAN BROS., INC., OMAHA, NEBRASKA, ET AL., APPELLEES.

220 N. W. 2d 245

Filed July 18, 1974. No. 39383.

1. **Carriers: Public Service Commissions: Statutes.** The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices.
2. ———: ———: ———. It is the policy of the Legislature to regulate transportation by motor carriers in intrastate com-

merce in such manner as to preserve the inherent advantages of, and foster sound economic conditions in, transportation by motor carriers, in the public interest; and to promote economical and efficient service and reasonable charges, without unjust discrimination, or unfair or destructive competitive practices.

3. **Carriers: Public Service Commissions.** A certificate of public convenience and necessity may be issued only when required by the present or future public convenience and necessity.
4. **Carriers: Public Service Commissions: Hearings.** The burden is upon the applicant to show that the proposed service is required by public convenience and necessity.
5. **Carriers: Public Service Commissions: Appeal and Error.** The matter of the determination of public convenience and necessity is peculiarly within the discretion and expertise of the Nebraska Public Service Commission and its action will not be disturbed by this court in the absence of a showing that such action was illegal or arbitrary, capricious, and unreasonable.
6. **Carriers: Public Service Commissions: Hearings.** In determining the issue of public convenience and necessity, controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest.
7. **Public Service Commissions: Appeal and Error.** An order of the Nebraska Public Service Commission which is sustained by the evidence is not unreasonable or arbitrary and will be affirmed upon review.

Appeal from the Nebraska Public Service Commission. Affirmed.

Rodney Peake, for appellant.

James E. Ryan and Richard A. Knudsen, for appellees.

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

NEWTON, J.

Ruan Transport Corporation of Des Moines, Iowa, applied for a certificate of public convenience and neces-

sity authorizing it to transport cement by motor vehicle as a common carrier from the Ash Grove Cement Company plant near Louisville, Nebraska, to all points in Nebraska. Applicant handles cement shipments originating in Omaha, Nebraska, and in Kansas and Iowa. It has assets required for the purpose mentioned.

The Ash Grove Cement Company is now served by Herman Bros., Inc., and has no complaint regarding the quality, type, and efficiency of the service rendered except on comparatively rare occasions when its business peaks and short delays are encountered. It would like to use Ruan as a back-up carrier on such occasions. Ash Grove also has access to rail transport. Ash Grove plans to expand its operation.

Herman Bros., Inc., possesses 283 power units, 25 flatbeds for transport of bagged cement, and 202 units equipped to haul bulk cement. Although its equipment is not always fully utilized, it is willing to add additional equipment as required.

The Nebraska Public Service Commission found that the present service rendered by Herman Bros., Inc., was not shown to be inadequate; and that the granting of the application would not serve a public demand or need, is not required by public convenience or necessity, would endanger or impair the present carrier contrary to the public interest, and would result in deteriorating service. The application was denied.

It is conceded that: "The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices." Petroleum Transport Service, Inc. v. Wheeler Transport Service, Inc., 188 Neb. 400, 197 N. W. 2d 8.

It is the policy of the Legislature to regulate transpor-

tation by motor carriers in intrastate commerce in such manner as to preserve the inherent advantages of, and foster sound economic conditions in, transportation by motor carriers, in the public interest; to promote economical and efficient service and reasonable charges, without unjust discrimination, or unfair or destructive competitive practices. See § 75-301, R. R. S. 1943.

A certificate of public convenience and necessity may be issued only when required by the present or future public convenience and necessity. See § 75-311, R. S. Supp., 1972.

The burden is upon the applicant to show that the proposed service is required by public convenience and necessity. See Parsons v. Nebraska State Railway Commission, 181 Neb. 185, 147 N. W. 2d 521.

"The matter of the determination of public convenience and necessity is peculiarly within the discretion and expertise of the Nebraska State Railway Commission and its action will not be disturbed by this court in the absence of a showing that such action was illegal or arbitrary, capricious, and unreasonable." Robinson v. National Trailer Convoy, Inc., 188 Neb. 474, 197 N. W. 2d 633.

"In determining the issue of public convenience and necessity, controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest." Black Hills Stage Lines, Inc. v. Greyhound Corp., 174 Neb. 425, 118 N. W. 2d 498.

We have before us an instance in which the existing carrier has and is rendering generally satisfactory service. One hundred percent satisfaction is rarely attainable due to business variations and unforseeable or un-

preventable situations. The existing carrier has agreed to expand its services to the Ash Grove Cement Company as may be required. Applicant, under the pretext of rendering only back-up services, seeks a certificate permitting it to enter into unrestricted competition with the existing carrier. This could only result in endangering and impairing the operation of the existing carrier and rendering its large investment in specialized facilities assigned to the service of the Ash Grove Cement Company unprofitable. A disservice may be rendered the public interest by too much, as well as too little, competition in an industry. Such questions are for the determination of the Nebraska Public Service Commission. They are matters of judgment determinable upon the facts in each case and unless its action is illegal, arbitrary, capricious, or unreasonable, this court cannot interfere.

We believe that the order of the Nebraska Public Service Commission is sustained by the evidence. "An order of the Nebraska State Railway Commission which is sustained by the evidence is not unreasonable or arbitrary and will be affirmed upon review." Parsons v. Nebraska State Railway Commission, *supra*.

The order of the Nebraska Public Service Commission is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FLOYD CRAIG, APPELLANT.
220 N. W. 2d 241

Filed July 18, 1974. No. 39384.

1. **Criminal Law: Trial: Witnesses: Evidence.** Where a defendant, who testifies as a witness, offers evidence of his reputation for truth and veracity, the State may offer contradicting evidence. Such contradicting evidence must be confined to the reputation of the defendant for truth and veracity in the community where he lives or works.
2. ———: ———: ———: ———. In a criminal prosecution for theft, where the determination of the facts by the jury may

turn upon its acceptance or nonacceptance of the credibility of the defendant, who has testified on his own behalf, the admission into evidence over objection of the opinion of a law enforcement officer that the defendant's reputation is, "that he would take anything that he could get a hold of," is erroneous and we cannot, under such circumstances, say that it was not prejudicial.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Reversed and remanded for new trial.

John R. O'Hanlon, for appellant.

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

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

CLINTON, J.

Defendant was convicted by a jury on separate counts of having stolen and having willfully and maliciously killed one cow and was sentenced to a term in the Nebraska Penal and Correctional Complex. On appeal the issues are: (1) Denial of a motion for mistrial made because of the admission, over objection, of rebuttal testimony by the sheriff as follows: "Mr. Craig's reputation is that he would take anything he could get a hold of." (2) Refusal to admit into evidence in support of a motion for new trial on the ground of newly discovered evidence, a writing by a third party confessing guilt of the crime of which the defendant was convicted, which confession tended to exculpate the defendant. (3) Denial of a motion for continuance of hearing on the motion for new trial so that the testimony of the confessing third party could be adduced. (4) Sufficiency of the evidence to support the conviction.

With reference to the first issue, the State argues that the error was cured by the striking of the testimony and an admonition to the jury to disregard it. With

reference to issue (2), the State relies upon prior decisions of this court to the effect that declarations against penal interest are not exceptions to the hearsay rule and therefore inadmissible. The State does not respond to issue (3).

In order to determine whether the admission of the sheriff's testimony was prejudicial, it is necessary to summarize the evidence. This summary will also dispose of, adversely to the contentions of the defendant, the fourth issue.

Since we find that a new trial is required because of the erroneous admission of the testimony of the sheriff, it is not necessary to determine issue (2) because, inasmuch as a new trial is necessary, the defendant will be afforded a reasonable opportunity to produce the direct testimony of the confessing third party at trial. We therefore need not determine at this time whether the existing rules on admissibility of declarations against penal interest should be modified to conform to the more modern and seemingly more rational holdings. See, Rule 804(b) (4) and Comment, Proposed Nebraska Rules of Evidence, August 1, 1973; People v. Brown, 26 N. Y. 2d 88, 257 N. E. 2d 16 (1970); Chambers v. Mississippi, 410 U. S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Since such exculpatory third party confessions, if true, bear directly upon the guilt or innocence of the defendant, their admission or rejection is more than just a technical nicety. Due process may require the admission of testimony corroborating a third party confession which was subsequently retracted. Chambers v. Mississippi, *supra*. On the other hand, the possibility of the fabrication of either the confession or its contents, perhaps by a confederate who has nothing to lose, would seem to require care in the admission of such evidence where the declarant (the confessing third party) himself is not available to testify.

The defendant was apprehended at about 11 o'clock p.m. on the day in question by a sheriff's patrol in a

pasture where the apparently freshly killed and partially gutted cow was found. The sheriff's deputies testified that they came upon a pickup truck parked along the road with lights off and the engine not running. They stopped to investigate. They heard a sound and directed a flashlight in the direction from which it came. A man was lying (according to the defendant, crouching) near the carcass a very short distance from the road. The defendant ran. The officer recognized him and yelled, " 'Floyd, stop or I'll shoot.' " The defendant stopped.

The explanation of the defendant, who was self-employed as a car body repairman, was that while driving along the road to pick up a disabled car for a friend, Steve Mundorf, he saw a fellow jump up in the pasture and run. He stopped his pickup, turned off the lights and motor, and went to investigate. He saw the animal. He squatted down. At the time the sheriff's patrol came along and when the light struck him, he ran, but stopped when he recognized the voice of the deputy. At the scene he denied he had killed the animal.

The evidence showed that the cow had been killed by a .22 caliber bullet in the head and that a knife had been used to open the animal and also to make a throat cut. A search of the area by the sheriff's department disclosed neither a knife nor a gun and none was found on the defendant. A double-bladed axe and a flashlight, the latter item, unlighted but focused on the open portion of the carcass, were found at the scene. The defendant denied ownership of these items and asked that the officers check them for fingerprints. This was not done because it would have been "unproductive" as the deputies had handled the items after the seizure. The defendant asked to take a polygraph test, but this was not done.

The defendant's version of how he came to be at the site was corroborated to some extent. The road in question is regularly patrolled. The lights of an

approaching car can be seen for over a half mile. There would be time for someone to escape or move from the immediate area before a car arrived. After the defendant was placed in the patrol car one of the deputies heard voices which he judged to be about 100 yards away.

Mundorf, the defendant's friend, corroborated the defendant's story that the defendant was to pick up his stalled car. He stated that he and one Mike Martin had left the defendant's body shop in another car at about 10:45 p.m. at which time the defendant also left. The defendant was to meet them with his pickup and tow the car. The defendant was to follow them, but they lost sight of him when he stopped at a gas station. Mundorf and Martin drove directly to the disabled vehicle and arrived there about 11 p.m. Martin corroborated Mundorf's story. They stated that they found they could fix the auto and upon doing so drove it away when defendant did not show up. That these parties and the defendant left the body shop at about 10:45 p.m. was corroborated by yet another witness. Defendant's statement that he stopped at the filling station at about 10:45 p.m. was corroborated by two other witnesses.

The defendant offered and there was received into evidence trousers which he stated he had worn on the evening in question. They had been examined and tested by a laboratory. It was determined that red substance on the trousers was paint and not blood. At the preliminary hearing, although not at trial, deputy sheriffs had testified that defendant had blood on his trousers and person. At trial this testimony was that he had blood on his hands. The defendant's clothing was not taken from him for testing after his arrest.

The defendant had considerable experience in a packing plant and so had some knowledge of aspects of the slaughtering process. The throat cut on the cow in question resulted in very little bleeding. The defendant

introduced evidence by a veterinarian to the effect that if the jugular vein of the cow had been cut, "there could be a great deal of bleeding."

An unopened box containing a roll of polyethylene was found in the pickup at the time of the defendant's arrest. The apparent purpose of offering this evidence was to show that it might be used to lay the meat on. Defendant testified that it was for use in his body shop to cover auto bodies to protect them from grime and paint spray. Another auto body repairman verified that polyethylene was sometimes used for that purpose.

It is apparent that a successful defense by Craig depended upon the jury's acceptance of his credibility. He had been twice convicted of felonies and this, of course, was before the jury although the details and the nature of the charges were not. The defendant offered and there was received testimony by several witnesses attesting to his good reputation for truth and veracity. The State sought to rebut this testimony by contradictory testimony from the sheriff.

The sheriff testified as follows: "Q. Do you know if Floyd Craig has a reputation for truth and veracity in the community from your conversations or knowledge of him in this community? A. I know he has a reputation. Q. Do you know if he has a reputation for truth and veracity? A. No. Q. You do not know if he has a reputation, or you do know and did I misunderstand your answer? A. Well, I don't know as I have ever heard anybody say he was—I don't know exactly how to say—What was your question? . . . THE COURT: We are having difficulty with this question. I don't know if you understand the question. The whole question is: Do you know whether the defendant has a reputation with respect to truth and veracity in the community, and that's either yes or no. THE WITNESS: No. . . . Q. You don't know if he has a reputation? A. I answered that once. I know he has got a reputation." Objection was made and overruled. The testi-

mony then continued: "THE WITNESS: Mr. Craig's reputation is that he would take any thing he could get a hold of." At this point a motion to strike was sustained. The court then stated: "And the jury is instructed now, and will be given specific instructions that anything that has been stricken from the record in this case is not to be considered by the jury." As a consequence of further questioning an unfavorable opinion on the reputation of the defendant for truth and veracity was elicited. Cross-examination developed that this was the sheriff's own opinion and not founded upon his knowledge of the reputation of the defendant in the community.

This and most courts have long refused to permit testimony of a witness' general character on the issue of his credibility and have consistently held that only evidence of his reputation for truth and veracity is admissible on the point. Courts further do not permit evidence of specific instances of either truth-telling or of lying. One of the reasons for this is an avoidance of collateral issues. The accused, if he chooses to testify, is, of course, subject to the same rules of impeachment as other witnesses.

The defendant was entitled to offer evidence of his reputation for truth and veracity and he did. The prosecution was entitled to dispute that evidence, but only by contradictory evidence of his bad reputation for truth and veracity. Myers v. State, 51 Neb. 517, 71 N. W. 33; Wells v. State, 152 Neb. 668, 42 N. W. 2d 363. The impeaching witness is not entitled to give his own opinion of the defendant's truth and veracity. Lee v. State, 147 Neb. 333, 23 N. W. 2d 316. A witness who has testified to the general reputation of another for truth and veracity may, however, be cross-examined for the purpose of eliciting the sources of his information. State v. Newte, 188 Neb. 412, 197 N. W. 2d 403. Although a defendant may be questioned as to his convictions for a felony, if he admits the fact and the

correct number of convictions, no information as to the nature of the charges or other details may be elicited or received. Latham v. State, 152 Neb. 113, 40 N. W. 2d 522. Evidence of facts which constitute a crime are not admissible for impeachment purposes. Vanderpool v. State, 115 Neb. 94, 211 N. W. 605. It is the rule in practically all jurisdictions that the character witness may be interrogated only as to truth and veracity. McCormick on Evidence, § 44, p. 95.

As shown by the summary of the testimony, the sheriff had twice answered that he did not know the defendant's reputation for truth and veracity. At that point an objection for the continuation of the pursuit of the subject should have been sustained. The answer eventually elicited was not material to any issue to be determined by the jury and, since it clearly implied that the defendant was an habitual thief, we cannot say in the light of the questions of credibility which the jury had to determine that it was not prejudicial. The motion for a mistrial should have been granted.

REVERSED AND REMANDED FOR NEW TRIAL.

VIRGINIA RELLER, EXECUTRIX OF THE LAST WILL AND TESTAMENT AND ESTATE OF MERRILL R. RELLER, DECEASED, APPELLEE, V. DONALD R. HAYS ET AL., APPELLEES, IMPLEADED WITH SALLY A. HAYS ET AL., APPELLANTS, ROLLIE C. JOHNSON, APPELLEE AND CROSS-APPELLANT.

220 N. W. 2d 228

Filed July 18, 1974. No. 39399.

1. **Estates: Taxation: Trusts: Interest: Penalties.** Generally, estate and inheritance taxes, including interest and penalties, levied in respect of a trust in which both an income beneficiary and a remainderman have an interest, should be charged against principal.
2. ———: ———: ———: ———: ———. Where the personal representative is also the life income beneficiary of a testamentary trust, interest on estate and inheritance taxes paid

by the personal representative on behalf of the trust should be reduced by the income realized from that part of the trust property which otherwise would have been used to pay the taxes apportioned to the trust.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

A. James McArthur, for appellants.

Fredric H. Kauffman of Cline, Williams, Wright, Johnson & Oldfather and William P. Kelley, for appellee Reller.

Nelson, Harding, Marchetti, Leonard & Tate and Alan J. Plessman, for appellee Johnson.

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

BOSLAUGH, J.

This is an action by the executrix of the will and estate of Merrill R. Reller, deceased, to recover from the beneficiaries of the estate the inheritance and estate taxes which had been apportioned and prorated to the respective shares. The trial court sustained the plaintiff's motion and entered summary judgment against the beneficiaries, including the trust, for the taxes plus interest which had been paid by the executrix.

The appellants are Sally A. Hays and John McArthur, beneficiaries of the trust created under paragraph III of the will. They contend the trial court erred in considering the lands devised to Sally A. Hays in paragraph V of the will as a part of the corpus of the trust, and in charging to principal the interest on taxes due from the trust.

There is no controversy concerning the amounts of the taxes, the apportionment of the taxes, the payment by the executrix, or the fact she has not been reimbursed.

Paragraph III of the will devised the Commercial Center in trust subject to terms and conditions set out in the

will. The Commercial Center is a tract of land lying north of Cornhusker Highway and west of Fortieth Street in Lincoln, Nebraska. It includes a large trailer court and a number of business buildings. The will provided generally for the Commercial Center to be held in trust during the life of Virginia Reller, the widow of the deceased and the executrix, and for 5 years thereafter, with remainder to Donald R. Hays, Sally A. Hays, John McArthur, and Rollie C. Johnson. Upon the death of Virginia Reller, the life income beneficiary of the trust, Donald R. Hays and Sally A. Hays, Rollie C. Johnson, and John McArthur become income beneficiaries of the trust for a period of 5 years after which the trust is to be dissolved and the property divided among these beneficiaries.

Paragraph V of the will provided: "It is my will and I give, devise and bequeath to Donald R. Hays and Sally A. Hays, or the survivor of them, the home and immediate premises developed and being used by them. In event they predecease me, then said bequest shall go to their surviving children by right of representation." In 1969, Donald R. Hays, the trustee named in paragraph III of the will, brought an action for the construction and interpretation of the will of the deceased. In that action the trial court found: "There was evidence as to Paragraph V. However this part of decedant's (decedent's) will is not presented within the issues pleaded, and the evidence in the record is insufficient to establish a claim or interest of Donald R. Hays and Sally A. Hays to any part of the Commercial Center property." The judgment of the District Court in that action was affirmed in all respects in Hays v. Johnson, 187 Neb. 307, 189 N. W. 2d 475.

Sally A. Hays made no showing in this case and there was nothing before the trial court to show that Donald R. Hays or Sally A. Hays have ever established any right to any part of the Commercial Center property. There is nothing in the record upon which the trial court could

have determined that Sally A. Hays was the owner of a specific portion of the land known as the Commercial Center.

With respect to interest on the inheritance and estate taxes charged against the principal of the trust, the appellants contend the interest on the taxes should have been charged to income. They rely upon Bartels v. Seefus, 132 Neb. 841, 273 N. W. 485, and other similar cases holding generally that interest on a mortgage or trust property should be charged to income.

The general rule is that ordinary expenses incurred in the administration, management, and preservation of the trust property including regularly recurring taxes should be charged to income. Estate and inheritance taxes are not regularly recurring taxes and ordinarily should be charged to principal. The Revised Uniform Principal and Income Act provides that in the absence of a contrary provision in the trust instrument, estate and inheritance taxes, including interest and penalties, levied in respect of a trust in which both an income beneficiary and a remainderman have an interest, should be charged against principal even though the income beneficiary also has rights in the principal. 7 U.L.A. (Master Ed.), § 13 (c) (5), p. 652. See, also, III Scott on Trusts (3d Ed.), § 233.2, p. 1902.

Where, as in this case, the personal representative is also the life income beneficiary, some allowance should be made to compensate for income realized on the amount of the taxes during the time the principal was not diminished by the taxes apportioned and charged to it but not yet paid out of the trust property. The principle is illustrated by the following statement in Commissioner of Internal Revenue v. Wade, 155 F. 2d 918: "As a matter of equity, however, interest falling due upon an estate tax during a delay in the payment of a deficiency ought to be borne by the life beneficiary, at least so far as he has during the delay actually received income, which he would

not have received had the correct tax been ascertained and paid at once." See, also, in re Estate of Forsheim, 235 N.Y.S. 2d 945, 37 Misc. 2d 969; In re Smith's Will, 82 N.Y.S. 2d 468; In re Estate of Harjes, 10 N.Y.S. 2d 627, 170 Misc. 431; Jones v. Hassett, 45 F. Supp. 195. Such adjustment is necessary to prevent the income beneficiary from receiving income twice from the same property at the expense of the residuary beneficiaries.

To determine the amount of the allowance or adjustment which should be made, it will be necessary to receive evidence. The cause is, therefore, remanded to the District Court for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WILLIAM D. GAFFNEY ET AL., APPELLEES, V. STATE DEPARTMENT OF EDUCATION ET AL., APPELLANTS.
220 N. W. 2d 550

Filed July 25, 1974. No. 38957.

1. **Constitutional Law: Schools and School Districts: Public Funds.** Article VII, section 11, of the Constitution of Nebraska, provides in part: Neither the state Legislature nor any county, city, or other public corporation shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof.
2. ———: ———: ———. By its terms, Article VII, section 11, declares and requires that any educational institution which receives any aid by way of public appropriation must be exclusively owned and controlled by the state or a governmental subdivision thereof.
3. **Constitutional Law: Statutes.** Constitutional and statutory provisions are not open to construction as a matter of course.
4. **Constitutional Law.** By its terms, the criteria announced in Article VII, section 11, of the Constitution of Nebraska, do not permit an examination of the distinction between secular or sectarian purposes, nor do they permit an examination of a scheme to determine the elusive distinction between primary

or incidental benefit, nor an examination into the areas of surveillance, entanglement, and political divisiveness.

5. **Constitutional Law: Legislature: Statutes.** The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly.
6. **Constitutional Law: Schools and School Districts: Public Funds.** The fact that the benefit of the secular textbooks goes originally to the student rather than directly to the school is a mere conduit and does not have the cleansing effect of removing the identity of the ultimate benefit to the school from public funds.
7. ———: ———: ———. Textbook loans to students or parents of students are, in effect, appropriations for, or in aid of, private schools, and as such are impermissible.
8. ———: ———: ———. The channeling of free textbook loans to students or their parents as distinguished from a grant to the school is immaterial. Such a device is a patent attempt to sanction by indirection that which the Constitution forbids.
9. **Constitutional Law: Schools and School Districts: Statutes.** L.B. 659 is in violation of Article VII, section 11, of the Constitution of Nebraska.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded.

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

William J. Hotz, Jr., of Hotz, Byam & Kellogg, for appellees.

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

WHITE, C. J.

At issue in this appeal is the constitutionality, under the Constitution of Nebraska and the Constitution of the United States, of the "Nebraska Textbook Loan Act," originally L. B. 659, Laws 1971, now sections 79-4,118, 79-4,118.01, 79-4,119, and 79-1338, R. R. S. 1943. Generally, the legislative program embodied in these sections of the statute and in L. B. 659 intended to provide financial assistance to nonpublic elementary and sec-

ondary schools through the loan of secular textbooks by public school district boards of education. The plaintiffs, pursuant to section 79-4,118, R. R. S. 1943, requested the free loan of textbooks from the Omaha Public School District, on behalf of their children who were enrolled in a private parochial school. Their request was forwarded to the Nebraska Department of Education. On advice from the Attorney General, the Nebraska Department of Education advised the school district to take no action implementing the Nebraska Textbook Loan Act until there had been a determination of its constitutionality. The plaintiffs then brought this declaratory judgment action seeking to have the law declared valid. The District Court, in a judgment entered on December 1, 1972, declared the act constitutional. On appeal we hold that the Nebraska Textbook Loan Act is unconstitutional under the Constitution of Nebraska. Accordingly, the judgment of the District Court is reversed.

In pertinent part the Nebraska Textbook Loan Act, L. B. 659, Laws 1971, provides as follows: (1) A general declaration of legislative policy and purpose to aid education and develop the resources and skills of youths that the state and local communities should retain primary responsibility for public education, and that the public welfare and safety of the state require that the state give assistance to educational programs which are important to the *national defense and the general welfare of the state.* (2) Section 79-4,118, R. R. S. 1943, provides as follows: "Boards of education shall have the power and duty to purchase and to loan textbooks to all children who are enrolled in grades kindergarten to twelve of a public school and, upon individual request, to children who are enrolled in grades seven to twelve of a *private school* which is *approved* for continued legal operation *under rules and regulations established by the State Board of Education* pursuant to subdivision (c) of subsection (5) of section

79-328. Textbooks loaned to children enrolled in grades seven to twelve of such private schools shall be textbooks which are designated for use in the public schools of the school district. *Such textbooks are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by such boards of education.*" (3) Section 79-4,119, R. R. S. 1943, provides that for the "purpose of paying for school books, equipment, and supplies, the school district officers may draw an order on the district treasurer" for the payment of school books, equipment, and supplies; and further provides that each school district shall receive from the School Foundation and Equalization Fund an amount equal to the cost of textbooks purchased and loaned by the district, subject to certain maximums of reimbursement, and then section 79-1338, R. R. S. 1943, provides for the bookkeeping scheme by which the funds provided for are paid for by the state. (4) The title to the Act states only one purpose, "to provide for purchase and loan of textbooks by school districts to children enrolled in private schools; * * *" and to accomplish that purpose the Act only amends previous sections 79-4,118 and 79-4,119, R. R. S. 1943, and section 79-1338, R. S. Supp., 1969.

We discuss first the issue of constitutionality under Article VII, section 11, of the Constitution of Nebraska. It provides in part: "Neither the state Legislature nor any county, city or other public corporation, shall *ever* make *any appropriation* from any public fund, or grant any public land *in aid of any sectarian* or denominational *school or college,* or any educational institution which is not *exclusively owned and controlled* by the *state* or a *governmental subdivision* thereof." (Emphasis supplied.)

It seems to us that to state the constitutional provision is to answer our question. By its terms the provisions furnish aid (in the form of textbooks) to private sectarian schools. By its terms the cost is paid by a public

appropriation of tax funds. By its terms textbooks must be used and are given in aid of students in educational institutions which are not exclusively owned and controlled by the state or a governmental subdivision thereof.

The question, if we can call it that, here presented, is fundamentally different than the one presented by state action involving an examination of the standards set up by the United States Supreme Court under the Establishment Clause of the First Amendment. It is true the question under the Constitution of Nebraska and the Constitution of the United States both relate to the overall principle of separation of church and state. But, by its terms, the Constitution of Nebraska does not permit of an examination of secular or sectarian purposes, a determination of primary or incidental benefit, or a balancing of the issues involved in state-church entanglement and political divisiveness. There is no ambiguity in our constitutional provision. The impact of the language and its purpose can be understood by any literate person. The standards are not secular purpose, primary aid, or political divisiveness and state-church entanglement. They are whether there is a public appropriation, whether the grant is in aid of any sectarian or denominational school or college, and, perhaps more importantly, the meaning of these two terms, if they would require any further definition, is fastened down unequivocally, fundamentally, and permanently by the statement that any educational institution which receives such aid must be exclusively owned and controlled by the state or a governmental subdivision thereof.

Constitutional and statutory provisions are not open to construction as a matter of course. It would be difficult to find a constitutional or statutory provision that is more precise in its meaning, purpose, and terms. It says what it means and means what it says. We therefore resort to the proceedings in the Constitutional

Convention of 1919-1920 only for the purpose of demonstrating the transcendent purpose and thrust of the design and purpose of this amendment. In the proceedings of the 1919-1920 Constitutional Convention, the following are pertinent excerpts from the Convention proceedings: "As far as I am personally concerned, I desire to have the Constitution prohibit any state aid under any guise to any educational institution other than the public school. It is not a difficult matter, if the Legislature sees fit to find an excuse in the interests of general welfare, to make donations under the guise of military training or normal training or what not, in a private institution. I have absolutely no hostility to those institutions, but it will invariably bring on the kind of *war fare* that this state should stay clear from, if you mingle the *state* and *church* even to that extent. * * *

"* * * The state might desire to adopt the policy, instead of extending its own plan for normal schools, to utilize the denominational schools. * * *

"I am opposed to that principle. * * *

"Mr. Taylor: This amendment simply does this: It prohibits the *aiding by the state of any schools other than those owned and controlled by the state or its subdivisions.* It makes that matter plain and the amendment ought to be adopted." (Emphasis supplied.) Vol. II, Proceedings of the Constitutional Convention, 1919-1920, pp. 2661, 2678, 2680.

We come to the conclusion that by its terms, by its history, and by its purpose, that the intent of the amendment was, and is, to prohibit the extension of aid from public funds to nonpublic schools, in any manner, shape, or form.

The attempt to transpose and inject the First Amendment by carrying on tests of secular purpose, primary effect of aiding religion, and governmental entanglement or political divisiveness, into the interpretation of a state constitutional provision such as ours, must be rejected. By its terms, the criteria of our state

constitutional provision do not permit an examination of the now challenged distinction between secular or sectarian purposes, nor do they permit an examination of a scheme to determine the elusive distinction between primary or incidental benefit, nor an examination into the areas of surveillance, entanglement, and political divisiveness. By its terms the language of the constitutional provision was designed to prevent reexamination and circumvention of its purpose, by the categorical objective requirement that there shall be no aid or appropriation to any school or institution of learning *not owned or exclusively controlled* by the state. Almost incredibly prophetic is the previously quoted statement in our Constitutional Convention of 1919-1920, that "it will invariably bring on the kind of *war fare* that this state should stay clear from, * * *." The argument goes on in an avalanche of cases and statutes under the First Amendment as to how far the door should be opened and when the "verge" that Justice Black announced in Everson v. Board of Education, 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711, should be reached or extended. But surely no detached examination of our constitutional provision, its history, and declared purpose can come to any other conclusion than that the State of Nebraska attempted to avoid even opening the door to an involvement in the political, legislative, and judicial disputes involved in determining hairline and illusory distinctions of degree. The Constitution neither commands nor permits any financial aid by way of public appropriation. It does not limit it, it says there shall be no aid at all. Relevant here is this excerpt from Madison's classic statement in his Remonstrance. It is: "That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

Other states having similar or identical constitutional provisions to that of Nebraska have come to the same

conclusion as we have hereinbefore expressed. We cite only those most pertinent. In Almond v. Day, 197 Va. 419, 89 S. E. 2d 851, the Virginia court declared unconstitutional an act appropriating funds with which to provide tuition, institutional fees, board and room, *books and supplies,* at nonpublic schools which had been approved by the Superintendent of Public Instruction. Our constitutional provision is identical with theirs. Said the Virginia Supreme Court: "It will be observed that the prohibition in Section 141 is in broad and inclusive language. It says, '*No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof*' with two provisos or exceptions then spelled out. The effect is thus to prohibit all appropriations of public funds to institutions of learning other than those expressly permitted. The prohibition is against any or all aid to the excluded institutions." (Emphasis supplied.)

In Dickman v. School District No. 62C, 232 Ore. 238, 366 P. 2d 533, the Oregon Supreme Court passed on the constitutionality of a statute providing for the furnishing of free textbooks to all children, including those attending nonpublic schools. The Constitution of the State of Oregon provided in part: "No money shall be drawn from the Treasury for the benefit of any religious, or theological institution * * *." We note that the constitutional provision does not even approach the prohibitory conciseness, definiteness, and definitiveness of our own constitutional provision. In this case the statute provided for the loan of textbooks to individual children, the same as here, but observed that in practice, as here, the books would be delivered to the authorities in charge of the schools, and would furnish an integral part, as all textbooks do, in the educational secular effort in the parochial schools. The court held the act unconstitutional and in closing stated as follows: "We are not unmindful of the fact that parents who send their

children to Catholic schools must bear the double burden of supporting not only their parochial schools but the public schools as well. But the added burden is self-imposed; instruction in the public schools is available to all. Catholic schools operate only because Catholic parents feel that the precepts of their faith should be integrated into the teaching of secular subjects. Those who do not share in this faith need not share in the cost of nurturing it."

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

"The Idaho Const. art. 9, § 5, requires this court to focus its attention on the legislation involved to determine whether it is in 'aid of any church' and whether it is 'to help support or sustain' any church affiliated school. The requirements of this constitutional provi-

sion thus eliminate as a test for determination of the constitutionality of the statute, *both the 'child benefit' theory discussed in Everson v. Board,* supra, and the standard of Board of Education v. Allen, supra, i.e., whether the legislation has a 'secular legislative purpose and a primary effect that neither advances nor inhibits religion.' In this context, while we recognize that even though this legislation does assist the students to attend parochial schools, *it also aids those schools by bringing to them those very students for whom the parochial schools were established.* Thus, it is our conclusion that this legislation, the effect of which would be to aid the school, is prohibited under the provisions of Idaho Const. Art. 9, § 5." (Emphasis supplied.)

The plaintiffs nevertheless attempt to escape the direct impact of the language of our constitutional provision by arguing extensively that the furnishing of the textbooks to the students is an aid to the students and not to the school. This argument was exhaustively answered in our recent opinion in State ex rel. Rogers v. Swanson, *ante* p. 125, 219 N. W. 2d 726. Therein we quoted extensively from both state and federal cases that explore and deny a contention that ignores substance for form, reality for rhetoric, and would lead to total circumvention of the principles of our Constitution and the First Amendment to the Constitution of the United States. In State ex rel. Rogers v. Swanson, *supra,* this court said: "In Committee for Public Education & Religious Liberty v. Nyquist (1973), 413 U. S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948, the Supreme Court had before it a New York law granting tuition reimbursement and tax benefits to the parents of elementary and secondary private school students. The court stated: 'As Mr. Justice Black put it quite simply in Everson: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U. S. at 16.

" 'The controlling question here, then, is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result. * * * Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid — to perpetuate a pluralistic educational environment and to protect the fiscal integrity of over-burdened public schools — are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions. * * *

" 'First, it has been suggested that it is of controlling significance that New York's program calls for reimbursement for tuition already paid rather than for direct contributions which are merely routed through the parents to the schools, in advance of or in lieu of payment by the parents. The parent is not a mere conduit, we are told, but is absolutely free to spend the money he receives in any manner he wishes. * * * A similar inquiry governs here: if the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the *Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward or a subsidy, its substantive impact is still the same.*'

"To the same effect is Sloan v. Lemon (1973), 413 U. S. 825, 93 S. Ct. 2982, 37 L. Ed. 2d 939, wherein it was said: 'The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or

as a reward for having done so, at bottom its intended consequences is to preserve and support religion-oriented institutions.' See, also, Almond v. Day, 197 Va. 419, 89 S. E. 2d 851; Hartness v. Patterson, 255 S. C. 503, 179 S. E. 2d 907; Wolman v. Essex, 342 F. Supp. 399, affirmed 409 U. S. 808, 93 S. Ct. 61, 34 L. Ed. 2d 69; Kosydar v. Wolman, 353 F. Supp. 744, affirmed, 413 U. S. 901, 93 S. Ct. 3062, 37 L. Ed. 2d 1021; Public Funds for Public Schools of New Jersey v. Marburger, 358 F. Supp. 29; People ex rel. Klinger v. Howlett (1973), 156 Ill. 2d 1, 305 N. E. 2d 129.

"Although these cases dealt with questions arising under the First Amendment to the Constitution of the United States, they specifically hold that tuition allowances from public funds to *parents of students* are, in effect, appropriations for, or in aid of, private schools, and as such are impermissible. *Direct allowance of such tuition funds to the students as distinguished from their parents is immaterial.* The same factors are present. *It is a patent attempt to sanction by indirection that which the Constitution forbids.*" (Emphasis supplied.)

Committee for Public Education & Religious Liberty v. Nyquist (1973), 413 U. S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948, dealt with nonideological subsidies for repairs and maintenance, and instructional materials and supplies, as well as tuition grants. The other cases cited deal mainly with tuition grants and some with textbook loans to students. Besides the other lessons that these cases teach, it is indisputable that channeling the aid to the parents or to the students when such aid is used as an integral part of the education received in the private or parochial school, is an impermissible circumvention and is unconstitutional.

All these cases emphasize that the court must examine the character of the aided activity rather than the manner or the form in which aid is given. We point out further that one of the main purposes of the parent sending his child to a parochial school is to insure the early

inculcation of religion. Assuming that textbooks promote the notion of an absolutely neutral and equal secular educational program, the reimbursement or the loan of textbooks to the students is for the purpose of augmenting the public school secular education with religious training. The state, by aiding the parents and the students by textbooks, secular though they may be, is providing a program for aiding the church and in advancing religious education. It is clear to us the fact that the benefit of the secular textbooks goes originally to the student rather than directly to the school is a mere conduit and does not have the cleansing effect of removing the identity of the ultimate benefit to the school as being public funds. And interwoven with this situation, realism demands that we see that free textbook loans may be, and it is reasonably probable that they are, the circumstance which determines whether a given pupil will remain in a parochial school or in a public school. The granting of free textbook loans to a parochial school student lends strength and support to the school and, although indirectly, lends strength and support to the sponsoring sectarian institution.

We therefore hold, under Article VII, section 11, of the Constitution of Nebraska, that L. B. 659 is unconstitutional and that the District Court was in error in holding to the contrary.

Having reached this decision under the Constitution of Nebraska, we find it unnecessary to pass on or determine the question of whether the Nebraska Textbook Loan Act is unconstitutional under the Establishment Clause of the First Amendment to the Constitution of the United States.

The judgment of the District Court finding the Act constitutional is reversed and the cause remanded.

REVERSED AND REMANDED.

CLINTON, J., dissenting. McCOWN, J., joining.

L. B. 659, Laws 1971, held by the majority opinion to be unconstitutional, does two things. First, it imposes

upon boards of education the duty to purchase and loan textbooks to all children in grades kindergarten through 12 of the public schools and, upon individual request, to loan textbooks to children enrolled in grades 7 to 12 of those private schools approved for operation under section 79-328(5)(c), R. R. S. 1943. The textbooks to be loaned were those designated for use in the public schools. Secondly, it provides that the public school districts should be reimbursed from state funds for the cost of the textbooks purchased and loaned to both classes of students. These state funds were not to exceed an amount equal to an average of $15 per pupil for those enrolled in grades 7 to 12 in the public and private schools within the district for certain named years and not to exceed $10 per pupil per year thereafter.

The act recites that its purpose is, among others, to afford more adequate educational opportunities and that these purposes are important for the general welfare of the state.

The determination of the constitutionality of any legislative act may require the examination of several sections of our Constitution. In this case it seems clear that the majority has not only had to twist the language of Article VII, section 11, but also has disregarded other pertinent constitutional provisions which, in my judgment, seem to remove any doubt whatsoever as to the correct construction and interpretation of Article VII, section 11. Likewise, they have paid scant attention to what seems to be the most direct and weighty authority in point. We will discuss the latter assertion first.

In Board of Education of Central School Dist. No. 1 v. Allen, 27 App. Div. 2d 69, 276 N. Y. S. 2d 234, 20 N. Y. 2d 109, 281 N. Y. S. 2d 799, 228 N. E. 2d 791, there was considered a New York statute which in substance is the same as the one here involved, and a provision of the New York Constitution just as or more restrictive than our own constitutional provision. The New York

Court of Appeals upheld the constitutionality of the statute under the provisions of the state Constitution. Its decision on the separate but related question of constitutionality under the Establishment Clause of the First Amendment was reviewed by the Supreme Court of the United States in Board of Education v. Allen, 392 U. S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060. The court necessarily had to consider whether a benefit accrued to the private schools. In other words, it had to determine whether there was an aid to the schools. The concept considered by the Supreme Court of the United States was essentially the same as that involved in the state constitutional question and the one before us here.

The New York Court of Appeals said: "Since we must reach the merits in this case, we come to the question whether this statute violates section 3 of article XI of the New York State Constitution: 'Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for the examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught . . .' . . .

"The purpose underlying section 701, found in the Legislature's own words (L. 1965, ch. 320, § 1, supra), belies any interpretation other than that the statute is meant to bestow a public benefit upon all school children, regardless of their school affiliations. There can be no serious suggestion that the declaration of purpose by the Legislature was a verbal smoke screen designed to obscure a nefarious scheme to circumvent the New York State Constitution. No one in the last third of the 20th Century can doubt that a program aimed at improving the quality of education in all schools is a matter of legitimate State concern.

"Since there is no intention to assist parochial schools

as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly. . . .

"Having decided that section 701 entails no aid to the parochial schools, we thus hold that there is no Federal constitutional question under the establishment clause of the First Amendment. The State makes no affirmation of religious beliefs or activities within the public schools. Section 701 remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends. Despite the flexibility of the English language, it is impossible to conclude that loaning nonreligious textbooks to all students, including those who attend a parochial school, establishes a religion or constitutes the use of public funds to aid religious schools (cf. Everson v. Board of Educ., 330 U. S. 1, 16, 18)." Board of Education of Central School Dist. No. 1 v. Allen, *supra.*

The Supreme Court of the United States said: "The express purpose of § 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support for a religious institution." Board of Education v. Allen, *supra.*

Our own Constitution prohibits an "appropriation . . . in aid of . . . [the] institution." In 1972 the constitutional provision was amended to provide: "Appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof.

"All public schools shall be free of sectarian instruction.

"The state shall not accept money or property to be used for sectarian purposes; Provided, that the Legislature may provide that the state may receive money from the federal government and distribute it in accordance with the terms of any such federal grants, but no public funds of the state, any political subdivision, or any public corporation may be added thereto." Art. VII, § 11, Constitution of Nebraska.

We must decide the question, of course, under the language of the Constitution in effect at the time of the enactment of the statute. Central Nat. Bank v. Sutherland, 113 Neb. 126, 202 N. W. 428.

The majority opinion chooses to disregard and significantly, we believe, fails to mention the stipulated facts upon which the case was tried as though those facts were irrelevant. The stipulation provides: "The plaintiffs in the case of each of their children attending private grade schools and private high schools and on behalf of each of their children have been required to purchase or rent text books for use in their children's classes." It is further stipulated that the cost of "book fees" is in the amount of $25 for each child. "The cost of providing textbooks has been and will be a continuing financial burden upon plaintiffs and further that they are members of a class intended to be aided by L. B. 659." It is clear that the Textbook Loan Act does not relieve the private school of any of its obligations. It receives no aid or benefit and obtains no more dollars than it would otherwise have. The legislation in question seems clearly to be public benefit legislation apply-

ing alike to children in all schools and gives a certain modest measure of financial relief to all parents from the tax sources to which all alike contribute. Such legislation has a long history of legislative and judicial approval going back at least to 1929.

In Borden v. Louisiana State Board of Education, 168 La. 1005, 123 S. 655, 67 A. L. R. 1183, the Supreme Court of Louisiana considered a statute similar to the one here considered and a comparable state constitutional provision. The court said: 'Section 8 of article 4 prohibits, among other things, the taking of money from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister, or teacher of religion as such, or for private, charitable, or benevolent purposes to any person or community, excepting certain institutions conducted under state authority. Section 4 of article 1 relates to the right to worship God according to the dictates of one's own conscience, and prohibits the passage of laws establishing religion, or the free exercise thereof, or the granting of preferences to, or making discriminations against, any church, sect, or religious creed. Section 13 of article 12 prohibits the using of public funds for the support of any private or sectarian school. Section 12 of article 4 prohibits, among other things, the lending, pledging, or granting the funds, credit, property, or things of value of the state or of any political corporation thereof to or for any person or persons, association, or corporation, public or private.

"In our opinion, which is the view of the majority of the court, these acts violate none of the foregoing constitutional provisions. One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and

the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them."

This decision of the Louisiana Supreme Court was reviewed by the Supreme Court of the United States in Cochran v. Board of Education, 281 U. S. 370, 50 S. Ct. 335, 74 L. Ed. 913, to determine whether it violated the Fourteenth Amendment to the Constitution of the United States. In an opinion by Mr. Chief Justice Hughes, the court said: "The contention of the appellant under the Fourteenth Amendment is that taxation for the purchase of school books constituted a taxing of private property for a private purpose. Loan Association v. Topeka, 20 Wall. 655. The purpose is said to be to aid private, religious, sectarian, and other schools not embraced in the public educational system of the State by furnishing text-books free to the children attending such private schools. The operation and effect of the legislation in question were described by the Supreme Court of the State as follows (168 La., p. 1020)." The court then quoted a portion of the opinion which we have earlier set forth.

The direct and clear construction contained in the language of the two state Supreme Courts and the Supreme Court of the United States in the foregoing cases is in sharp contrast to the strained construction relied on in the majority opinion in this case which in effect equates the children and the institution.

Other decisions of state Supreme Courts are in point. See, Opinion of the Justices, 109 N. H. 578, 258 A. 2d 343 (1969); Bowerman v. O'Connor, 104 R. I. 519, 247 A. 2d 82 (1968); Chance v. Mississippi State Textbook R. & P. Board, 190 Miss. 453, 200 S. 706. The New

Hampshire Supreme Court said: "Our State Constitution bars aid to sectarian activities of the schools and institutions of religious sects or denominations. It is our opinion that since secular education serves a public purpose, it may be supported by tax money if sufficient safeguards are provided to prevent more than incidental and indirect benefit to a religious sect or denomination. . . .

"Senate Bill 327 would provide for the loan or sale of public school textbooks to pupils enrolled in nonpublic schools. Since the books would be confined to those required for use in public schools, they would presumably include only books on secular subjects. In our opinion this bill if enacted would be constitutional. Board of Education v. Allen, supra; Everson v. Board of Education, supra; Opinion of the Justices, 99 N. Y. 519, supra; Opinion of the Justices, 99 N. H. 536, supra. Our answer presumes that the books will be loaned free of charge, or sold at cost, to the pupils, as this bill provides." Opinion of the Justices, *supra.*

The Supreme Court of Mississippi approved a plan similar to that authorized by our own Legislature. Pertinent portions of the statutes and state Constitution as found in the opinion are these: "It is further provided in section 208 thereof: '. . . nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school.'

"Chapter 202, Laws 1940, is an act to establish a State Textbook Rating and Purchasing Board, with power to select, purchase and distribute free textbooks by loaning same to the pupils through the first eight grades in all qualified elementary schools located in the state.

"Section 23 of the act provides as follows:

" 'This act is intended to furnish a plan for the adoption, purchase, distribution, care and use of free textbooks to be loaned to the pupils in the elementary schools of Mississippi.

" 'The books herein provided by the board shall be distributed and loaned free of cost to the children of the first eight grades in the free public elementary schools of the state, and all other elementary schools located in the state, which maintain elementary educational standards equivalent to the standards established by the state department of education for the state elementary schools.' " Chance v. Mississippi State Textbook R. & P. Board, *supra.*

We now consider the effect of pertinent provisions of our own Constitution in addition to Article VII, section 11, and in so doing quote from our dissent in State ex rel. Rogers v. Swanson, *ante* p. 125, 219 N. W. 2d 726: "The majority opinion completely ignores the mandate of our own Constitution contained in Article I, section 4, which after the provision for freedom of worship, conscience, and the prohibition against compulsory attendance and support of any place of worship and the prohibition of discrimination on account of religious belief or lack of it, goes on to say: '*Religion, morality, and knowledge,* however, being essential to good government, it shall be the duty of the legislature to *pass suitable laws* to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, *and to encourage schools and the means of instruction.*' (Emphasis supplied.) The words in this section of the Constitution directing the passage of suitable laws to encourage schools certainly mean more than a mere statutory exhortation of encouragement. The term 'pass suitable laws' can only mean laws which have an effect and which require implementation. This section of our Constitution cannot refer to the common schools of the state, the mandatory establishment of which is required by the specific provisions of Article VII, section 1, which reads: 'The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years.' " Article I, section 4, therefore can

refer only to "schools and the means of instruction," other than the public schools lawfully operated under the laws of this state.

The state's interest in education is obviously not limited to children in attendance at public schools. In Meyerkorth v. State, 173 Neb. 889, 115 N. W. 2d 585 (1962), we held that the statutes and regulations concerning parochial, denominational, or private schools providing for compulsory school attendance, certification of teachers, and for operation and supervision of said schools are not unconstitutional and were a valid exercise of the police power of the state. In so holding we said: "The above-cited statutes set up a standard for a good education. They allow churches and private groups to establish schools on the same basis. They require each child to be exposed to a school a certain number of months. Private and parochial schools are a part of the educational system of this state." See, also, § 79-1701, R. R. S. 1943.

The constitutionality of the textbook loan act does not, in the light of the totality of the pertinent constitutional provisions and the cited authorities, seem at all doubtful. Even if the constitutionality of the act were doubtful there would be applicable that salutary stricture on our own powers, enunciated innumerable times by us: Statutes are to be upheld by the courts unless unconstitutional beyond reasonable doubt. State v. Standard Oil Co., 61 Neb. 28, 84 N. W. 413 (1900); Smith v. Chicago, St. P., M. & O. Ry. Co., 99 Neb. 719, 157 N. W. 622 (1916); Central Markets West, Inc. v. State, 186 Neb. 79, 180 N. W. 2d 880 (1970); Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N. W. 2d 236 (1972).

We would hold that the Legislature was clearly within its constitutional authority in enacting the Nebraska Textbook Loan Act, section 79-4,118, R. R. S. 1943, because it serves a lawful public purpose and does not in fact aid the private school.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH SANCHELL, APPELLANT.

220 N. W. 2d 562

Filed July 25, 1974. No. 39042.

1. **Criminal Law: Trial: Evidence: Constitutional Law.** The admission of evidence of a tainted showup does not without more violate due process.
2. **Criminal Law: Trial: Evidence.** The purpose of excluding evidence made as a result of a tainted identification procedure is to avoid a substantial likelihood of irreparable misidentification.
3. **Criminal Law: Trial: Evidence: Constitutional Law.** In order to find a due process violation, the court must determine if the independent basis of the identification when viewed in the totality of the circumstances defeats a substantial likelihood of irreparable misidentification.
4. **Criminal Law: Trial: Evidence: Witnesses.** The credibility of the witnesses and the weight of the testimony are questions for the jury to decide.
5. **Criminal Law: Trial: Evidence.** A voice identification is enough to support a conviction.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. On reargument. See 191 Neb. 505, 216 N. W. 2d 504, for original opinion. Affirmed.

Paul E. Watts, J. Joseph McQuillan, Bill Campbell, Gerald E. Moran, and George R. Sornberger, for appellant.

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

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

WHITE, C. J.

This case reaches us a second time on reargument after we granted a motion for rehearing. Our first opinion in this case is reported in State v. Sanchell, 191 Neb. 505, 216 N. W. 2d 504. In that opinion we reversed

the judgment and remanded the cause for a new trial solely on the ground that the identification of the defendant by the witness Patricia, one of the identification witnesses, was a product of a tainted showup with no independent basis; and, therefore, should have been excluded. On reargument, we affirm the conviction and set aside that part of our previous opinion holding that the admission of the witness Patricia's identification testimony was error.

The facts of this case may be found in our previous opinion, State v. Sanchell, *supra*. The sole issue presented before us on reargument is whether the witness Patricia in making an in-court identification of the defendant did so as a result of a taint; and if so, was there an independent basis for the identification?

As the State concedes in its brief the showup of February 8, 1972, was "unnecessary" and possibly "impermissible." However, the admission of evidence of a tainted showup does not without more violate due process. Neil v. Biggers, 409 U. S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401; Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199. The entire purpose of excluding such evidence made as a result of a tainted identification procedure is to avoid "* * * a substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U. S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247. Each case must be determined on its particular facts. In order to find a due process violation, the court must determine if the independent basis of the identification when viewed "in the totality of the circumstances" defeats a "substantial likelihood of irreparable misidentification." We find no error in the District Court's decision of admissibility at the suppression hearing.

We stated in State v. Cannon, 185 Neb. 149, 174 N. W. 2d 181, citing United States v. Broadhead, 413 F. 2d 1351 (7th Cir., 1969): "* * * the court held that

in-court identification evidence was admissible where such identification was made on a basis independent of a tainted line-up. This case also sets out the general procedure for determination of such questions by the trial court in the following words: 'Where the prosecution intends to offer only an in-court indentification, the defense may challenge its admissibility. The court should then, on facts elicited outside the presence of the jury, rule upon whether a pre-trial identification by the same eyewitness is violative of due process or the right to counsel. If a violation is found, the court should then decide whether the in-court identification is still admissible because it has an independant (sic) source; indeed, it would appear in the interest of expeditious judicial administration for such a ruling to be made in any event. If the judge regards only the in-court identification as admissible, in the trial to the jury thereafter, the defense may, as a matter of trial tactics, decide to bring out the pre-trial confrontation itself, hoping that it can thus detract from the weight the jury might otherwise accord the in-court identification.' " The District Court either decided at the suppression hearing that there was no taint flowing from the showup or that there was an independent basis.

In the instant case, witness Patricia did not make an identification at the showup on February 8, 1972, nor did she do so immediately afterwards. She did not make an identification at the showup even though Patricia knew that she and several other girls were in court "* * * to identify somebody." Witness Patricia identified the defendant for the first time on January 24, 1973, at the suppression hearing. She identified the defendant based partly on his profile and hands that she saw clearly for the first time after the robbery at the preliminary hearing on March 1 and March 2, 1972. More importantly, however, she heard him speak for the first time at the preliminary hearing. She stated

that the voice was the same as the voice she heard in her room on January 22, 1972. She made the positive identification only after she was sure the defendant was the same man. While it cannot be determined how much effect the showup had on Patricia, there is no doubt that the basis of her identification, the profile, the hands, and the voice was totally independent of the showup. At the showup, she did not notice anything. The defendant had his back to her and there is nothing in the record to indicate that she heard the defendant speak.

Thus, the three factors that Patricia used to identify the defendant were not affected as a result of the tainted showup. Furthermore, the basis of the identification, even if the taint had some effect on Patricia, was totally independent of the taint. The voice identification had absolutely no connection with the visual showup of February 8, 1972.

In all the identification cases, an indentification has been made directly as a result of a "impermissibly suggestive," "tainted," or "illegal" identification procedure. United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (post-indictment line-up without counsel); Gilbert v. California, 388 U. S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (post-indictment line-up without counsel); Stovall v. Denno, *supra* (showup without counsel); Simmons v. United States, *supra* (pre-indictment photographic array); Neil v. Biggers, *supra* (a station house showup without counsel). That is not the case in the present situation. The identification was made over a period of time as a result of memory and recollection. The showup occurred prior to the filing of the information.

It must be said that some, if not all, of the difficulty in our determination of admissibility arose from a detailed, searching, and very able cross-examination of Patricia. A close reading of this cross-examination

reveals that this young witness became uncertain and perhaps confused at certain times in responding to the precise questions propounded to her. This, of course, is a rather typical picture of an able and experienced defense counsel examining a young and inexperienced lay witness. In any event we do not pass on the credibility or the weight of Patricia's testimony. The question here is the sufficiency of her testimony to support its admissibility. The impact and effect of her testimony during cross-examination is for the jury. It is clear however that throughout her testimony, she never waivered from her basis for identification. Patricia was only one of three witnesses identifying the defendant. It is true that she could not positively identify the defendant until a year and one day after the crime. As to the voice identification it is argued that another witness sitting next to Patricia at the preliminary hearing when she first heard the defendant's voice only heard a "mumble." It is also true that Patricia was only able to see the intruder's face for 3 seconds. There was a question as to whether there was sufficient "daylight" available for her to observe the defendant in the 3-second period of time. But, whatever the source, she did testify that there was sufficient light available for her to observe the defendant's face for this period of time. But more importantly, Patricia did not identify the defendant at the showup or at any other time on the basis of visual face identification. Her positive identification was based, by her own testimony, upon the independent voice recognition. The trial court could have found that there was no impermissible suggestiveness or taint arising from the showup on February 8, 1972, because *Patricia did not identify the defendant at that time.* We cannot say as a matter of law, that there was some momentum of impermissible suggestiveness or taint that was initiated and put into motion at the time of the February 8, 1972, showup. Her failure

to identify at that time, of course, may be used and was used for the purpose of impeaching her identification testimony. These questions, of course, are all for the jury. The credibility of the witnesses and the weight of the testimony are questions for the jury to decide. State v. Meyers, 182 Neb. 117, 153 N. W. 2d 360; State v. Sukovaty, 178 Neb. 779, 135 N. W. 2d 467; State v. Abraham, 189 Neb. 728, 205 N. W. 2d 342. It was the jury's duty to weigh these factors in determining how much weight, if any, it should place on Patricia's testimony.

Since there was an independent basis, was the means of identification sufficient to support a conviction? We have held that a voice identification, without more, is enough to support a conviction. Froding v. State, 125 Neb. 322, 250 N. W. 91; Small v. State, 165 Neb. 381, 85 N. W. 2d 712. In the present case, not only is there a voice identification, but such is also accompanied by the profile and hand characteristics of the defendant. Where the defendant is identified by a witness with the above physical features, the probative value of such is solely a question for the jury. Froding v. State, *supra*.

We adhere to our former opinion and decision except for that portion holding the testimony of Patricia inadmissible. On reargument we hold it admissible and affirm the judgment and sentence of the District Court.

AFFIRMED.

CLINTON, J., dissenting. McCOWN, J., joining.

I dissent for the reasons stated in the original opinion of this court found in State v. Sanchell, 191 Neb. 505, 216 N. W. 2d 504, but I desire to amplify the matters there set forth even though at the risk of some repetition. For a complete statement of the case and of the applicable rule of law, which the present opinion does not disavow, see the original opinion.

That rule, which this court now in practice rejects, is not a technical exclusionary rule such as that in-

volved in Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 84 A. L. R. 2d 933, imposed as a sanction to restrain supposed unconstitutional police activity and having nothing to do with the probative value of evidence and the wisdom and effectiveness of which is dubious. The rule which we apply in this case relates to the reliability of evidence and consequently goes directly to the issue of the innocence or guilt of the person charged and involves constitutional due process.

The proof here depends solely upon eyewitness identification where the opportunities for observation were difficult and severely limited, and where there was no circumstantial evidence whatever supporting a finding of guilt. In putting the matter in proper perspective, the following observations, in a text written by an experienced trial judge, are pertinent. "Trials are held many months after the initial pretrial corporeal or photographic confrontation. When the victim (or other identifying witness) takes the stand and, pointing to the defendant seated conspicuously at the counsel table, says 'that's the man!' he rarely is saying 'that's the man who robbed me several months ago.' In truth, most often he is saying: (1) that's the man whose photo I identified shortly after the crime; (2) whom later I identified at a lineup; (3) whom later I identified at the preliminary examination; (4) whom later I identified by 'mug shot' before the grand jury; (5) whom later I saw in the courtroom during several adjournments of the trial.

"If the *initial* identification, whether corporeal or photo, was accurate, then the right man is on trial.

"If the initial identification was, however, mistaken or uncertain, then an innocent man is on trial. The initial mistake will inevitably be carried through all future identifications. Rarely if ever will the witness who was positive at the initial identification, or who

has become positive by virtue of suggestion, express any doubt in the several later judicial proceedings, including the trial. This the Wade Court observed was the 'common experience!'

"There are indicia of 'danger' which unhappily only the truly experienced trial judge will recognize.

"The prime concern must necessarily be with the 'pure' identification cases, those in which there is no evidence other than eye-witness identification to establish guilt." Eye-witness Identification, Legal and Practical Problems, Sobel, § 3.01, pp. 10, 11. The above are express truths which almost every person knows from his own experience in harmless but perhaps embarrassing encounters where one has been the subject of or has made a mistaken identification.

The present opinion does not abrogate the rule of law followed in the original opinion in this case, but purports to find that Patricia's positive identification has a source "independent" of the tainted one man showup in that it is based upon her observations at the time of the crime. We therefore direct our attention to this assertion even though it requires repetition of matters covered in the original opinion.

The court now asserts that the identification by Patricia is independent of the illegal and tainted showup because: (1) She saw the actor's profile at the time of crime; (2) she recognized his hands; and (3) she recognized his voice.

The precise question asked of Patricia demonstrates that her identification was not based upon her observations at the time of the event. On point (1), we now quote from the original opinion and portion of the record included in the quotation: "Patricia testified on direct examination at the suppression hearing that she did not know why she was there on February 8. She made no identification of the defendant as the perpetrator immediately thereafter. The night before the suppres-

sion hearing on January 24, 1973, 1 year and 1 day after the crime, she first advised the prosecutor that she would make a positive identification. At the suppression hearing she testified on cross-examination: 'I told him last night that I was going to identify him today.' On direct examination she had answered the following leading question in the affirmative: 'Now, . . ., from the observation which you made in your room of this particular individual *and observations which you made in the County Courtroom at the preliminary hearing* in this matter and from hearing the defendant speak here in the courthouse today do you have an opinion as to whether or not the person that was in your room on the early morning of January 22nd, 1972, is here in the courtroom today?' She then identified the defendant as the man. On cross-examination she admitted that at the preliminary hearing she testified that he 'fits the description.' *She testified that she had never heard his voice until the suppression hearing.* It was the *night before* the suppression hearing that she decided she would testify positively that the defendant was the robber. She admitted that at the preliminary hearing she could not identify him because she had not seen his whole features at the time of the crime. She also acknowledged that she had told a police officer she 'could not identify the person that robbed [her]'." (Emphasis supplied.) State v. Sanchell, *supra.*

Note, she did not identify the defendant as the man at the preliminary hearing, yet her trial identification was based upon her observations at that time. Her observations at the time of the crime were limited to 3 seconds in a dark room. She saw a black face 2 to 6 inches from hers, necessarily out of focus. For 1 year and 1 day she could not make her identification. She could not give a description to the police sufficient to make a composite drawing. This was done wholly from Renee's description. She could not identify de-

fendant's photograph. She did not even pick his photograph out as bearing a resemblance to the robber. She could not identify him at the one man showup. She could not identify him at the preliminary hearing. Yet 1 year and 1 day after the event and immediately prior to the suppression hearing, without any explanation or reason, she agreed in a conference with the prosecutor to make a positive identification.

On point (2), the record clearly demonstrates on pages 200 to 215 of the bill of exceptions that never at any time had Patricia claimed that she "saw" the thief's hands. The testimony found on those pages of the record referred to conclusively demonstrate that she did not. She acknowledged that at the preliminary hearing she had testified (referring to the thief's hands): "I had just concluded that they would be long and lanky." Yet this supposed identification of hands is a key factor in the court's determination that the basis of identification was independent of suggestion.

On point (3), the identification by voice, at no time during the 1 year that elapsed between the crime and the suppression hearing did Patricia make any assertion that she could recognize the perpetrator's voice. The night before the suppression hearing she agreed to make a positive identification without ever having heard the defendant speak in the interim, neither at the showup, nor at the preliminary hearing. If she made any such claim, would not a lineup designed for the sole purpose of voice identification have been appropriate?

It seems clear beyond question that the identification made by Patricia was not based upon her observations at the time of the event. The finding of independent source by the trial judge cannot be sustained on the record and neither can the present opinion of this court.

The text writer earlier quoted summarizes as follows: "An in-court identification has an independent source

when the suppression hearing judge can find on the basis of the factors discussed, that the identifying witness by drawing on his memory of the events of the crime and his observations of the defendant during the crime, has retained such a definite image of the defendant that he is now able, in court, to make an identification of the defendant without dependence upon or assistance from the tainted pretrial confrontation and unaffected by any observations, prompting or suggestions which there took place." Eye-Witness Identification, Legal and Practical Problems, Sobel § 68, p. 122.

The present opinion states: "A close reading of this cross-examination reveals that this young witness became uncertain and perhaps confused at certain times in responding to the precise questions propounded to her. This, of course, is a rather typical picture of an able and experienced defense counsel examining a young and inexperienced lay witness." This statement can, in the light of the record, be correctly, but uncharitably, characterized as inaccurate. There was no unfair advantage taken at all. She was simply confronted with her prior contradictory statements and failure to identify. These she reluctantly and evasively acknowledged.

It cannot be said that the admission of Patricia's identification is harmless error, because the identification by Renee (the only evidence sufficient to support a conviction) is shaky and subject to grave doubt. We illustrate the point by the following from the record. Officer Jacobson, in his report (he gave essentially the same testimony in his cross-examination), states: "She [referring to Renee] had of course told me in the polygraph examination that she could not identify him." At that time she also told him "none of the girls could identify him." Renee said "perhaps she could recognize [his] voice." In one of the officer's comments

regarding a question he had asked the defendant during his polygraph examination as to whether the defendant had ever seen Renee before the hearing and to which he received a negative response, he remarked *"however, if the room was as dark as the girl had said,* possibly he maybe hadn't seen the girl in his own mind." (Emphasis supplied.) (Note the assumption of guilt by the officer—despite the fact there was yet no evidence to connect the defendant.)

This seems to be a case in which a great many minds have changed from time to time. (1) The polygraph operator, for reasons extrinsic to the crime here involved, backed away from his original statement to defense counsel that the defendant had passed the polygraph test. (2) The prosecutors, who were so doubtful after the preliminary hearing that they had the right man that they agreed to dismiss if the defendant did pass the polygraph examination, later backed away from that agreement. (3) Patricia, 1 year and 1 day after the event, changed her mind and decided that after all she could positively identify the thief. (4) Two judges of this court have changed their minds on the question of whether the record establishes an independent source for Patricia's identification of the defendant.

One wonders about this uncommon coincidence of events. This is an age of much lawlessness and that is of great concern to all, especially to the victims, the courts, and those engaged in law enforcement. We must not, however, allow our reactions to this scourge to affect our judgment to the extent that in the methods we use and the principles we apply we lose sight of the ultimate question of innocence or guilt. It does not do to convict just anyone. It does not do to follow methods and principles which may as readily convict the innocent as the guilty.

The defendant may be guilty; he may be innocent.

But the record makes one thing clear: Patricia is not able, on the basis of her observations and recollections at the time of the crime, or those presented by an accurate initial identification, to point out the perpetrator. Her identification was clearly the result of impermissible suggestion. She ought not be permitted to make the identification. I would adhere to the original opinion and remand the cause for a new trial.

RONALD D. GRAY, APPELLANT, V. JOYCE ANN GRAY, APPELLEE.

220 N. W. 2d 542

Filed July 25, 1974. No. 39285.

1. **Divorce: Parent and Child: Judgments.** A decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children.
2. ———: ———: ———. A judgment for child support may be modified only upon a showing of facts or circumstances which have occurred since the judgment was entered. The judgment is res judicata as to all matters existing at the time it was rendered.
3. ———: ———: ———. A proceeding to modify a judgment for child support is not a retrial of the original case or a review of the equities of the original decree.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded.

William E. Naviaux of Corrigan, Dowd & Naviaux, for appellant.

Richard M. Fellman, for appellee.

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

NEWTON, J.

This is an appeal from an order modifying a divorce decree in regard to parental claims to income tax deductions for the four minor children. The original decree awarded custody to defendant, required plaintiff to pay $300 per month child support which, as of August 1, 1973, was to increase to $400 per month and to maintain medical and dental insurance coverage for the children. Defendant was to hold in trust for the children part of a fund received in settlement of a malpractice action. It was further provided that plaintiff should take as exemptions for purposes of state and federal taxes the four minor children. On July 27, 1973, defendant applied for a modification of the decree in regard to the tax exemption provision. The court ordered that each of the parties should take two of the children as tax exemptions. We reverse the order so entered.

The original decree was entered October 24, 1972. At that time the parties contemplated that plaintiff would receive his doctor's degree and obtain employment in the summer of 1973. Plaintiff has remarried and now has a wife, who also works, and two stepchildren. Certainly the parties were aware that either or both might remarry. It does not appear that there has been any change in the circumstances of the parties not contemplated at the time of the divorce. It has been a well-established rule that a decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children. See, Walters v. Walters, 177 Neb. 731, 131 N. W. 2d 166; Schlothauer v. Schlothauer, 184 Neb. 750, 171 N. W. 2d 786.

The record fails to reveal any change in circumstances not contemplated and foreseen at the time of the divorce.

Section 42-312, R. R. S. 1943, repealed in 1972, permitted a modification of an order or decree for child support in the event of a change in the circumstances of the parties or if it was in the best interests of the children. Section 42-364, R. S. Supp., 1972, permits such modification "when required." The term is broad and indefinite but does not contemplate modification at the whim of either a party or the court. "A judgment for child support may be modified only upon a showing of facts or circumstances which have occurred since the judgment was entered. The judgment is res judicata as to all matters existing at the time it was rendered. * * * A proceeding to modify a judgment for child support is not a retrial of the original case or a review of the equities of the original decree." Walters v. Walters, *supra*. See, also, Schlothauer v. Schlothauer, *supra*. The change in the statute does not alter these basic principles.

The order of the District Court pertaining to the modification of the decree in regard to the taking of tax exemptions is reversed.

Costs in this court, including defendant's attorney fees in the sum of $500, are taxed to plaintiff.

REVERSED AND REMANDED.

McCOWN, J., concurring in result only.

The modification of the decree here is not a modification of provisions for payment of child support. It is instead a modification of a portion of a divorce decree which attempted to determine for the future which parent would be entitled to federal income tax dependency exemptions for the children. That issue is determinable by federal law and generally depends upon actual amounts of support furnished by each parent during the tax year. That factual determination cannot be made in advance. Neither should the decree purport to fix and determine the allocation of future dependency exemptions to one or the other of the

parents. A divorce court should consider the impact of federal income tax laws and regulations upon the parties in fixing amounts of child support or in allocating child support payments between individual children. Modifications should ordinarily be made upon the same considerations and in the same fashion. A decree in either case should avoid judicial conclusions or determinations as to the allocation of future federal income tax dependency exemptions.

CLINTON, J., joins in concurrence.

WHITE, C. J., concurring.

I concur in the result in this case and in the opinion holding that there has been no change of circumstances that would justify this court's interference with the original decree in the case.

Implied in the opinion is the power of the District Court and this court, in a divorce case, to enter orders directing the parties to take actions that affect the income tax liability of the parties. I do not think that the District Court or this court has any jurisdiction, either directly or indirectly, to do this. There is absolutely no statutory authority for the entry of such an order. It opens a Pandora's box of conflict and confusion with federal and internal revenue jurisdiction over tax exemption decisions.

It is settled and fundamental law in the State of Nebraska that jurisdiction of the court in matters relating to divorce and alimony and child support is given by the statute and every power exercised by our courts with reference thereto must look for its source in the statute or it does not exist. Harrington v. Grieser, 154 Neb. 685, 48 N. W. 2d 753; Cizek v. Cizek, on rehearing, 69 Neb. 800, 99 N. W. 28; Ruehle v. Ruehle, 161 Neb. 691, 74 N. W. 2d 689; Timmerman v. Timmerman, 163 Neb. 704, 81 N. W. 2d 135.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1974

STATE OF NEBRASKA, APPELLEE, V. WILLIE A. TURNER, APPELLANT.

222 N. W. 2d 105

Filed October 3, 1974. No. 39356.

Criminal Law: Evidence: Controlled Substances: Intent. Circumstantial evidence to establish that possession of a controlled substance was with intent to distribute or deliver may consist of the quantity of the substance; the equipment and supplies found with it; the place it was found; the manner of packaging; and the testimony of witnesses experienced and knowledgeable in the field.

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

Frank B. Morrison, Sr., Stanley A. Krieger, and Thomas D. Carey, for appellant.

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

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

MCCOWN, J.

The defendant was found guilty by a jury of possession of a controlled substance with intent to distribute. He was sentenced to imprisonment for a term of 3 to 9 years. The defendant's contention on appeal is that the evidence is insufficient to establish an intent to distribute.

Shortly before noon on April 1, 1973, police officers executed a search warrant at an apartment in Omaha, Nebraska. Upon entering the apartment, the officers observed the defendant and a companion, both of whom were holding hypodermic needles to their arms. The substance in the two syringes was later identified as heroin. On a coffee table directly in front of the defendant and his companion there was an envelope with 15 packets of heroin and 1 packet of a white powder. The individuals were arrested and the officers conducted a search of the apartment. In a drawer in the kitchen the officers found a brown paper sack. It contained 7 cartons and a small bottle of a substance called dormin; a package of 1,000 staples; 13 envelopes; a stapler; a strainer; scissors; and a small measuring utensil. The officers also found another brown paper sack that contained 431 tinfoil squares.

There was testimony that dormin is commonly used to dilute heroin in preparation for street sale and that the other items were also of the sort commonly and regularly used in preparing and packaging heroin for street sale. There was also testimony that the occupants of the apartment, including the defendant, were all users of heroin and that the 15 or 16 packets of heroin actually seized would last an addict only 1 or 2 days.

The defendant's contention is that possession of a controlled substance by a user, in a form and amount he might commonly have for his own use, will not support an inference of intent to distribute. That argument assumes that the quantity of heroin found was the only evidence tending to establish intent to distribute. The defendant ignores all the other evidence as to the intent or purpose of possession. Here the evidence established that virtually all the equipment, supplies, and packaging material found were of the kind commonly and generally used in connection with the packaging, distribution, and delivery of heroin.

Circumstantial evidence is sufficient to support an inference of possession with intent to distribute. State v. Sullivan, 190 Neb. 621, 211 N. W. 2d 125. Circumstantial evidence to establish that possession of a controlled substance was with intent to distribute or deliver may consist of the quantity of the substance, the equipment and supplies found with it; the place it was found; the manner of packaging; and the testimony of witnesses experienced and knowledgeable in the field. See, State v. Jung, 19 Ariz. App. 257, 506 P. 2d 648; People v. De La Torre, 73 Cal. Rptr. 704, 268 Cal. App. 2d 122. In this case it would require a legal magician to make the evidence of intent to distribute disappear or to transform it into evidence of possession for personal use alone.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICKART SENDGRAFF, APPELLANT.

222 N. W. 2d 106

Filed October 3, 1974. No. 39367.

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

Frank B. Morrison, Sr., and Bennett G. Hornstein, for appellant.

Clarence A. H. Meyer, Attorney General, and Steven C. Smith, for appellee.

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

BOSLAUGH, J.

The defendant pleaded nolo contendere to burglary. On March 13, 1973, he was placed on 3 years probation. Thereafter he was charged with leaving the scene of a

property damage accident and pleaded guilty to operating a motor vehicle while his driver's license was suspended or revoked. On September 23, 1973, he was arrested and charged with possession of approximately 100 tablets of amphetamine.

The defendant's probation was revoked and he was sentenced to 5 years imprisonment. He has appealed and contends the sentence was excessive.

The defendant has a lengthy juvenile record which includes commitment to the Boy's Training School for burglary and violation of parole. His record as an adult shows a disregard for the law both before and after March 13, 1973, when he was placed on probation for burglary. At the time of his arrest on September 23, 1973, the defendant attempted to elude the arresting officers and resisted arrest after he had been captured.

The maximum sentence for burglary is 10 years imprisonment. § 28-532, R. R. S. 1943. The sentence imposed in this case did not constitute an abuse of discretion. The judgment of the District Court is affirmed.

AFFIRMED.

JONNIE V. FORD, APPELLANT, V. LYLE D. FORD, APPELLEE.
222 N. W. 2d 107

Filed October 3, 1974. No. 39388.

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. ———: ———. In cases involving determinations of child custody, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion.

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

Samuel A. Boyer, Jr., for appellant.

Dennis B. Smouse, for appellee.

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

NEWTON, J.

Plaintiff and defendant have been divorced. They have four children, a son and three daughters, ranging in age from 5 to 11 years. The trial court awarded custody of the children to the defendant father. The sole question presented here is the propriety of the custody award. We affirm.

The trial court found that plaintiff was living in an adulterous relationship and that defendant had a drinking problem which at times resulted in violence to plaintiff but not in abuse of the children. The record supports these findings and also indicates that plaintiff was openly living with her paramour in the presence of the children; also, that there was occasional abuse of the children by this individual. Defendant is able, with his mother's assistance, to care for the children.

"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. * * *

"In cases involving determinations of child custody, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of custody, will not be disturbed unless there is a clear abuse of discretion." Broadstone v. Broadstone, 190 Neb. 299, 207 N. W. 2d 682.

We do not find that the trial court abused its discretion in this instance, but, on the contrary, find that the award of custody to their father was in the best interests of the children.

The decree of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RUSSELL P. TWISS, APPELLANT.
222 N. W. 2d 108

Filed October 3, 1974. No. 39415.

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

Fisher & Fisher, for appellant.

Clarence A. H. Meyer, Attorney General, and Steven C. Smith, for appellee.

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

NEWTON, J.

Defendant was arrested for operating a motor vehicle while under the influence of alcoholic liquor and subsequently the operator's license of defendant was revoked for refusal to take a blood, breath, or urine test. The order of revocation was appealed.

The record discloses that the requirements of section 39-727.03 (2), (4), and (5), R. S. Supp., 1972, were complied with and defendant was given the choice of taking a breath, blood, or urine test. Defendant refused to take a test. Defendant insists that after he had refused to take a test, it was incumbent upon the arresting officer to *again* advise the defendant of the consequences of failing to take the test.

Section 39-727.03 (5), R. S. Supp., 1972, requires that any "person who is required to submit * * * to a chemical blood, breath or urine test * * * shall be advised of the consequences of refusing to submit to such test." This admonition was given but we fail to find any statutory requirement that it be repeated after a defendant refuses to take the test. The proposition advanced is without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL KEITH RODMAN, APPELLANT.

222 N. W. 2d 109

Filed October 3, 1974. Nos. 39416, 39417.

Criminal Law: Sentences. It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively.

Appeals 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 Terry R. Schaaf, for appellee.

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

BOSLAUGH, J.

The defendant was charged in separate informations with burglaries on May 19, 1973, and August 5, 1973. Upon pleas of guilty he was sentenced to imprisonment for 18 months to 3 years for the burglary on May 19, 1973, and to imprisonment for 1 to 3 years for the burglary on August 5, 1973. The defendant contends the sentences were excessive because they were consecutive and not concurrent.

The maximum sentences which could have been imposed would have been imprisonment for 10 years on each count. § 28-532, R. R. S. 1943.

The defendant has one previous conviction for a felony. It was within the discretion of the District Court to direct that the sentences be served consecutively. See, In re Walsh, 37 Neb. 454, 55 N. W. 1075; Culpen v. Hann, 158 Neb. 390, 63 N. W. 2d 157. The sentences which were imposed by the trial court were not excessive under the circumstances.

The judgments of the District Court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL L. CANNADY, APPELLANT.

222 N. W. 2d 110

Filed October 3, 1974. No. 39424.

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 discretion.

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

T. Clement Gaughan, Richard L. Goos, and Robert I. Eberly, for appellant.

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

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

SPENCER, J.

Defendant pled nolo contendere to the felony offense of forgery. He was sentenced to a term of not less than 2 nor more than 3 years in the Nebraska Penal and Correctional Complex, said sentence to be consecutive to any now being served or to be served by defendant. Defendant contends the sentence is excessive because the court failed to make it concurrent to the sentence yet to be served in the Ohio State Penitentiary. We affirm.

The presentence report indicates defendant has had difficulties with the law practically without interruption since 1953. In 1961 he pled guilty to breaking and entering. Subsequently he was twice charged with parole violations. In January 1972 he was charged with armed robbery and receiving stolen property. In June 1972 he was convicted of unarmed robbery and sentenced to 1 to 25 years in the Ohio State Penitentiary.

He escaped on August 31, 1972. The State of Ohio has filed a detainer against him. In addition to the sentence to be served in Ohio, he could be charged with escape from custody.

Section 28-601, R. S. Supp., 1972, prescribes a penalty of not less than 1 year nor more than 20 years, and a fine not exceeding $500 for the felony offense of forgery. We have repeatedly held that 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 discretion. State v. Cano (1974), 191 Neb. 709, 217 N. W. 2d 480.

Exactly how much time defendant will be required to serve on the Ohio sentence we do not know, but it could be a substantial number of years. However, if this court were to make the Nebraska sentence concurrent to the Ohio sentence, it would in effect amount to no sentence at all and defendant would go unpunished for the crime he committed in this state. It is frivolous to suggest that the refusal of the trial court to adopt such position was an abuse of discretion.

The judgment is affirmed.

AFFIRMED.

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

222 N. W. 2d 111

Filed October 3, 1974. No. 39447.

Criminal Law: Entrapment. Where a person already has the readiness or willingness to violate the law, the mere fact that an officer provides what appears to be a favorable opportunity for such violation, or merely seeks to collect evidence of the offense, does not constitute unlawful entrapment and is no defense.

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

Brian R. Watkins, for appellant.

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

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

NEWTON, J.

Defendant was charged with escape from custody. He was represented by counsel and entered a plea of nolo contendere. When he appeared for sentencing, defendant requested leave to withdraw his plea because he felt he had a defense of entrapment. Leave was denied. Defendant asserts this was an abuse of discretion and further states he was prejudiced by appearing before the court in leg irons. We affirm the judgment of the District Court.

Defendant received permission to accompany a guard to a music store. They drove to Omaha where defendant visited relatives. While in Omaha defendant was apparently not under strict supervision and took the opportunity to leave Nebraska. He was later apprehended in Wisconsin. The situation was not one which would warrant a defense of entrapment and this was the basis upon which the court denied a motion to withdraw the plea of nolo contendere.

We have repeatedly held that: "* * * where a person already has the readiness or willingness to violate the law, the mere fact that an officer provides what appears to be a favorable opportunity for such violation, or merely seeks to collect evidence of the offense, does not constitute unlawful entrapment and is no defense." State v. Smith, 187 Neb. 511, 192 N. W. 2d 158. See, also, State v. Young, 190 Neb. 325, 208 N. W. 2d 267; State v. Amen, 190 Neb. 362, 208 N. W. 2d 279.

According to defendant's own version of events, there was no entrapment and consequently no abuse of discretion in denying his request to withdraw his plea of nolo contendere.

Defendant, an inmate of the penal complex, appeared before the court in leg irons when arraigned. He was assured by the court that this would not prejudice the court in any way and defendant then entered his plea of nolo contendere. This was not a jury trial. Defendant has failed to indicate, and we are unable to see, how he was prejudiced in the slightest degree under the existing circumstances. The assignment is entirely without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, C. J., not participating.

STATE OF NEBRASKA, APPELLEE, V. ROGER BUSS, APPELLANT.
222 N. W. 2d 113

Filed October 3, 1974. No. 39455.

Appeal and Error: Time: Judgments. Where a notice of appeal is not filed within 1 month from the entry of the judgment or final order appealed from as required by section 25-1912, R. R. S. 1943, this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Appeal dismissed.

T. Clement Gaughan and Robert I. Eberly, for appellant.

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

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

CLINTON, J.

Defendant pled guilty to a charge of possession of a controlled substance. He was sentenced on December 21, 1973. An examination of the transcript shows that the notice of appeal was not filed until February 5, 1974.

"Where a notice of appeal is not filed within 1 month from the entry of the judgment or final order appealed from as required by section 25-1912, R. R. S. 1943, this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed." State v. Howell, 188 Neb. 687, 199 N. W. 2d 21.

APPEAL DISMISSED.

LYLE C. SCHMIDT ET AL., APPELLEES, V. TERRY HENKE, APPELLANT.

222 N. W. 2d 114

Filed October 10, 1974. No. 39028.

1. **Parties: Actions: Statutes.** Section 25-301, R. R. S. 1943, requires that every action be prosecuted in the name of the real party in interest.
2. ———: ———: ———. The purpose of section 25-301, R. R. S. 1943, is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause, as well as to discourage harassing litigation and to keep litigation within certain bounds in the interest of sound public policy.
3. **Parties: Actions: Torts: Insurance.** An insured's cause of action against a tort-feasor cannot be split. There is only one cause of action on the part of the insured against the tort-feasor.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Reversed and dismissed.

Barlow, Watson & Johnson, for appellant.

Healey, Healey, Brown & Burchard and Douglas L. Kluender, for appellees.

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

SPENCER, J.

This action is brought in the name of Lyle C. Schmidt and Sharon Schmidt, husband and wife, plaintiffs, to recover for medical expenses incurred for personal injuries sustained by Sharon, and for property damage to plaintiffs' 1963 vehicle. The damages resulted from a collision between vehicles operated by Lyle C. Schmidt and defendant, Terry Henke. The only issue we consider is whether or not the plaintiffs are the real parties in interest. The trial court found they were. Defendant perfected this appeal. We reverse.

Plaintiffs' vehicle was insured with the State Farm Mutual Automobile Insurance Company under a policy which provided collision coverage, with $50 deductible, and medical payment coverages. On May 27, 1970, plaintiffs signed and executed a loan receipt for the amount of their collision damage less $50 to State Farm. On June 12, 1970, plaintiffs signed and executed a loan receipt for the amount of their medical coverage to State Farm. These were repayable *only to the extent of any recovery for the collision.*

On October 29, 1971, plaintiffs executed a release to the defendant "from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, known or unknown, both to person or property, which have resulted or may, in the future, develop" from the accident which was described. The release expressly stated that it was understood it would in no way release the claim of State Farm Mutual against the defendant for money paid the plaintiffs under a collision insurance policy.

In Scholting v. Alley (1970), 185 Neb. 549, 178 N. W. 2d 273, we said: "Section 25-301, R. R. S. 1943, requires that every action be prosecuted in the name of the real party in interest. The purpose of statutes such as this is to prevent the prosecution of actions by

persons who have no right, title, or interest in the cause as well as to discourage harassing litigation and to keep litigation within certain bounds in the interest of sound public policy."

It was expressly stipulated by and between the parties herein that the term "collision insurance policy" meant collision and medical payment insurance policy. It was further expressly stipulated that the plaintiffs' $50 deductible interest was included in the claims covered by the release. Obviously, therefore, the Schmidts released any claims they had against the defendant. Consequently, they had no further interest in the lawsuit and could not be the real parties in interest.

Plaintiffs argue that by virtue of the loan receipts they are under a contractual obligation to prosecute the claim of the State Farm under the loan receipts in their name. Unfortunately for them, they are not the real parties in interest and can no longer do so. The release signed by the plaintiffs contained the following language: "Undersigned hereby declares that the terms of this settlement have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise settlement and adjustment of any and all claims, disputed or otherwise, on account of the injuries and damages above mentioned." It is true the release contained the following language: "* * * except that it is expressly agreed and understood that this release shall in no way release the claim of the State Farm Mutual against * * * Terry Henke for monies paid for the undersigned under a collision insurance policy." The difficulty is that the State Farm had no claim against the defendant.

As we said in Krause v. State Farm Mut. Auto. Ins. Co. (1969), 184 Neb. 588, 169 N. W. 2d 601: "Nebraska is in harmony with the prevailing rule in most jurisdictions that the insured's cause of action against the tort-

feasor cannot be split and that at all times there is one cause of action on the part of the insured against the tort-feasor."

The claim was that of the plaintiffs, and they executed a release as to all claims so far as they were concerned. The loan receipts at most were contracts between plaintiffs and State Farm. The cause of action was solely the plaintiffs. When they acknowledged full and complete settlement from defendant, they gave up their right to bring an action against him. The loan receipts executed by plaintiffs did not change the real parties in interest.

For the reason stated we reverse the judgment entered herein and dismiss the plaintiffs' petition.

REVERSED AND DISMISSED.

BOSLAUGH, J., dissenting in part.

This case amounts to a logical extension of a legal fiction which results in an absurdity. What was originally intended as a shield for the collision insurer has become a sword.

The settlement between the plaintiffs Schmidt and their insurer, State Farm Mutual Automobile Insurance Company, was obviously a *payment* of the amount due Schmidts by reason of the terms of the contract of insurance. The parties cast it in the form of a "loan," but that was merely a fiction which has been indulged in as a means to avoid consequences normally attendant upon payment of a loss. Undoubtedly, it serves a useful purpose where the circumstances would otherwise prevent any settlement under the policy. See Kopperud v. Chick, 27 Wis. 2d 591, 135 N. W. 2d 335.

Upon payment of the indemnity, the insurer became entitled to subrogation, either by contract or in equity, for the amount paid. Krause v. State Farm Mut. Auto. Ins. Co., 184 Neb. 588, 169 N. W. 2d 601. Schmidts had but one cause of action, but the insurer then had an interest in it by reason of the payment under the

policy. Only one action could be brought to recover all the damages resulting from the accident.

The settlement between Schmidts and the defendant Henke's insurer was but a partial settlement. The rights of State Farm in Schmidts' cause of action against Henke were expressly excepted from the release. As stated in Omaha & R. V. Ry. Co. v. Granite State Fire Ins. Co., 53 Neb. 514, 73 N. W. 950: "Knowing, as it then knew, of the rights of the insurance company, it is not protected, by that voluntary payment of Erickson's claim, against a valid claim of the insurance company not included in that settlement."

The only issue in this case was whether the action could be brought in the name of Schmidts or had to be brought in the name of State Farm. Since Schmidts had no interest remaining in the cause of action against Henke, Schmidts were no longer a real party in interest. Although I concur in this holding, it appears to conflict with Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc., 162 Neb. 47, 75 N. W. 2d 366.

I would remand the cause for further proceedings.

STATE OF NEBRASKA, APPELLEE, V. ROBERT D. MORFORD, APPELLANT.

222 N. W. 2d 117

Filed October 10, 1974. No. 39358.

1. **Criminal Law: Right to Counsel: Waiver.** It is a sufficient waiver of counsel if it is made intelligently and understandingly with knowledge of the right to counsel.
2. **Courts: Records.** Ordinarily the duly authenticated record of a county court imports absolute verity.
3. **Courts: Records: Evidence: Right to Counsel: Waiver.** The journal entry of an arraigning court stating facts showing an intelligent waiver of counsel is sufficient evidence of such waiver in the absence of proof that the journal entry is incorrect.
4. **Courts: Trial.** A trial judge cannot effectively discharge the

roles of both judge and defense counsel and one proceeding pro se is bound by his own acts and conduct.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

H. B. Muffly, Brian R. Watkins, and Richard H. Osborne, for appellant.

Clarence A. H. Meyer, Attorney General, and Steven C. Smith, for appellee.

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

NEWTON, J.

Defendant was convicted on a misdemeanor charge of possessing marijuana. The conviction was affirmed on appeal to the District Court. We affirm the judgment.

Defendant states he did not knowingly waive his right to counsel; that the trial judge did not properly advise him of his rights during the trial; and that the evidence is insufficient to sustain the conviction.

A police officer talked with two young persons and determined that they had been drinking alcoholic beverages although below the age limit permitting such activity. On accompanying these individuals to their car, the officer observed two other individuals in the car, one of whom was the defendant. He also observed beer in the car. The defendant was seated in the rear seat and had a sleeping bag between his feet under which was a cigar box, taped or tied shut, containing marijuana and smoking paraphernalia. When the officer stated the contents appeared to be marijuana, the defendant ran from the scene.

When arraigned in the county court, defendant was informed of his right to have an attorney at public expense but informed the court that he did not want one and if he did, he would be able to retain one. This statement was made with full knowledge of the nature

of the charge and the possible penalties. It is sufficient if the waiver of counsel was made intelligently and understandingly with knowledge of his right to counsel. See, Spanbauer v. Burke, 374 F. 2d 67 (7th Cir., 1966), cert. den. 389 U. S. 861; State v. Green, 185 Neb. 673, 178 N. W. 2d 271.

No transcript of the county court arraignment proceeding appears. The facts regarding waiver of counsel are taken from the county court journal entry. The correctness of the journal entry is not questioned. Defendant simply states it is not a sufficient record. Ordinarily the duly authenticated record of a county court imports absolute verity. See Anderson v. State, 163 Neb. 826, 81 N. W. 2d 219. In McGhee v. Sigler, 328 F. Supp. 538, (D. Neb., 1971), affirmed per curiam, McGhee v. Wolff, 455 F. 2d 987 (8th Cir., 1972), cert. den. 409 U. S. 1022 (1972), a similar situation was presented. Therein it is stated: "It is true that waiver cannot be presumed from a silent record. * * * But acquiescence to proceeding without counsel can be inferred from the record in the present case, which is not a silent record. The records of the district court of Nebraska state that on October 29, 1952, the defendant, Harold McGhee, appeared before the Honorable John L. Polk and in open court waived his right to counsel." In a footnote the journal entry of the District Court is set out as the record relied on. We conclude that a journal entry of an arraigning court stating that a defendant has waived counsel will support such a finding on appeal in the absence of proof that the journal entry in incorrect.

Defendant asserts that the trial court has a duty to advise a defendant proceeding pro se of his various rights as they come into question. At the conclusion of the State's case, defendant stated he would take the stand. The court then informed him that he had a right not to testify but could do so if he wished, and that if he did, he would be subject to cross-examination

and would waive his right to remain silent. Defendant has failed to cite any authority in point to support his contention. It is generally recognized that a trial judge cannot effectively discharge the roles of both judge and defense counsel. One of the penalties of a defendant's self-representation is that he is bound by his own acts and conduct and held to his record. See, United States v. Dujanovic, 486 F. 2d 182 (9th Cir., 1973); State v. Lashley, 21 N. C. App. 83, 203 S. E. 2d 71.

In regard to the sufficiency of the evidence to sustain the judgment of conviction, the evidence first abovementioned is pertinent. On cross-examination the defendant admitted he knew the box contained marijuana. The case of State v. Faircloth, 181 Neb. 333, 148 N. W. 2d 187, presented an identical situation. It was therein stated: "In this case the evidence shows that Oram had the blue duffle bag containing marijuana between his legs when the automobile was stopped by the patrolman. This circumstance placed the marijuana 'within such close juxtaposition' or 'easy reach' of the defendant that he could be found to be in possession of it." We conclude that the assignment is without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY MUGGINS, APPELLANT.

222 N. W. 2d 289

Filed October 10, 1974. No. 39368.

1. **Probation and Parole.** A sentencing court in prescribing probation may impose any conditions of probation that it is authorized by statute to impose.
2. ———. This court will disturb an order of probation only where it appears from the record that in executing such order the sentencing court imposed a condition or conditions of probation which it was not authorized by statute to impose.
3. **Probation and Parole: Alcoholic Liquors: Statutes.** A require-

ment that one convicted of driving while intoxicated attend and complete an "Alcohol Abuse Course" established under sections 39-669.31 and 39-669.32, R. R. S. 1943 (Reissue of 1974), is a valid condition of probation under section 29-2262(2)(e) and (m), R. S. Supp., 1972.

4. **Probation and Parole: Alcoholic Liquors.** A condition of probation that one convicted of driving while intoxicated pay the fee for an Alcohol Abuse Course is presumptively valid as reasonably related to the rehabilitation of the offender, and will not be disturbed on appeal, absent a showing in the record that the fee charged is unreasonable in amount or unduly onerous to probationer.

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

Zane M. Pic, for appellant.

Clarence A. H. Meyer, Attorney General, and Steven C. Smith, for appellee.

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

BRODKEY, J.

The appellant, Jerry Muggins, pleaded guilty on September 26, 1973, in the county court of Scotts Bluff County, Nebraska, to the charge of driving while intoxicated and on that date was placed on probation. Among the conditions of probation imposed by the county judge were provisions requiring appellant to attend the Alcohol Safety Action Program, sometimes referred to as the Alcohol Abuse Course, and also to pay the fee for the course in the sum of $100. Appellant was also ordered to pay a fine of $100 and the court costs. He appealed from the order of probation to the District Court, which court found that his appeal was without merit, dismissed the appeal, and affirmed the proceedings in the county court. Appellant's motion for a new trial was overruled and he thereafter perfected his appeal to this court. In his brief on appeal, he assigns five errors which we summarize as

follows: (1) The court erred in not deciding that a sentencing court has no inherent power to grant probation, but only has that probationary power conferred by statute; (2) the court erred in not deciding that the $100 cost of the Alcohol Safety Action Program was penal in nature in the absence of any showing that the cost of such program was incurred by anyone, and further that the cost was ascertainable, susceptible of proof, and reasonably related to the rehabilitation of the offender; (3) the court erred in not deciding there must be "notice" and hearing afforded to the offender to determine whether he had the ability to pay; (4) that the sentencing court was without power to impose the $100 penalty, which was tantamount to a fine, and even if it had, the money must be distributed to the schools in Scotts Bluff County rather than to the Alcohol Safety Action Program under Article VII, section 5, Constitution of Nebraska; and (5) the court erred by not ruling that the portion of sections 39-727, 39-727.21, and 39-727.22, R. S. Supp., 1973, providing alternative penalties for first offense driving while intoxicated is unconstitutional as working a denial of equal protection under the Fourteenth Amendment to the United States Constitution.

The bill of exceptions filed in this appeal consists only of the order of probation entered in the county court by the judge thereof at the time of sentencing. There is no evidence contained therein of any nature, and specifically with regard to the Alcohol Safety Action Program, whether or not in this case such program, if any, was certified, nor any evidence with reference to how the fee charged for the program was computed, or the money distributed. Nor is there any evidence in the record that any issue of constitutionality was raised in either the county or District Courts. Moreover, in his motion for new trial, appellant alleged only that there is new authority for the proposition that there

is no inherent power to impose conditions of probation and that the power is a statutory power only. In view of the state of the record, therefore, it is clear that we may only consider on this appeal assignment of error No. (1). State v. Haile, 185 Neb. 421, 176 N. W. 2d 232 (1970); Kennedy v. State, 170 Neb. 193, 101 N. W. 2d 853 (1960); State v. Seger, 191 Neb. 760, 217 N. W. 2d 828 (1974); State v. Griger, 190 Neb. 405, 208 N. W. 2d 672 (1973); Mitchell v. State, 159 Neb. 638, 68 N. W. 2d 184 (1955); State v. Schwade, 177 Neb. 844, 131 N. W. 2d 421 (1964).

It is clear, of course, that a sentencing court in prescribing probation may impose any conditions of probation that it is authorized by statute to impose. State v. Nuss, 190 Neb. 755, 212 N. W. 2d 565 (1973). As a consequence, this court will disturb an order of probation only where it appears from the record that in executing such order the sentencing court imposed a condition or conditions of probation which it was not authorized by statute to impose. The order of probation in this case indicates that the conditions of appellant's probation were imposed upon him pursuant to section 29-2262, R. S. Supp., 1972. That section, so far as material, provides among other things: "(1) When a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life. (2) The court, as a condition of its sentence, may require the offender: * * * (e) To pursue a prescribed secular course of study or vocational training; * * * (l) To pay a fine in one or more payments, as ordered; or (m) *To satisfy any other conditions reasonably related to the rehabilitation of the offender.*" (Emphasis supplied.)

Another statute, which should be considered, is section 39-727.22, R. S. Supp., 1973, now appearing as section 39-669.32, R. R. S. 1943 (Reissue of 1974). That statute

provides as follows: "If any county or municipality having jurisdiction of such offenses shall any time after April 21, 1973 develop a certified program of probation as provided for in section 39-669.31 and shall have conducted such program either before or after certification for a period of at least ninety days, then so long as the program remains certified the court within such county or municipality having jurisdiction over offenses covered by sections 39-669.07, 39-669.31, and 39-669.32 *may waive the requirement that persons placed on probation shall not drive any motor vehicle for any purpose for a period of thirty days from the date of the order as provided for in section* 39-669.07." (Emphasis supplied.)

There is certainly nothing in the nature of a course of study described as an "Alcohol Abuse Course," or in the record of this case, that would cause us to conclude that a condition of probation requiring a probationer convicted of driving while intoxicated to undertake and complete such a course would not be a proper condition of probation under the foregoing statutes specifying proper terms and conditions of probation. On its face, it seems that the Alcohol Abuse Course prescribed herein might reasonably be regarded as a proper condition of probation as being either "a secular course of study" or as being reasonably related to the rehabilitation of the offender. Black's Law Dictionary (4th Ed.), defines "secular" as "Not spiritual; not ecclesiastical; relating to affairs of the present world." Section 39-669.31, R. R. S. 1943 (Reissue of 1974), requires such program to comply with the ASAP Program of the National Highway Traffic Safety Administration. It is obvious that the program referred to in that section is clearly "secular" under the foregoing definition as "relating to affairs of the present world." In addition the program is clearly "reasonably related to the rehabilitation of the offender." The word "rehabilitation" is defined in Webster's Third New Inter-

national Dictionary as (a) the reestablishment of the reputation or standing of a person; (b) the physical restoration of a sick or disabled person by therapeutic measures and reeducation to participation in the activities of a normal life within the limitations of his physical disability; (c) the process of restoring an individual (as a convict, mental patient or disaster victim) to a useful and constructive place in society through some form of vocational, correctional, or therapeutic retraining or through relief, financial aid, or other reconstructive measure.

The Alcohol Safety Action Program apparently represents an effort by the state and the national government to reduce drunken driving offenses through the medium of education. Such being the case, we cannot say that the sentencing court was without power to prescribe the Alcohol Abuse Course as a condition of probation. It follows, therefore, that if the Alcohol Abuse Course itself may be regarded as a proper condition of probation then it would seem that the $100 fee taxed to finance the costs of that course would also on its face be a proper condition of probation as being reasonably related to the rehabilitation of the offender. As previously stated, there is nothing in the record to indicate that the actual cost of the course was less than the amount of the fee charged therefore, and we must assume that the $100 fee charged was not excessive in amount so as to constitute an improper condition of probation.

Appellant also argues that the Alcohol Abuse Course is not a condition of probation which could be properly imposed by the county court because the course was not "certified" within the meaning of section 39-669.32, R. R. S. 1943 (Reissue of 1974). Although there is nothing in the record which would indicate whether or not the course was or was not "certified," and we are not required to speculate on this fact, nevertheless

we add in passing that we believe appellant misunderstands the significance of that section. It is clear from a reading of the statute that where a program of probation is not certified as provided for in the foregoing section, the only effect thereof is to compel the sentencing judge to order the offender not to drive a motor vehicle for a period of 30 days under section 39-727, R. S. Supp., 1973, now section 39-669.07, R. R. S. 1943 (Reissue of 1974), rather than permitting a waiver of this requirement by the court. Such lack of certification would in itself have no effect upon the power of the sentencing court to formalize an otherwise proper program of probation. In the absence of a record we are unable to say that the $100 fee condition was unreasonable, nor that the amount thereof was or would be onerous to this appellant.

We conclude, therefore, that the conditions of probation imposed by the county court of Scotts Bluff County were entirely proper, and the judgment of the District Court in upholding the county court in that regard, must be affirmed.

AFFIRMED.

VELVA MAUSER, APPELLANT, V. DOUGLAS & LOMASON COMPANY, APPELLEE.
222 N. W. 2d 119

Filed October 10, 1974. No. 39375.

1. **Workmen's Compensation: Evidence.** In order to recover under the Workmen's Compensation Act, the evidence must show the plaintiff's disability was the result of accident arising out of and in the course of the employment.
2. **Workmen's Compensation: Words and Phrases.** "Arising out of" refers to the origin or cause of the accident and is descriptive of its character, while "in the course of" refers to the time, place, and circumstances of the accident.
3. **Workmen's Compensation.** Injury to plaintiff resulting from donation of blood to Red Cross did not arise out of nor in

course of employment as punch press operator although employer gave employees time off without loss of pay to participate in program.

Appeal from the District Court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

Winkle & Allphin and Lyle Winkle, for appellant.

Walter, Albert, Leininger & Grant, for appellee.

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

BOSLAUGH, J.

This is a proceeding under the Workmen's Compensation Act. The plaintiff was employed by the defendant as a punch press operator at its plant in Columbus, Nebraska. On June 1, 1971, the plaintiff was injured and sustained disability as a result of complications following a donation of blood to the Red Cross.

The Workmen's Compensation Court found the evidence failed to show the plaintiff had sustained an accident and injury which arose out of and in the course of her employment by the defendant and dismissed the proceeding. The plaintiff waived rehearing before the full compensation court and appealed directly to the District Court.

The District Court found the evidence was insufficient to support a finding that the plaintiff had sustained an accident and injury which arose out of her employment by the defendant. The plaintiff has appealed to this court.

The record shows the defendant posted a notice at its plant which stated employees wishing to donate blood to the Red Cross on June 1, 1971, would be excused for 1 hour of work for which they would be paid. Employees wishing to donate blood were asked to sign their name on a sheet provided for each shift and to give their name and clock number to the Red Cross at the

city auditorium at the time they reported for the donation. In order to be paid for the hour for which they were excused from work, it was necessary that the employees give their name and clock number to the Red Cross. The defendant offered to furnish transportation to the city auditorium for any employee who needed it.

In order to recover under the Workmen's Compensation Act, the evidence must show the plaintiff's disability was the result of an accident arising out of and in the course of the employment. The sole question presented in this case is whether the accident and injury to the plaintiff arose out of and in the course of her employment by the defendant. "Arising out of" refers to the origin or cause of the accident and is descriptive of its character, while "in the course of" refers to the time, place, and circumstances of the accident. Oline v. Nebraska Nat. Gas Co., 177 Neb. 851, 131 N. W. 2d 410.

The act does not cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service, and does not cover workmen who, on their own initiative, leave their line of duty or hours of employment for purposes of their own. § 48-151 (6), R. R. S. 1943.

The accident and injury to the plaintiff in this case occurred during normal hours of service but not on premises where her presence was required. The defendant had no control over the operation of the Red Cross program and received no benefit from the plaintiff's participation in the program except that which might flow from its willingness to cooperate with the program by offering employees time off with no loss of pay.

Participation in the Red Cross program by the plaintiff was in the nature of a civic or patriotic duty and not reasonably necessary nor incident to her work as a punch press operator. The evidence failed to show

the plaintiff was injured as a result of a risk incident to the employment.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LUTHER ARTHUR FOX, ALSO KNOWN AS RONALD WILSON, APPELLANT.
222 N. W. 2d 121

Filed October 10, 1974. No. 39376.

1. **Criminal Law: Forgery.** The elements of the crime of uttering a forged instrument are: (1) The offering of a forged instrument with the representation by words or acts that it is true and genuine; (2) knowing the same to be false, forged, or counterfeited; and (3) with intent to defraud.
2. **Criminal Law: Evidence.** An essential element of a crime may be proved solely by circumstantial evidence.

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

Frank B. Morrison, Sr., Stanley A. Krieger, and Ivory Griggs, for appellant.

Clarence A. H. Meyer, Attorney General, and Terry R. Schaaf, for appellee.

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

CLINTON, J.

Defendant was found guilty by a jury on a charge of having, on April 7, 1973, uttered a forged check. He was sentenced to a term of 5 to 20 years in the Nebraska Penal and Correctional Complex. On this appeal he asserts the insufficiency of the evidence to support the verdict. This contention rests on two propositions: (1) The evidence does not show he was involved in a forgery; and (2) the evidence does not show that the

defendant knew the instrument was forged. It is not denied that the defendant uttered the instrument by endorsing it as payee and delivering it to a motel at which he was registered. The check was accepted by the motel and defendant received cash in payment.

A summary of the evidence is necessary. The check in question was dated April 7, 1973, and drawn upon the account of "Moores Skelly," which name was imprinted on the check. Evidence shows that that service station business was owned and operated by James L. Moore. The amount of $62.50 was both typed and imprinted by a check protector. The instrument bore the typed alias of the defendant, Ronald Wilson, as payee. It was under this name that he had registered at the motel. When negotiated by the motel it was returned by the bank marked returned unpaid and a stamp thereon was checked for a signature defect.

Moore, who testified for the State, stated that the signature of the maker was not his and had not been authorized by him; that the check was one of a number of blank checks which were missing from his desk in his place of business; that he did not own or use a check protector or typewriter and never used such instruments in filling out his checks; and that he had not made the check in question and had not given it to the defendant, the payee thereon. Moore's testimony also indicated that the defendant, an occasional customer of the station, had been in the room where the checks were kept during the period before discovery that the checks were missing.

Upon the arrest of the defendant he executed an authorization for the search of his room. The search disclosed, among other things, a quantity of consecutively numbered Moores Skelly checks, some of which bore the purported signature of James L. Moore as maker, but were otherwise blank. Other checks were completely blank. Moore identified these checks as

those missing from his place of business; he stated that the signatures were not his nor authorized by him; and that he had never given the checks to the defendant. The defendant testified that the check involved had been given to him by Moore in payment for service to be rendered, apparently in connection with a detective agency he was about to form and which he gave as the reason for his presence in Omaha. The defendant denied any knowledge of the presence of the other checks in his motel room and related circumstances which suggested that these checks had been planted by Moore or someone else because the defendant had refused to carry out an illegal enterprise in which Moore and another party, an attorney named Williams, had solicited his help. Both Moore and Williams, although admitting slight social or business acquaintance with the defendant, denied the relevant portions of the defendant's testimony.

Four checks of businesses or professions located outside Omaha were also found in the search of the defendant's room. Three of these were for substantial sums of money and had been completed in a manner similar to that of the check in question. These three checks were purportedly made by and drawn upon the account of a Minneapolis attorney. The defendant claimed they had been delivered to him by Williams. This Williams flatly denied. The fourth check was that of a Des Moines drug company and was blank except for the signature of a purported maker.

This state of the evidence presented a factual determination for the jury which was, under proper instructions, resolved against the defendant.

The statute defining the offense of uttering a forged instrument is as follows: "(2) whoever shall utter or publish as true and genuine or cause to be uttered or published as true and genuine or shall have in his possession with intent to utter and publish as true and

genuine, any of the above-named false, forged . . . matter . . . knowing the same to be false, altered, forged . . . with intent to prejudice, damage or defraud any person . . . ." § 28-601, R. S. Supp., 1972. The elements of the crime of uttering a forged instrument are: (1) The offering of a forged instrument with the representation by words or acts that it is true and genuine; (2) knowing the same to be false, forged, or counterfeited; and (3) with intent to defraud. 37 C. J. S., Forgery, § 37, p. 57.

The defendant asserts that "writing by Mr. Fox has not been proven." He seems to assume there must be proof that the utterer was also the forger. He relies on State v. Addison, 191 Neb. 792, 217 N. W. 2d 468. Addison stands for no such proposition. That case simply pointed out that the proof of the forgery in the case before it was incomplete because there was no proof that the signature was not authorized. It then went on to point out how that deficiency might have been remedied. As we pointed out in State v. Huffman, 186 Neb. 809, 186 N. W. 2d 715, "forging and fraudulently uttering the same instrument if done by the same person constitute but one crime." The utterer need not be the forger. 37 C. J. S., Forgery, § 37, p. 57.

With reference to the defendant's second contention, there was, of course, sufficient circumstantial evidence to prove that the defendant knew the instrument was forged—indeed enough to permit a finding, had it been necessary, that he was the forger. An essential element of a crime may be proved solely by circumstantial evidence. State v. Ortiz, 187 Neb. 515, 192 N. W. 2d 151; State v. Lowrey, 187 Neb. 451, 191 N. W. 2d 600.

In this case, if the jury chose, as it did, to believe the evidence in the State's case, it was justified in finding that the defendant knew of the falsity of the instrument he passed. The checks found in the defendant's room, some signed and some unsigned, cannot be accounted for

upon any rational theory which does not include the defendant's knowledge of their falsity. State v. Watson, 182 Neb. 692, 157 N. W. 2d 156.

AFFIRMED.

PAUL R. ROBINSON, GUARDIAN OF HAZEL THOMPSON, AN INCOMPENT PERSON, APPELLEE,
V. CLARENCE HAROLD THOMPSON ET AL., APPELLANTS.
222 N. W. 2d 123

Filed October 10, 1974. No. 39426.

1. **Quieting Title: Equity.** A quiet title action is equitable in character and is tried de novo on appeal.
2. **Deeds.** The essential fact to render delivery effectual always is that the deed itself has left the control of the grantor who has reserved no right to recall it, and it has passed to the grantee.
3. ———. It is not essential to the validity of the deed that it should be delivered to the grantee personally. It is sufficient if the grantor delivers it to a third person unconditionally for the use of the grantee, the grantor reserving no control over the instrument.

Appeal from the District Court for Cedar County: JOSEPH E. MARSH, Judge. Reversed and remanded.

Kirby, Duggan & McConnell, for appellant Thompson.

Kem W. Swarts of Olds & Swarts, for appellee.

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and COLWELL, District Judge.

NEWTON, J.

This is an action to quiet title. Defendant Thompson has appealed from a decree quieting title in plaintiff. The issue presented is in regard to the execution and delivery of a deed to defendant Thompson. We reverse the judgment of the District Court.

One John A. Goodwin died testate on December 29, 1962. He was the owner of a 200-acre farm in Cedar

County, Nebraska, and other property. He left a nephew, six nieces, and offspring of a seventh niece as his heirs-at-law. Two had been raised in the home of John Goodwin. Hazel Thompson, in whose behalf this action was brought, lived with her uncle until his death. The defendant Thompson left the home of his uncle when he became 21 years of age. Following the death of John A. Goodwin it was ascertained that his will left the entire estate to Hazel. Defendant Thompson and his wife testified that defendant Thompson objected to the will and threatened to contest it; and that the attorney for the estate, Philip H. Robinson, advised Hazel and defendant Thompson to settle the matter and a deed was then prepared conveying to defendant Thompson a one-half interest in the farm subject to a life estate in Hazel.

The deed was left with Philip H. Robinson and placed in his file of the Goodwin estate. Defendant Thompson and his wife state Mr. Robinson promised to "take care of it" and "get it fixed up" when defendant Thompson inquired if there was anything he had to do about it. Mr. Robinson died 2 years and 8 months later during which time defendant Thompson states he inquired about the deed 3 times and was assured it would be recorded. He states he also made inquiry of Paul Robinson, a son of Philip H. Robinson, who took over his father's practice. Paul Robinson denies this. He testified he was informed defendant Thompson claimed an interest in the farm but there was no specific mention of a deed. Paul Robinson was unaware of the existence of the deed, but in 1971 when defendant Thompson asserted an interest in the farm, he made a complete search of pertinent files in his office and found the deed in the Goodwin estate file.

Prior to the death of John A. Goodwin, Philip H. Robinson had not represented either Hazel or the defendant Thompson. He was the attorney for the Goodwin es-

tate and thereafter represented Hazel in numerous matters. The Goodwin will was probated and defendant Thompson received a $500 bequest.

The execution of the deed is not questioned. Whether or not there was a consideration is not material as the deed would still be valid as a gift from Hazel whether or not defendant Thompson had grounds for a contest of the will or it was executed in settlement of a proposed will contest.

The sole question presented is whether or not the deed was delivered. The circumstances are unusual. Since Hazel reserved a life estate there was no apparent reason for a failure to record the deed at once and the grantee ordinarily does this, yet he permitted considerable time to elapse without seeing that this was done. Was the delivery of the deed to Mr. Robinson a delivery sufficient to sustain the deed? At the time Mr. Robinson represented the Goodwin estate but was not the attorney for either Hazel or the defendant Thompson.

A quiet title action is equitable in character and is tried de novo on appeal. See Neylon v. Parker, 177 Neb. 187, 128 N. W. 2d 690.

"The essential fact to render delivery effectual always is that the deed itself has left the control of the grantor who has reserved no right to recall it, and it has passed to the grantee." Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183.

"'* * * it is not essential to the validity of the deed that it should be delivered to the grantee personally. It is sufficient if the grantor delivers it to a third person unconditionally for the use of the grantee, the grantor reserving no control over the instrument.'" Milligan v. Milligan, 161 Neb. 499, 74 N. W. 2d 74. See, also, Brunson v. Kahler, 176 Neb. 735, 127 N. W. 2d 281.

Philip H. Robinson, to whom the deed was delivered, was a third party not representing either the grantor or grantee in this transaction. There is no contention

that the instrument was conditionally delivered or that Hazel reserved a right to retain control over it. Under such circumstances we conclude that there was an adequate delivery of the deed and reverse the judgment and remand the cause to the District Court.

REVERSED AND REMANDED.

SPENCER and CLINTON, JJ., concur in result.

EDUCATIONAL SERVICE UNIT NO. 3, APPELLANT, V. MAMMEL, OLSEN, SCHROPP, HORN & SWARTZBAUGH, INC., APPELLEE.

222 N. W. 2d 125

Filed October 10, 1974. No. 39427.

Limitations of Actions: Time: Statutes. A statute of limitations which does not impair existing substantive rights but only alters the procedural enforcement of those rights operates on all proceedings instituted after its passage, whether the rights accrued before or after that date. The only restriction on the exercise of this power is that the Legislature cannot remove a bar or limitation which has already become complete, and that no limitation shall be made to take effect on existing claims without allowing a reasonable time for parties to bring action before these claims are absolutely barred by a new enactment.

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

David S. Lathrop of Lathrop, Albracht & Dolan, for appellant.

McGrath, North, Dwyer, O'Leary & Martin and David L. Hefflinger, for appellee.

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and COLWELL, District Judge.

SPENCER, J.

The issue involved in this appeal is whether plaintiff's cause of action against the defendant is barred by

section 25-222, R. S. Supp., 1972, the professional negligence statute of limitations. The trial court so found. We affirm.

Defendant was employed by plaintiff in December 1967, to plan an employee benefit program to include a retirement program for plaintiff's employees. On January 4, 1968, defendant presented a suggested employee benefit plan containing an insurance retirement program to the exclusion of the provisions of the federal Social Security Act. Plaintiff instituted the plan on April 1, 1968. On June 3, 1970, it was determined that plaintiff was bound by the federal Social Security Act and was required to make contributions to the social security program. In January of 1972, plaintiff paid $41,110.94 to the federal government. This represented the amount which should have been withheld from the payroll, and interest.

The present action was commenced June 8, 1973. The petition alleged defendant-appellee negligently and erroneously professionally advised plaintiff that it was unnecessary to contribute to the social security program if the insurance retirement plan was instituted. Defendant demurred to the petition, alleging the action was barred by the statute of limitations set forth in section 25-222, R. S. Supp., 1972. The District Court sustained the demurrer.

Section 25-222, R. S. Supp., 1972, was passed by the Legislature on March 17, 1972, signed by the Governor on March 21, 1972, and became effective July 6, 1972. It provides as follows: "Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; Provided, if the cause of action is not discovered and could not be reasonably

discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; and provided further, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action."

Previous to the enactment of section 25-222, R. S. Supp., 1972, the statutory limitation period was 4 years. Our law is well settled. A statute of limitations which does not impair existing substantive rights but only alters the procedural enforcement of those rights operates on all proceedings instituted after its passage, whether the rights accrued before or after that date. This has been the law since Horbach v. Miller (1875), 4 Neb. 31. That case involved a claim of adverse possession. At the time claimant entered into adverse possession, the statutory period of limitations was 21 years. Subsequently, it was changed to 10 years. Claimant brought this action after the 10-year period but before he had been in possession for 21 years. The case states: "We think the rule is correctly laid down in the case of Bigelow v. Bemen, 2 Allen, 497, as follows: 'It is well settled that it is competent for the legislature to change statutes prescribing limitations to actions, and that the one in force at the time suit is brought is applicable to the cause of action. The only restriction on the exercise of this power is, that the legislature cannot remove a bar or limitation which has already become complete, and that no limitation shall be made to take effect on existing claims without allowing a reasonable time for parties to bring action

before these claims are absolutely barred by a new enactment.' In this case the court held that there was a reasonable and sufficient time given to bring the action between the time of the passage of the act and the time when it took effect."

Plaintiff's program was instituted on April 1, 1968. The statute of limitations began to run on plaintiff's cause of action at least by June 3, 1970. That was the date it was finally determined that plaintiff was obligated to contribute to the federal social security program on behalf of its employees. Suit was filed herein June 8, 1973. This was more than 5 years after the program was instituted and 3 years and 5 days subsequent to the date any alleged negligence was discovered.

Section 25-222, R. S. Supp., 1972, was passed and signed by the Governor within the 2-year period which expired June 3, 1972, or more than 1 month before the act became effective. This action was filed 11 months after the effective date of the act, and 15 months after its passage. The question presented is whether the action was instituted within a reasonable period of time from the passage of the act.

In Horbach v. Miller, 4 Neb. 31, the court held the time between the passage of the act and its effective date provided a reasonable and sufficient time given to bring the action. The act in that case was passed February 12, and became effective July 1. This covered a period of approximately 5 months. Here, less than 4 months elapsed between the passage of the act and its effective date. Plaintiff waited an additional 11 months before bringing its action. The trial court, relying on Horbach v. Miller, *supra,* held the time between the passage of the act and the time when it took effect provided a reasonable and sufficient time to bring the action. On the facts of this case we cannot say this

finding was so unreasonable as to amount to a denial of justice. We affirm the judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY S. WILSON, APPELLANT.

222 N. W. 2d 128

Filed October 10, 1974. No. 39438.

1. **Criminal Law: Homicide: Evidence.** In a prosecution for homicide, the State may show by circumstantial evidence the cause of death was a criminal act of the defendant.
2. **Criminal Law: Conspiracy: Aiders and Abettors.** To be effective as a defense, there must be an appreciable interval between the alleged abandonment of the criminal enterprise and the act for which responsibility is sought to be avoided. The coconspirator must have a reasonable opportunity to follow the example and refrain from further action before the act in question is committed.

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

Michael C. Washburn of Leahy, Gergen, Washburn & Cavanaugh, for appellant.

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

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

BOSLAUGH, J.

The defendant appeals from a sentence to life imprisonment for murder in the perpetration of a robbery. The robbery involved is the same as in State v. Casper, *ante* p. 120, 219 N. W. 2d 226.

The robbery or attempted robbery took place at the Surfside Marina Club which is located near the Missouri River north of Omaha, Nebraska. After arriving at the club the defendant and Charles Casper held the victim,

Joseph Armstrong, on the ground and went through his clothing in an attempt to find $200 they knew Armstrong had in his possession.

The defendant testified that when he and Casper were unable to find the money in Armstrong's clothing, Casper told Armstrong he "was going for a swim" if he did not produce the money. The defendant tried to separate Casper and Armstrong and told Casper to leave Armstrong alone. The defendant then started walking to Casper's car and heard the splash. The defendant had told two police officers at the time of his arrest that Casper pushed Armstrong in the river. When last seen alive, Armstrong was into the river. His dead body was found floating in the river 10 days later.

A post mortem examination of Armstrong's body was made but the exact cause of death could not be determined from the examination. The pathologist who performed the autopsy testified his findings were consistent with drowning but it could not be determined from examination of the body alone that Armstrong had drowned. In response to a hypothetical question which assumed the victim had been pushed into the river with no other injuries, the pathologist testified it was "most likely" death was caused by drowning.

In a prosecution for homicide, the State may show by circumstantial evidence the cause of death was a criminal act of the defendant. State v. Casper, *supra*. The evidence in this case was similar to the evidence in State v. Casper, *supra*, and was sufficient to sustain a finding that Armstrong's death was caused by drowning.

The defendant contends instruction No. 10A which related to the defense of abandonment was erroneous. The instruction was as follows: "In order for a defendant who has conspired with another to commit a robbery to avoid responsibility for a homicide which occurs during the course of the robbery or attempted robbery, such defendant must have abandoned the criminal en-

terprise before the robbery or attempted robbery was in the course of consummation.

"The abandonment must be such as to show not only his determination to go no further but also such as to give his coconspirator a reasonable opportunity to follow his example and refrain from further action before the robbery is attempted.

"An aider and abettor, or conspirator, cannot escape responsibility for an act which is the natural result of a common scheme which he has helped to devise and to carry forward because as a result either of fear or even of a better motive he concludes to desist or flee at the very instant when the robbery which is about to be committed and when the transaction which immediately begets it has actually been commenced."

The defendant contends the second paragraph of the instruction was erroneous because it required abandonment to be complete before the robbery was attempted.

To be effective as a defense, there must be an appreciable interval between the alleged abandonment of the criminal enterprise and the act for which responsibility is sought to be avoided. The coconspirator must have a reasonable opportunity to follow the example and refrain from further action before the act in question is committed. A conspirator cannot escape responsibility for an act which is the natural result of a criminal scheme he has helped to devise and carry forward by running away at the instant when the act in question is about to be committed and the transaction which immediately begets it has actually been commenced. See, People v. Nichols, 230 N. Y. 221, 129 N. E. 883, Pollack v. State, 215 Wis. 200, 253 N. W. 560.

At the time Casper threatened to push Armstrong into the river, the robbery or attempted robbery had been in progress for some time with full participation by the defendant. The defendant does not claim that he made any effort toward abandonment of the crime until

Casper threatened to put Armstrong in the river and immediately started shoving him toward the bank. At the time defendant claims he withdrew, the transaction which resulted in the death of Armstrong was in the course of consummation and the act in question followed immediately.

There was no appreciable interval between the alleged abandonment and the act of Casper which forced Armstrong into the river. There was no reasonable opportunity for Casper to reflect on the defendant's alleged change of heart and refrain from proceeding further with the robbery or attempted robbery. Under the facts and circumstances in this case the instruction was not prejudicially erroneous.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD EUGENE WARNER, APPELLANT.
222 N. W. 2d 292

Filed October 10, 1974. No. 39461.

1. **Criminal Law: Statutes: Sentences: Time.** Where an amendatory statute serving to mitigate criminal punishment becomes effective after conviction and sentence, but before final judgment, while the cause is pending on appeal, an "appeal" means a direct appeal from the criminal conviction and sentence.
2. **Post Conviction: Appeal and Error: Sentences.** An appeal in a post conviction proceeding is not a direct appeal from a conviction and sentence in a criminal case.
3. **Post Conviction: Criminal Law: Sentences: Judgments.** Matters relating to sentences imposed within statutory limits are not 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 prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States.

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

Richard J. Bruckner of Schrempp, Bruckner & Dinsmore, 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.

MCCOWN, J.

Ronald Eugene Warner filed a petition for declaratory relief and/or judgment on October 20, 1973. The petition was considered by the District Court as a motion to vacate sentence under the Post Conviction Act. After hearing, the District Court overruled the motion and the defendant has appealed.

In August 1970, in the District Court for Douglas County, the defendant Warner was found guilty of auto theft and burglary and sentenced to imprisonment for a term of 7 to 9 years on each count, sentences to run concurrently. On October 15, 1971, the judgment was affirmed by this court on appeal. See State v. Warner, 187 Neb. 335, 190 N. W. 2d 786. Mandate of this court was stayed pending application for writ of certiorari to the United States Supreme Court. The United States Supreme Court denied certiorari on April 17, 1972. Mandate of this court was issued on April 26, 1972.

On May 10, 1972, the defendant filed a motion in the District Court for Douglas County to vacate sentence and set aside the judgment of August 31, 1970. Execution of sentence was suspended until May 22, 1972, and the defendant's bond continued until that date. On May 22, 1972, after hearing, the matter was taken under advisement by the court and bond continued until further order of the court. On July 6, 1972, section 83-1,105, R. S. Supp., 1972, became effective. That statute

provided that when an indeterminate sentence was imposed, the minimum limit fixed shall not be less than the minimum provided by law nor more than one-third of the maximum term. If applicable to the present case, that statute would require a reduction in the minimum limit of defendant's sentences. On July 24, 1972, the Douglas County District Court overruled defendant's motion to vacate sentence in its entirety and remanded the defendant to the custody of the sheriff.

On October 20, 1973, the defendant filed the petition which is now before us on appeal. Hearing was had on November 20, 1973, and on January 11, 1974, defendant's motion for modification of sentence, denominated petition for declaratory relief, was overruled.

The defendant relies on the proposition that where an amendatory criminal statute, which serves to mitigate a criminal sentence previously imposed, becomes effective while the cause is still pending on appeal, and before final judgment, the punishment and sentence are those provided by the amendatory act. The defendant relies on State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225, and State v. Rubek, 189 Neb. 141, 201 N. W. 2d 255. We have no quarrel with the rule, but the facts of this case place it wholly outside the ambit of the rule.

The real issue here is whether the defendant's original conviction and sentence of August 31, 1970, had become a "final judgment" on or before July 6, 1972, the effective date of the amendatory sentencing act. It is clear that the cause was pending on direct appeal until the entry of the final mandate of this court on April 26, 1972. On that date the conviction and sentence became a final judgment and thereafter was subject only to post conviction or other indirect attack.

Where an amendatory statute serving to mitigate criminal punishment becomes effective after conviction and sentence, but before final judgment, while the cause is

pending on appeal, an "appeal" means a *direct* appeal from the criminal conviction and sentence. Such an "appeal" does not include an appeal in or from a collateral or related proceeding.

The defendant's contention here rests on the assumption that the filing of a petition for post conviction or other collateral relief automatically terminates the finality of any preceding final judgment and reinstates any former appeal as though it had been continuously pending. To accept that assumption would destroy the distinctions between direct appeals from, or collateral attacks on, a criminal judgment and sentence. It would also destroy the finality of any judgment and sentence in a criminal case. An appeal in a post conviction proceeding is not a direct appeal from a conviction and sentence in a criminal case. The same conclusion has been reached elsewhere as to an amending act involving criminal punishment. See, People v. Chupich, 53 Ill. 2d 572, 295 N. E. 2d 1; People v. Gonzales, 15 Ill. App. 3d 265, 304 N. E. 2d 294.

The defendant's petition for relief, which was quite properly treated as a motion for post conviction relief, rests on an alleged illegal sentence. Matters relating to sentences imposed within statutory limits are not 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 prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. State v. Wade, *ante* p. 159, 219 N. W. 2d 233.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BENJI L. TEMPLE, SR., APPELLANT.

222 N. W. 2d 356

Filed October 17, 1974. No. 39282.

1. **Evidence: Trial.** Polygraph tests are not admissible in evidence.
2. **Evidence: Trial: Appeal and Error.** A party may not predicate error on the admission of evidence to which no objection is made at the time it is offered or adduced.
3. **Appeal and Error: Trial: New Trial.** In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon.
4. **Criminal Law: Evidence: Confessions.** The resolution of conflicting testimony as to the voluntariness of a confession is for the trial court and jury.
5. ———: ———: ———. A finding that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous.
6. **Criminal Law: Evidence: Trial: Accomplices.** Failure of the court to caution the jury on evidence given by an accomplice, in the absence of special request, will not ordinarily constitute reversible error.
7. **Criminal Law: Statutes: Sodomy: Constitutional Law.** The sodomy statute, section 28-919, R. R. S. 1943, is not unconstitutional as being vague and indefinite, or as invading the right of privacy.

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

Richard J. Dinsmore, for appellant.

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

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and BLUE, District Judge.

NEWTON, J.

A jury returned a verdict that defendant was guilty of sodomy. On appeal defendant assigned as error the admission of evidence that defendant had taken a poly-

graph examination, admission of a confession, failure to give a cautionary instruction on the testimony of an alleged accomplice, unconstitutionality of section 28-919, R. R. S. 1943, and excessiveness of the sentence. We affirm the judgment.

The State introduced evidence that defendant had taken a polygraph test and the defendant himself, on direct examination, stated he had requested and taken such a test. The result was not mentioned. Defendant failed to object to this evidence, or move for a mistrial, or assign it as error in his motion for a new trial. We have long held that polygraph tests are not admissible in evidence. See Parker v. State, 164 Neb. 614, 83 N. W. 2d 347. We disapprove any reference to such tests offered in evidence. In the present instance, there being no objection to this evidence and a failure to assign it as error in the motion for new trial, the assignment is not well taken. "A party may not predicate error on the admission of evidence to which no objection is made at the time it is offered or adduced." State v. Weiland, 186 Neb. 325, 183 N. W. 2d 244.

"In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon." State v. Ryan, 188 Neb. 381, 196 N. W. 2d 919.

The purported confession was a rather garbled statement in part but was clearly an admission of guilt. The statement was taken at police headquarters and defendant directly contradicted evidence of police officers regarding circumstances testified to by them indicating it was voluntarily and intelligently made. The resolution of conflicting testimony as to the voluntariness of a confession is for the trial court and jury. See State v. Foster, 183 Neb. 247, 159 N. W. 2d 561. "A finding that a statement of an accused is voluntary will not ordinarily be set aside unless the finding is clearly

erroneous." State v. Medina, 189 Neb. 765, 204 N. W. 2d 785.

In the present instance there is ample evidence to support a finding that the defendant's statement was voluntarily given after proper instruction regarding his rights.

The court did not give a cautionary instruction regarding the testimony of an individual whom defendant asserts was an accomplice. It does not appear that the witness in question was, in fact, an accomplice as each had committed separate acts of sodomy. In any event: "Failure of the court to caution the jury on evidence given by an accomplice, in the absence of special request, will not ordinarily constitute reversible error." State v. Martin, 185 Neb. 699, 178 N. W. 2d 573. Such an instruction was not requested and no prejudicial error appears.

It is asserted that the sodomy statute, section 28-919, R. R. S. 1943, is unconstitutional as being vague and indefinite and as invading the right of privacy. The statute provides: "Whoever has carnal copulation with a beast, or in an opening of the body except sexual parts with another human being, shall be guilty of sodomy * * *." The statute appears to speak clearly and certainly. That it covers a case like the present one involving oral copulation is beyond doubt. See Sledge v. State, 142 Neb. 350, 6 N. W. 2d 76. The assertion that the statute in the present instance permits an unwarranted invasion of privacy is unconvincing. The performance of oral copulation with a 4-year-old child, as here, is an act which, if sanctioned, would be conducive to contributing to the delinquency and immorality of children. It is within the purview of the State's police power to prohibit public immorality and this is a subject in which there is a definite State interest. "Personal freedoms are not absolute and must give way when outweighed by legitimate state inter-

ests." Stradley v. Andersen, 349 F. Supp. 1120, affirmed, 478 F. 2d 188.

The sentence rendered was not excessive considering the nature of the crime and a previous felony record.

We affirm the judgment of the District Court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIE BROOKS HAYNES, APPELLANT.

222 N. W. 2d 358

Filed October 17, 1974. No. 39377.

1. **Statutes: Constitutional Law.** Section 28-1011.15, R. S. Supp., 1972, is constitutional.
2. ———: ———. All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature.
3. ———: ———. If the classification of persons singled out by the legislation is reasonable and not arbitrary, and is based on substantial differences having a reasonable relation to the persons dealt with and the public purpose to be achieved, it meets the constitutional test of equal protection.
4. **Criminal Law: Trial: Evidence.** Defendant's status as a felon is an essential element of the crime described in section 28-1011.15, R. S. Supp., 1972, and evidence must be adduced on that status in the absence of a stipulation.
5. **Criminal Law: Attorneys at Law.** Where defendant's trial counsel performs at least as well as a lawyer with ordinary training and skill in the criminal law and conscientiously protects his client's interest, he has met the criteria of effective trial counsel.
6. **Criminal Law: Continuances.** An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Lawrence I. Batt, for appellant.

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

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

SPENCER, J.

Defendant appeals his conviction for the offense of a felon in possession of a firearm. He predicates his appeal on five issues: (1) The alleged unconstitutionality of the statute, section 28-1011.15, R. S. Supp., 1972; (2) the submission to the jury of his status as a felon; (3) ineffective assistance of counsel; (4) the illegality of his initial detention; and (5) the insufficiency of the evidence. We affirm.

During the evening of May 21, 1973, three Omaha police officers, cruising in the area of Twenty-fourth and Erskine Streets, observed eight people congregated near the intersection. The officers recognized some of the parties from past arrests. Two of them got out of the vehicle and approached the group while the third officer, Gary Bolen, proceeded to park the car. As he got out of the vehicle he noticed two parties walking to the south away from the others. One of them turned a corner and started walking west on Erskine Street. Bolen called out to him that he was a police officer and wished to talk to him. The individual quickened his pace. The officer did likewise, called to him again, and after another 20 feet the individual stopped beside a trash can. The officer observed the individual who he later recognized as the defendant, remove a shiny object from his under shirt. He heard a loud thud when the object went into the trash can. He took the defendant to another officer and went back to check the trash can, where he found a loaded 22-caliber revolver. Officer Bolen subsequently ran a check on the gun and found that it was registered to one Eddie Walker of Omaha. The evidence would indicate that Eddie Walker was at

Twenty-fourth and Erskine Streets on the evening in question.

Defendant denied possession of the firearm. He testified he went to Twenty-fourth and Erskine Streets that evening to pick up his sister at a lounge at that location; he walked away from the crowd because he did not have any identification on him; and he was on parole and one of its conditions was to have identification on him at all times, and another was to stay away from the area of Twenty-fourth and Erskine Streets.

The statute which defendant claims is unconstitutional on its face for overbreadth is as follows: "It shall be unlawful for any person who has been convicted of a felony, or who is a fugitive from justice, to possess any firearm with a barrel less than twelve inches in length, or brass or iron knuckles. Such felony conviction may have been had in any court of the United States, the several states, territories, or possessions, or the District of Columbia."

Defendant admits the intent of the Legislature and the terms of the statute itself are basically clear and unambiguous, but argues this intent is not constitutionally acceptable. He argues: "The possession of a hand gun, even by a felon, is not an act which is *malum in se*. Rather, such possession is *malum prohibitum* and therefore governed by considerations of reasonableness." We assume defendant is arguing the statute is unconstitutionally overbroad because it includes felons whose prior offenses did not involve the use of firearms.

A federal law, 18 U. S. C. A., § 922 (g), provides: "(g) It shall be unlawful for any person—

"(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; * * * to ship or transport any firearm or ammunition in interstate or foreign commerce."

This statute was challenged in United States v. Weatherford (7th Cir., 1972), 471 F. 2d 47, on the ground

that it creates an illegal classification of citizens. Weatherford challenged the constitutionality of the alleged wide disparity between the states on the severity of punishment for essentially the same criminal act. For instance, what might be a misdemeanor in New York could be a felony in Louisiana. The court, in upholding the constitutionality of the statute, said: "It seems crystal clear that the purpose of Congress in enacting this legislation was to eliminate firearms from the hands of criminals, while interfering as little as possible with the law abiding citizen."

In State v. Skinner (1973), 189 Neb. 457, 203 N. W. 2d 161, we held the statute in question constitutional against a challenge of violation of the Second Amendment to the United States Constitution.

It is well established that all reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature. If the classification of persons singled out by the legislation is reasonable and not arbitrary, and is based on substantial differences having a reasonable relation to the persons dealt with and the public purpose to be achieved, it meets the constitutional test of equal protection.

This legislation is specifically limited to convicted felons who by past conduct have demonstrated little regard for the rights of others. The classification created is not only reasonable and practicable but also necessary for the protection of society.

Defendant next assigns as error the submission to the jury of his status as a convicted felon. He argues that the issue of possession of the gun should have been submitted to the jury prior to and apart from the issue of his status as a felon. There is obviously no merit to defendant's contention. His status as a felon was an essential element of the crime. Without evidence of a prior conviction of a felony, there can be no conviction under section 28-1011.15, R. S. Supp., 1972. No evidence

was adduced herein on defendant's two previous felonies because the defendant stipulated that he had been convicted of a felony.

Defendant, who is represented by other counsel on this appeal, alleges that he was denied his constitutional right to effective assistance of counsel in his trial. To sustain this position, using after-trial vision, defendant claims trial counsel: (1) Did not file a motion to require the State to allege which felony it was using as a basis for his prosecution; (2) offered no objection to the introduction of the revolver into evidence; (3) made no challenge as to the probable cause for an arrest or the reasonableness of the detention of defendant; (4) acquiesced in the deprivation of defendant's rights to have process to compel the attendance of witnesses in his behalf; and (5) did not sufficiently cross-examine officer Bolen, the chief prosecution witness.

There is no merit to this assignment. Defendant did not deny that he was a convicted felon. He admitted two previous felony convictions. Trial counsel, undoubtedly as a part of trial strategy to minimize the effect of defendant's record, thought it best not to spread the details of the previous convictions on the record.

Defendant's trial counsel did object to the introduction of the revolver in evidence, contending that no proper and sufficient foundation had been laid for its introduction. While defendant denied that he had ever been in possession of it, the evidence supporting its production was certainly sufficient to raise a jury question.

A review of the record herein indicates that defense counsel vigorously tried to protect the interests of the defendant. Defendant concedes his trial counsel was vigorous at times. We have never seen a criminal record which subsequent counsel could not criticize in some particular. We cannot say that defendant's trial counsel did not perform at least as well as a lawyer with ordinary training and skill in the criminal law, or that he did not conscientiously protect his client's interest.

On the record, we find the defendant had effective assistance of counsel.

Defendant assigns as error his counsel's failure to move for a continuance in order to secure the attendance of two witnesses. The record indicates the jury was picked on Tuesday, the trial was in recess on Wednesday, and commenced on Thursday, November 1, 1973. The trial was set for 9 a.m. on November 1, but the defendant did not appear until 10:15. The subpoenas for the two witnesses were issued Thursday morning, but the sheriff was unable to locate them. Defense counsel advised the court he had been assured the witnesses would be there, which was the reason he did not issue the subpoenas until it became obvious that they were not going to be present.

The court inquired what the proposed witnesses would testify to. He was informed that their testimony would be the same as that of the defendant's witness, Shaw. The only difference was that defendant's witness Shaw had a previous conviction for a felony, whereas the two witnesses who had not appeared had no felony convictions. The court then recessed the trial until 2:15 that afternoon. From the record it is apparent that any further requests for continuances would have been ineffectual. In Phillips v. State (1953), 157 Neb. 419, 59 N. W. 2d 598, we held: "An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby." The absent witnesses would have testified defendant did not have a revolver when he left his home. The testimony was at most cumulative. The witnesses were friends of the defendant. He elected to rely on their promise to appear. We cannot say that counsel can be criticized as ineffectual on this record.

Defendant asserts the illegality of his initial detention. The questions involved are whether the officer's action was justified at its inception, and whether it was reason-

ably related in scope to the circumstances which justified an identification stop. We answer both questions in the affirmative. Defendant was in a high crime area where he concedes he had no right to be under the terms of his parole. When the officer observed defendant hurrying away, he identified himself as an officer and advised defendant he wanted to talk to him. Defendant quickened his pace and continued moving away. When defendant stopped, the officer observed him remove a shiny object from his person and drop it into a trash can. He then took defendant into custody until he could search the trash can. After he did so and found the revolver, defendant was arrested.

Defendant's claim of insufficiency of the evidence seems to be predicated on his assertion that the gun found in the trash can was not his. Defendant testified officer Bolen called him by name. "He said, 'Haynes, hold it.' So I walked a little further and he called me again." He then stopped and the officer "spread-eagled" him against the trash can. He denied that he threw anything into it. The evidence was sufficient to present a jury question.

For the reasons stated, there is no merit to any of defendant's assignments of error. The judgment is affirmed.

AFFIRMED.

WHITE, C. J., participating on briefs.

RICHARD EUGENE PRETTYMAN, APPELLANT, V. MERLE KARNOPP ET AL., APPELLEES.
222 N. W. 2d 362

Filed October 17, 1974. No. 39386.

1. **Arrest: Words and Phrases: Extradition.** "Arrest" within the meaning of 18 U. S. C. A., § 3182, means an arrest caused by the executive authority of the asylum state, after formal demand in compliance with the statute has been made by the governor of the state from which the prisoner fled.

2. **Arrest: Time: Extradition.** Under the federal Constitution and statutes, a person arrested on a demand for extradition is entitled to be discharged if the agent of the demanding state does not appear and take custody of him within the prescribed statutory time, but such provisions do not apply so as to entitle him to be discharged where the delay is due to proceedings instituted to test the validity of his arrest.

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

Richard Eugene Prettyman, pro se.

Clarence A. H. Meyer, Attorney General, and Terry R. Schaaf, for appellees.

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

BRODKEY, J.

This case involves an appeal from a denial of a petition for habeas corpus filed by appellant in the District Court for Lancaster County. He was originally held in custody in this state on a fugitive from justice warrant pending the instigation of extradition by the State of Iowa and the issuance of a Nebraska Governor's warrant. His petition for a writ of habeas corpus was filed on November 2, 1973, his principal claim being that he was entitled to release from custody pursuant to 18 U. S. C. A., § 3182. The matter was tried on November 21, 1973, at which time the court found the contention to be without merit and denied the petition for writ of habeas corpus. He subsequently filed a motion for new trial, which was also denied on December 17, 1973, and he thereafter perfected an appeal to this court. We affirm.

By way of background, appellant was tried and convicted in the State of Iowa on February 16, 1970, for the felony offense of selling narcotic drugs. Following post-trial motions, sentencing was set for March 18, 1970; but appellant did not appear on that date. Sev-

eral years later appellant was extradited by the State of Nebraska from the State of California on a charge of escape from custody and possession of marijuana. He was tried and convicted on both charges and was sentenced to 1 year on the escape from custody charge and 30 days on the charge of possession of marijuana, those sentences to run concurrently. His release date on that sentence was August 19, 1973. He was arraigned in county court on August 24, 1973, on a fugitive from justice complaint, and on September 17, 1973, the Governor of Iowa issued a demand warrant seeking extradition of the petitioner. The following day, September 18, 1973, the Governor of the State of Nebraska issued a warrant of arrest authorizing continued incarceration of the petitioner for the purpose of complying with the demand warrant. On September 25, 1973, he was taken before the District Court for Lancaster County, where counsel was appointed and his rights were explained to him. He did not waive extradition. He was, however, given until October 5, 1973, to file a habeas corpus action and on October 24, 1973, he was again granted leave to file such an action, and did so on November 2, 1973. A hearing on the petition, as amended, was held on November 21, 1973, and the petition was dismissed. Hearing on a motion for "new hearing" was held on December 17, 1973, which motion was overruled. Subsequently he filed a motion to be admitted to bail, and that motion was also overruled. Appellant thereafter appealed to this court.

Appellant's main contention is that he should have been released pursuant to his application for a writ of habeas corpus based upon the fact that no agent from the State of Iowa appeared to take custody of him and return him to that state within 30 days of the issuance of the Nebraska Governor's warrant. This is made clear from the following language taken verbatim from his brief filed in this appeal: "Plaintiffs allegations and

position is a simple one: the only matter that was under consideration is whether or not any agent from state of Iowa caused his body to be removed back to the state of Iowa within thirty days secondarily whether plaintiff had legal right to have effected his removal within thirty days from date of issuance of Governor's warrant." In support of his contention appellant relies upon 18 U. S. C. A., § 3182, which he claims is controlling in the matters of interstate extradition, and supersedes any state statutes upon the subject so far as they may be in conflict therewith. 18 U. S. C. A., § 3182, referred to above, provides as follows: "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest the prisoner may be discharged."

The appellant argues that since more than 30 days passed from the time of his "arrest" and the time that his petition for writ of habeas corpus was filed, this state is required under 18 U. S. C. A., § 3182, to release him from custody. We feel that appellant is correct in his contention that § 3182, is applicable in this case, as the general rule appears to be that proceedings for

the interstate extradition of criminals are controlled by federal law, being provided for directly by the Constitution and implemented by federal legislation. Art. IV, sec. 2, Constitution of United States; 18 U. S. C. A., § 3182; Smith v. State of Idaho, 373 F. 2d 149 (1967); Day v. Keim, 2 F. 2d 966 (1924); § 29-730, R. R. S. 1943.

At the outset, we wish to point out that we believe appellant is in error when he argues that the 30-day period provided for in 18 U. S. C. A., § 3182, had run under the facts of his case. He construes the word "arrest" as used in the foregoing statute as meaning the date of his arrest on a fugitive warrant. He is mistaken in this assumption. The term "arrest" as used in the foregoing statute has been interpreted to mean an arrest caused by the executive authority of the asylum state, after formal demand in compliance with the statute has been made by the governor of the state from which the prisoner has fled. People ex rel. Heard v. Babb, 412 Ill. 507, 107 N. E. 2d 740 (1952). In this case appellant was arrested under the warrant from the Governor of Nebraska on September 18, 1973. On September 25, 1973, the District Court for Lancaster County appointed counsel for him, explained his rights and he was given until October 5, 1973, to file his habeas corpus action. Subsequent thereto, he was again given an extension to file the habeas corpus action. The case has been in that court since the above date at which time, by his own initiative, he started the judicial machinery in motion. Obviously less than 30 days had elapsed between the time of his arrest and that time. However, even assuming, without admitting, that the 30-day period had elapsed, it is clear that he is not entitled to the relief requested under his petition for habeas corpus.

The language appearing in said section: "If no such agent appears within thirty days from the time of the arrest the prisoner *may* be discharged" is clearly per-

missive, not mandatory. (Emphasis supplied.) In McEwen v. State of Mississippi, 224 So. 2d 206 (1969), the court ruled that under the United States statute pertaining to extradition proceedings, discharge of accused by asylum state is not mandatory if an agent of the demanding state does not appear within 30 days from the time of arrest, citing 18 U. S. C. A., § 3182. However, an even more cogent reason exists for denying appellant's claim that he was entitled to be released because of the failure of the officer from Iowa to appear within 30 days. It is clear from the record in this case that the delay was caused by appellant's own acts. His purpose in filing the habeas corpus proceeding was to test the validity of his detention. The general rule is stated in 35 C. J. S., Extradition, § 18, p. 444, as follows: "Under the federal Constitution and statutes, a person arrested on a demand for extradition is entitled to be discharged if the agent of the demanding state does not appear and take custody of him within the prescribed statutory time, *but such provisions do not apply so as to entitle him to be discharged where the delay is due to proceedings instituted to test the validity of his arrest.*" (Emphasis supplied.)

In Foley v. State of New Jersey and State of California, 32 N. J. Super. 154, 108 A. 2d 24 (1954), the court held that the statutory provision for discharge of a person demanded in extradition proceedings when agent for demanding state has not appeared to take custody contemplates a situation where an accused has been taken into custody on a rendition warrant and no proceedings have been instituted to test the validity thereof. In the opinion the court stated: "During practically all of the time that ensued from the inception of the proceedings before Judge Dzick up to the present time, Mr. Foley has been free on bail. If the agent from California had appeared it is obvious that the agent could not have taken physical custody of Mr.

Foley. We are inclined to the view that the provision in question contemplates a situation where an accused has been taken into custody on a rendition warrant and no proceedings have been instituted to test the validity thereof." The case of Smith v. State of Idaho, *supra*, contains language of the court which we feel is particularly appropriate to this case: "The State of Missouri is not to be penalized for awaiting the outcome of valid court proceedings, brought by appellant himself, before undertaking the expense of sending its agent to claim appellant for extradition." Likewise, in this case, the State of Iowa should not be required to incur the expense of sending agents to Nebraska to pick up the appellant until the final termination of his habeas corpus action. Appellant's assignment of error on this point must fail.

The appellant has also raised certain subsidiary issues in his appeal to this court. It appears from the bill of exceptions that the trial court considered these alleged errors in its decision announced at the conclusion of the habeas corpus action, and ruled adversely upon them. We have reviewed the entire record in this case and have concluded that the errors suggested by appellant were without merit and that the proceedings in the District Court were proper in every respect. The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurs in result.

EUELL MARION, APPELLANT, V. AMERICAN SMELTING AND REFINING CO., APPELLEE.
222 N. W. 2d 366

Filed October 17, 1974. No. 39389.

1. **Workmen's Compensation: Appeal and Error: Evidence.** On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the find-

ings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence.

2. ———: ———: ———. 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.

3. **Words and Phrases: Evidence.** Reasonable certainty and reasonable probability mean exactly the same thing when used in medical testimony.

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

Larry E. Welch of McGroarty, Welch, Langdon & McGill, for appellant.

Joseph K. Muesey of Fraser, Stryker, Veach, Vaughn & Muesey, for appellee.

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and COLWELL, District Judge.

SPENCER, J.

Plaintiff prosecutes this appeal from the denial of his workmen's compensation claim for disability as a result of two distinct diseases caused by ingestion of lead into his system. A single judge entered an award in favor of the plaintiff. Upon appeal the Nebraska Workmen's Compensation Court en banc, in a split decision, found: "That the plaintiff has failed to maintain the burden of proving by a preponderance of the evidence that there is a causal connection between the disability complained of by the plaintiff and his employment by the defendant and his petition should therefore be dismissed." The District Court affirmed the order of dismissal. Plaintiff perfected his appeal to this court. We affirm.

Plaintiff was employed by the defendant for 5 years, from 1951 through 1956. Prior to that time, he had worked for four major meat packing houses for about 15 years. Plaintiff's petition was filed August 10, 1972, or 16 years after his employment by defendant.

Defendant was in the business of refining lead at the time of plaintiff's employment. Plaintiff worked as a laborer, doing sweeping and cleanup work in the areas where the company melted lead. He also worked as a skimmer, apparently skimming residue off the molten lead in the kettles. Plaintiff testified that prior to 1954, his health was normal. His troubles began thereafter. Defendant's business records indicate that annual urine samples showed plaintiff's lead absorption was apparently normal in 1953 and 1954. No entries were made for 1955 and 1956.

Plaintiff's doctor examined plaintiff in 1972, and found him suffering from gout and hypertension, and suspected that lead was the culprit. Plaintiff's medical witnesses testified they believed plaintiff's illness was secondary to lead intoxication, probably ingested during his employment by defendant, and that his neurological difficulties were consistent with a diagnosis of lead poisoning.

Defendant called medical experts in the area of occupational diseases. They were of the opinion that plaintiff's exposure to lead through his employment with defendant was not the cause of his current disabling medical problems, and suggested alcohol as a more probable cause. These medical experts, who had done considerable research in this particular field, testified positively that there was no relationship between plaintiff's present condition and his employment by the defendant. Additionally, the evidence of plaintiff's experts was considerably weakened or neutralized on cross-examination.

The standard of review in workmen's compensation cases in this court was set out in Gifford v. Ag Lime, Sand & Gravel Co. (1971), 187 Neb. 57, 187 N. W. 2d 285. We there held: "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.

"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."

Where the record in a case reflects nothing more than a resolution of conflicting medical testimony, there appears no purpose in this court substituting its judgment of facts for the judgment of the compensation court. We therefore affirm the dismissal of plaintiff's petition.

Plaintiff devotes several pages of his brief to an attempt to determine whether this court has moved away from the rule of establishing causation to the degree of reasonable certainty to a more liberal rule of establishing causation to a degree of reasonable probability. Actually, this is a distinction without a difference.

In Welke v. City of Ainsworth (1965), 179 Neb. 496, 138 N. W. 2d 808, we defined "probably" as "reasonably; credibly; presumably; in all probability; so far as the evidence shows; and, very likely." We suggested that on many occasions in the past we had said "an award of compensation in a workmen's compensation case may not be based on possibility, *probability,* or speculative evidence," and suggested that a review of those cases indicated that the decisions would have been the same in every instance if we had merely said the award " 'may not be made on possibilities or speculative evidence.' "

We further suggested that in the area of certain disabilities, it is impossible for a reputable doctor to testify with absolute certainty that one cause and one cause alone is the reason for the disability. Absolute certainty is not required. Medical diagnosis is not that exact a science. Even though in most instances a certain result may follow, to be accurate the medical expert hedges by the use of the word "probably." A review of the cases since Welke v. City of Ainsworth, *supra,* demonstrates that reasonable certainty and reasonable prob-

ability mean exactly the same thing when used in medical testimony.

For the reasons stated, the judgment of dismissal is affirmed.

AFFIRMED.

IN RE ESTATE OF JESSIE ALWENA GARFIELD, DECEASED. MARGARET LOOMIS, APPELLANT, V. ESTATE OF FRANK B. DAVENPORT, DECEASED, APPELLEE.

222 N. W. 2d 369

Filed October 17, 1974. No. 39398.

1. **Wills: Trial: Evidence: Undue Influence.** When the party alleging undue influence establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden of going forward with the evidence then shifts to the opposite party.
2. ———: ———: ———: ———. Where the evidence establishes there was no undue influence the presumption disappears. The presumption is not evidence itself but only sustains the burden of proof until evidence rebutting the presumption is introduced.

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

Blevens, Bartu, Blevens & Jacobs, for appellant.

George E. McNally, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding to contest a paragraph of the will of Jessie Alwena Garfield, deceased. The plaintiff, Margaret Loomis, a residuary beneficiary, alleged the devise and bequest made in paragraph "second" of the will was the result of undue influence. There was no issue concerning due execution of the will or testamentary capacity. At the close of the evidence the trial court sustained the motion of the defendant

to admit the will to probate in its entirety. The plaintiff has appealed.

The deceased died on January 11, 1973. She was a single person and had been handicapped since birth. After the death of her mother, Verda Garfield, on April 26, 1962, the deceased lived in various rest homes.

The will was made on April 29, 1962, the day of the funeral of the mother of deceased. The deceased was hospitalized at Ingleside, Nebraska, at that time and was brought to David City on the day of the funeral. After the will had been executed she was returned to the hospital at Ingleside.

Paragraph second of the will devises 80 acres of land in Butler County, Nebraska, and a small residence in Octavia, Nebraska, to Frank B. Davenport. The bequest of the furniture in the house was ineffective because the furniture had been sold during the lifetime of the deceased. The rest of the property of the deceased, consisting of 240 acres of land in Butler County was devised to John Conson, Ida Conson, and Margaret Loomis, share and share alike.

John Conson is an uncle of the deceased who resides in Litchfield, Minnesota. Ida Conson, an aunt of the deceased, predeceased her. Margaret Loomis is a cousin of the deceased who resides in Indianapolis, Indiana, and is the plaintiff contestant.

Frank B. Davenport died on January 28, 1973. He was survived by Maude Davenport and Miriam Welton, who have succeeded to his interest.

Frank B. Davenport and his wife were friends of Sidney Garfield, the father of the deceased. After the death of Sidney Garfield on November 6, 1958, Davenport was appointed guardian for Verda Garfield and the deceased. After the death of Verda Garfield in 1962, Davenport continued as guardian for the deceased until her death. The record shows the deceased and her mother were dependent upon Davenport for advice and assistance in business matters after the death of Sidney

Garfield. Davenport and his wife did many things for the deceased and her mother. The relatives of the deceased, and especially Margaret Loomis, lived in distant states and were unable to help the deceased and her mother with day-to-day problems. It is apparent from the record that it was logical and appropriate for the deceased to make some provision for Davenport in her will.

The evidence shows that on the day of her mother's funeral, a Sunday, the deceased was brought to the Davenport home where a luncheon was served before the funeral. After the funeral the parties returned to the Davenport home. The deceased announced that she wanted to make a will. Frank Davenport then called Ray Sabata, an attorney, and arranged for the deceased to see Mr. Sabata at his office that afternoon.

Davenport and his wife took the deceased to the Sabata office where the will was prepared and executed and a petition for the administration of the estate of Verda Garfield, deceased, was signed.

Because of the confidential relationship existing between Davenport and the deceased, and his assistance in arranging for the conference with the lawyer, the trial court held there was a presumption of undue influence so far as the devise to Davenport was concerned. When the party alleging undue influence establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden of going forward with the evidence then shifts to the opposite party. See Cunningham v. Quinlan, 178 Neb. 687, 134 N. W. 2d 822.

After proof of the confidential relationship between the deceased and Davenport had been established, the defendant then proved all the circumstances surrounding the execution of the will. This evidence established a complete absence of undue influence by Davenport upon the deceased.

The plaintiff contends the trial court should have submitted the issue of undue influence to the jury because

the presumption once established should continue and be considered sufficient to carry the case to the jury. The plaintiff misconceives the purpose and effect of the presumption arising from proof of a confidential relationship between the testatrix and the devisee.

Where the evidence establishes there was no undue influence the presumption disappears. The presumption is not evidence itself but only sustains the burden of proof until evidence rebutting the presumption is introduced. See In re Estate of Kajewski, 134 Neb. 485, 279 N. W. 185. There was no evidence in this case which would have sustained a finding of undue influence. The order withdrawing the issue from the jury was proper.

At the beginning of the trial the plaintiff requested the right to open and close. The trial court ruled the case would be tried in the District Court on the same issues as in the county court. Since the defendant had the burden to prove due execution of the will and testamentary capacity in the county court, the defendant was required to proceed first in the District Court and was given the right to open and close. The plaintiff contends this ruling was erroneous.

The procedure in this case conformed to the practice which has been followed generally for many years. Seebrock v. Fedawa, 30 Neb. 424, 46 N. W. 650. See, also, Sorensen v. Sorensen, 68 Neb. 483, 94 N. W. 540, and on rehearing, 68 Neb. 490, 98 N. W. 837, 68 Neb. 500, 100 N. W. 930, 68 Neb. 509, 103 N. W. 455.

Since the case was decided upon motion at the close of the evidence and not submitted to the jury, there was no prejudice to the plaintiff and it is not necessary to determine whether the ruling was erroneous in this case.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JUANITA MAE GILPIN, APPELLANT.

222 N. W. 2d 372

Filed October 17, 1974. No. 39458.

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

Paul E. Watts, J. Joseph McQuillan, Gerald E. Moran, and George R. Sornberger, for appellant.

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

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

BOSLAUGH, J.

The defendant pleaded guilty to larceny from the person and was sentenced to imprisonment for 18 to 36 months. She has appealed and contends the sentence was excessive.

The defendant is single and was 18 years of age at the time the crime was committed. She completed the 8th grade in school and now has one child.

The defendant was originally charged with robbery. The offense took place at about 6 a.m. on July 28, 1973. The defendant, with two other girls, called at the apartment of another woman known as Deborah. After the defendant and the girls were admitted to the apartment, Deborah was severely beaten and was forced to write a statement saying that she was giving her television set to the girls. Deborah escaped and ran from the apartment when she heard one of the girls say they would push Deborah down the fire escape. When the defendant left the apartment with her companions she carried away the small television set belonging to Deborah. The defendant and her companions were together in a bar when they were arrested later that morning.

The defendant has an arrest record dating back to 1962. The circumstances of the crime and her record as a juvenile indicate that she was not entitled to probation. The sentence imposed by the trial court was not an abuse of discretion.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT COLE, ALSO KNOWN AS ROBERT PERCY COLE, APPELLANT.
222 N. W. 2d 560

Filed October 24, 1974. No. 39393.

1. **Criminal Law: Indictments and Informations: Habitual Criminals.** The requirement that 1 day shall elapse between service of an information and arraignment relates to the charge which is to be tried and does not apply to a charge that the defendant is an habitual criminal.
2. **Criminal Law: Evidence: Habitual Criminals.** A previous judgment and commitment in the same court may be proved by a certified copy of the judgment and commitment.

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

Frank B. Morrison, Sr., and Thomas D. Carey, for appellant.

Clarence A. H. Meyer, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

BOSLAUGH, J.

The defendant was convicted of robbery and sentenced to imprisonment for 12 to 30 years. The crime was a strong arm robbery committed in a restroom of a bowling alley in Omaha, Nebraska. The defendant was appre-

hended near the scene of the crime and identified as the robber.

The information originally charged only robbery. On the day the trial commenced the State was allowed to add a count that charged the defendant was an habitual criminal. Although there was no service of the amended information on the defendant until the day of the trial, there was no prejudicial error because the amendment did not relate directly to the charge being tried.

The purpose of section 29-1802, R. R. S. 1943, is to insure the defendant has a reasonable time in which to prepare his defense. Shepperd v. State, 168 Neb. 464, 96 N. W. 2d 261. The habitual criminal charge was not heard by the jury and was not presented to the trial court until a week later.

The defendant also complains the State was allowed to prove two previous convictions by certified copies instead of "duly authenticated" copies of the judgment and commitment as provided in section 29-2222, R. R. S. 1943.

The previous convictions were in the same court, the District Court for Douglas County. The certified copies of the judgments showed the defendant had been sentenced to 4 years imprisonment for assault with intent to inflict great bodily injury in 1956, and to 15 years imprisonment for rape in 1962.

Where the previous judgment and commitment was in the same court, a certified copy of the judgment and commitment is admissible to prove the previous conviction. See, State v. Clingerman, 180 Neb. 344, 142 N. W. 2d 765; State v. Bundy, 181 Neb. 160, 147 N. W. 2d 500.

There being no error, the judgment of the District Court is affirmed.

AFFIRMED.

WHITE, C. J., participating on briefs.

WAYNE DAVY ET AL., ON BEHALF OF THEMSELVES AND ALL OTHER TAXPAYERS AND ELECTORS OF THE SCHOOL DISTRICT OF COLUMBUS, PLATTE COUNTY, NEBRASKA, APPELLANTS, V. SCHOOL DISTRICT OF COLUMBUS, IN THE COUNTY OF PLATTE, IN THE STATE OF NEBRASKA, ET AL., APPELLEES.

222 N. W. 2d 562

Filed October 24, 1974. No. 39410.

Schools and School Districts: Contracts: Officers. In an action by a taxpayer to have declared void upon the grounds of public policy or prohibiting statute a contract for the purchase of real estate by a school district from an officer thereof, there can be no recovery of the purchase price in a case where the real estate is unchanged by improvements thereon and can therefore be readily returned unless the school district offers, or by being made a party can be compelled, to reconvey the title and deliver possession.

Appeal from the District Court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

Winkle & Allphin, for appellants.

Walter, Albert, Leininger & Grant and Walker, Luckey, Whitehead & Sipple, for appellees.

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

CLINTON, J.

This is an action by taxpayers of the School District of Columbus, Platte County, against the school district and the grantors in a deed of conveyance to the school district, brought under the provisions of the Declaratory Judgments Act, to have determined the legality of a contract for the sale of real estate by the individual defendants to the defendant school district. At the time the contract was authorized by the board of the defendant district, the defendants William E. Callihan, who was a member of the school board, and his wife were owners of an undivided one-half interest in the land. The other individual defendants were the owners

of the other undivided one-half interest. The petition alleges that the contract is null and void because contrary to public policy in that Callihan's interest as seller conflicts with his public obligation as a member of the school board. The prayer of the original petition was for a declaration that the "acquisition" of the real estate was *null and void* and to direct repayment of the purchase price with interest.

Later the plaintiffs requested leave of the court to file an amended petition requesting *affirmation* of the contract and restoration of the purchase price of $68,500. Leave was granted and thereafter the prayer was amended to read as follows: "WHEREFORE plaintiffs pray the Court declare that the aforesaid payment of $68,150.00 was unauthorized, improper, against public policy, and contrary to law, and order defendant, William E. Callihan and Maxine L. Callihan and Eugene L. Treadway, Sr. and Frieda Tredway, to refund the $68,150.00 so paid to them, plus interest, and that plaintiffs be allowed a reasonable attorneys fee and the costs of this action."

After the amendment the school district filed a demurrer to the petition. The demurrer was sustained. The plaintiffs did not replead. Thereafter the matter proceeded on the theory that the district was no longer a party to the action. The matter went to trial as between the plaintiff taxpayers and the individual defendants without participation by the district.

The trial court found that the transaction was not prohibited by law at the time it was made and the sale consummated; that neither Callihan nor any of the defendants had attempted to influence the board; that Callihan did not participate in the decision of the board to acquire the land; and that the price paid was reasonable.

The plaintiffs' petition was dismissed. The plaintiffs appeal. We affirm.

At the time of the transaction in question, section 79-442, R. R. S. 1943, provided in part as follows: "Except as provided in section 70-624.04, no school officer shall be a party to any oral or written school contract for building, furnishing supplies, or services in amounts in excess of two thousand dollars in any one school year, and no contract may be divided for the purpose of evading the requirements of this section; . . . ." The statute then exempted certain transactions and provided penalties for violation. The statutes make no mention of contracts for sale of real estate.

The theory of the defendants is that since the contract of conveyance in question is not within the express prohibitions of the above statute it is lawful. The position of the plaintiffs is that the contract and conveyance are void under the common law doctrine prohibiting such contracts by public officers on grounds of public policy relating to conflicts of interest. They cite and rely upon textual authority and the following decisions of this court: Grand Island Gas Co. v. West, 28 Neb. 852, 45 N. W. 242; Heese v. Wenke, 161 Neb. 311, 73 N. W. 2d 223; and Arthur v. Trindel, 168 Neb. 429, 96 N. W. 2d 208. In the latter case this court was considering sections 16-502 and 16-325, R. R. S. 1943. We there stated: "Such sections are merely declaratory of the common law, and of public policy, which declare that such contracts are void." The defendants counter that section 79-442, R. R. S. 1943, is inconsistent with the common law and the transaction is authorized because the statute does not prohibit it.

It is apparently the plaintiffs' position that the money may be ordered repaid but the school district may keep the real estate. The record would indicate, and apparently the parties concede, that the real estate in question has not been improved by erecting thereon a school structure or any other improvement, and that no such improvement is scheduled in the near future.

The plaintiffs' position seems bottomed upon our opinions which have denied a public officer quantum meruit recovery. In Heese v. Wenke, *supra,* a taxpayer sought recovery from a village officer of the amount paid for material furnished in violation of the statute, § 17-611, R. R. S. 1943. The officer defended on the ground, among others, that the contract price was the reasonable value of the property and that he was entitled to recover under a quantum meruit. The court found for the plaintiffs and held there could be no recovery upon quantum meruit. Thus the village received the benefit of the materials and also the return of the price paid. This opinion expressly overruled Grand Island Gas Co. v. West, *supra,* insofar as that case held that the city must do equity by paying the reasonable value of the materials furnished. Arthur v. Trindel, *supra,* was a taxpayer's action to recover from a salaried member of the city's board of public works compensation for services furnished in connection with his job as such member and also for materials furnished. The statute was a broad one, prohibiting the officers from having any interest, directly or indirectly, in any contract with the city. The officer, in a cross-petition, claimed the fair and reasonable value of the merchandise furnished and the services rendered. The court held the contract void, denied recovery on quantum meruit, and rejected the contention that the statute resulted in the unconstitutional imposition of a penalty.

The defendants cite Scheschy v. Binkley, 124 Neb. 87, 245 N. W. 267; and Neisius v. Henry, 142 Neb. 29, 5 N. W. 2d 291. In the latter case, recovery was sought from the surety of the officer's bond for compensation paid in excess of the lawful salary. Here the officer again sought recovery on quantum meruit. The court cited Scheschy v. Binkley, *supra,* saying: "In Scheschy v. Binkley, 124 Neb. 87, 245 N. W. 267, plaintiff brought an equitable action for an accounting and to recover

for funds paid to school board members who performed services for the district in erecting and repairing temporary school buildings. The district was required to pay for benefits received. We think this decision was correct, but that it has no application to the case at bar. The applicable statute provided that 'No school officer shall be a party to any school contract for building or furnishing supplies, except in his official capacity as a member of the board.' Comp. St. 1929, sec. 79-513. No attempt was made by the legislature to avoid the obligation of the contract as is done by section 17-517, Comp. St. 1929. A school officer may not be a party to a school contract except in his official capacity, but he is not foreclosed of any right he may have exclusive of the contract. Consequently, if the contract is unenforceable, no reason exists why a recovery quantum meruit could not be had. We do not think that this case is a controlling authority in the case at bar." We point out that Scheschy v. Binkley, *supra,* relied upon Grand Island Gas Co. v. West, *supra,* which, insofar as it authorized recovery on a quantum meruit, was overruled in Heese v. Wenke, *supra.*

We believe there is a critical distinction between the cases upon which the plaintiffs rely and the principles properly applicable under the facts we have here. If we assume that the contract in question is void under the common law (there is substantial authority for that proposition in addition to our own cases cited by the plaintiffs), although not prohibited by section 79-442, R. R. S. 1943, the plaintiffs are nonetheless not entitled to the relief for which they pray.

It is apparent that denial of recovery on quantum meruit for services performed or materials furnished and consumed or incorporated in improvements is not the equivalent of a holding that the governmental entity is in all cases entitled to keep the benefit of

the unauthorized contract and also recover the consideration paid.

It seems clear to us that where an officer seeks compensation over and above his salary for services rendered, there is nothing for the governmental entity to return. The officer in that case is conclusively presumed to have rendered the services for his authorized compensation. Neisius v. Henry, *supra.* There can, in that case, be no sound claim of unjust enrichment of the governmental unit. In the case of materials received and which have been consumed or incorporated in an improvement there can be no physical return of the property. To authorize recovery on a quantum meruit under such circumstances would either defeat the statute or abrogate the public policy. All the cases cited by the plaintiffs are of these types. In none of the cases cited was the property which had been sold or conveyed still intact, unimproved, and susceptible of being returned.

In the case of Arthur v. Trindel, *supra,* which we earlier cited, we said: ". . . we conclude that the rights of a municipality to retain or recover the proceeds of void contracts such as those at bar are simply those which would accrue to any party under a void contract placed in a comparable position." The general rule is that where a party seeks to rescind a void contract (or one merely voidable), he "must restore or offer to restore the consideration or whatever he must receive under the contract; but the rule is not absolute, is not to be strictly construed where restoration is impossible, and is to be applied in accordance with equitable principles." 17A C. J. S., Contracts, § 439, p. 545. A purchaser of land who is entitled to cancel must restore possession and title. 12 C. J. S., Cancellation of Instruments, § 44, p. 1011. See, also, Langdon v. Loup River P. P. Dist., 139 Neb. 296, 297 N. W. 557; Bowen v. Johnson, 129 Neb. 868, 263 N. W. 215. It seems to

us that the above principles, applicable to contracts and conveyances generally, are to be applied even to contracts claimed to be void because prohibited by public policy in cases where the property has not been consumed, incorporated, or improved and may be readily returned.

The case most nearly like the one at hand comes from another jurisdiction. In Town of Boca Raton v. Raulerson, 108 Fla. 376, 146 S. 576, the court by way of dictum stated what seems a sound principle. In that case the municipal subdivision sought recovery of the money paid for real estate purchased as a site for and upon which a town hall had been erected. In that case there was a statute which prohibited the transaction. The court held that the contract was void and that the purchase price could be recovered. It, however, noted the harshness of the rule and held that it was nonetheless necessary to prevent negation of the statute. It then said: "The adoption of the rule does not necessarily mean that such vendor may not recover the property conveyed under proper proceedings and proof where the property is intact in the vendee."

We need not decide the question of whether section 79-442, R. R. S. 1943, abrogates the common law public policy principle and in effect authorizes the contracts which it does not expressly prohibit. The parties to this action assume without citation of authority that any invalidity which would attach to the Callihan interest in the contract would also affect that of Tredways. We need not decide this question either in the light of the view we take of the matter.

We will assume without holding that the contract in question is contrary to public policy. We hold that in an action by a taxpayer to have declared void upon the grounds of public policy or prohibiting statute a contract for the purchase of real estate by a school district from an officer thereof, there can be no re-

covery of the purchase price in a case where the real estate is unchanged by improvements thereon and can therefore be readily returned unless the school district offers, or by being made a party can be compelled, to reconvey the title and deliver possession. Neither the plaintiffs nor the school district are entitled to have the relief prayed for.

The judgment of the lower court dismissing the petition of the plaintiffs is affirmed.

AFFIRMED.

MIDWEST DEVELOPMENT CORPORATION, A CORPORATION, APPELLANT, IMPLEADED WITH HENRY A. BERNSTRAUCH ET AL., APPELLEES, V. CITY OF NORFOLK, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

222 N. W. 2d 566

Filed October 24, 1974. No. 39419.

1. **Special Assessments: Municipal Corporations.** A property owner may collaterally attack a special assessment only for fraud, actual or constructive, a fundamental defect, or a want of jurisdiction.
2. ———: ———. Where it is alleged and proved that the physical facts are such that the property was not and could not be specially benefited, the levy may be held to be arbitrary, constructively fraudulent, and therefore void, and so may be collaterally attacked.
3. **Special Assessments: Municipal Corporations: Waiver.** All defects, irregularities, and inequalities in the making of assessments, or in proceedings prior thereto, not raised by appeal from the assessment are waived and cannot be questioned in the collateral proceedings.
4. **Special Assessments: Municipal Corporations.** Mere excessiveness of a special assessment may not be corrected in a collateral attack upon the assessment.
5. **Special Assessments: Trial.** A property owner who attacks a special assessment as void has the burden of establishing its invalidity.
6. **Special Assessments: Municipal Corporations.** Special assessments are charges imposed by law on land to defray the ex-

pense of a local municipal improvement, on the theory that the property owner has received special benefits from the improvements in excess of the benefits accrued to people generally.

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

Brogan & Stafford, for appellant.

Jewell, Otte, Gatz & Collins, for appellees City of Norfolk et al.

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and COLWELL, District Judge.

CLINTON, J.

This is an action by the plaintiff property owners to have a special assessment against their property, included in water district No. 74 of the City of Norfolk, declared null and void, and to enjoin the collection of the assessment on the grounds that the assessment was arbitrarily made, constructively fraudulent, and illegal. The basis of the claim is that the property assessed was already adequately served by existing private and public water supply and was not and could not be benefited by the improvement. The trial court denied relief. Plaintiff Midwest Development Corporation perfected its appeal to this court. We affirm.

No appeal was taken from the action of the city council of Norfolk levying the assessment. This action is a collateral attack upon the assessment and the issues which the owner may present are therefore limited. A property owner may collaterally attack a special assessment only for fraud, actual or constructive, a fundamental defect, or a want of jurisdiction. Wead v. City of Omaha, 124 Neb. 474, 247 N. W. 24; Wiborg v. City of Norfolk, 176 Neb. 825, 127 N. W. 2d 499. We have held that where it is alleged and proved the physical facts are such that the property was not and could not be specially benefited, the levy may be held to be arbi-

trary, constructively fraudulent, and therefore void, and so may be collaterally attacked. Wiborg v. City of Norfolk, *supra*. All defects, irregularities, and inequalities in the making of assessments, or in proceedings prior thereto, not raised by appeal from the assessment are waived and cannot be questioned in the collateral proceedings. Wead v. City of Omaha, *supra*. Mere excessiveness of a special assessment may not be corrected in a collateral attack upon the assessment. Loup River P. P. Dist. v. Platte County, 141 Neb. 29, 2 N. W. 2d 609. A property owner who attacks a special assessment as void has the burden of establishing its invalidity. Bitter v. City of Lincoln, 165 Neb. 201, 85 N. W. 2d 302. Special assessments are charges imposed by law on land to defray the expense of a local municipal improvement, on the theory that the property owner has received special benefits from the improvement in excess of the benefits accrued to people generally, 63 C. J. S., Municipal Corporations, § 1290, p. 1025.

Since this is a proceeding in equity, we examine the record de novo.

The defendant city, acting under the provisions of section 19-2402, R. R. S. 1943, enacted an ordinance creating the water extension district, and pursuant thereto made the improvements and levied an assessment of $1,158.40 against the plot of land here involved. The evidence shows that the property specially assessed is an undeveloped, rectangular parcel in the southeast corner of a larger 10-acre tract owned by the plaintiff Midwest Development Corporation. The larger tract is bounded on the west by 13th Street and on the south by Omaha Avenue, which latter street is also a principal highway. Omaha Avenue, of course, also abuts on the south side of the assessed property. On the larger tract is located a Holiday Inn, two filling stations, two 1-story office buildings, and a 2 story office and apartment building. These businesses and buildings, at the time of the creation of water district No. 74 and the assessment in ques-

tion, were and had been served by a water main running north and south along 13th Street. The water was distributed to the various facilities from the 13th Street main by a private line constructed and paid for by the plaintiff corporation. This private line does not reach the plot in question, but could be extended to it. The evidence received tends to show that, if extended, the private line would have been adequate to serve it.

The water main for which the special assessments in question were made lies on the south side of Omaha Avenue and would serve properties on both sides of the avenue exclusive of the developed tract belonging to the plaintiff corporation. Each property owner would have to pay the cost of bringing a connecting line from the main to his own property. The water extension improvement in question includes a fire hydrant located on the south side of Omaha Avenue near the tract in question. The closest previously existing hydrant was at the intersection of 13th Street and Omaha Avenue, some 3 or 4 blocks west of the assessed tract.

The plaintiff corporation argues that since the undeveloped tract could be served by an extension of the already existing private line on the developed portion of the tract, it can derive no special benefit from the improvement in water district No. 74. It also argues that because the cost of connections is more than the special assessment and more than the connection cost of owners on the south side of the street, their properties being closer to the main, there can be no special benefit. It further argues that increased fire protection cannot be considered in determining whether there is a special benefit.

The defendant city presented testimony by a real estate broker to the effect that access to the public water supply increased the market value of the tract assessed because among other things it would permit the separate sale and development of the tract without reliance upon a connection with the existing private line for water

supply. Moreover, this witness considered access to a public water supply to be one of the things which a prospective purchaser would consider. He also testified that the area was a developing commercial area and that the highest and best use of the assessed property would be for such enterprises as a motel, restaurant, office building, or other similar commercial enterprise. The fire chief of the city testified that the property was benefited because the new hydrant would eliminate the necessity of relay pumping and make fire fighting equipment more quickly available to the properties in the district, including the subject property. The District Judge, with the consent of the parties, made a personal inspection of the property and the area in question.

We conclude that the property in question was specially, and indeed, substantially benefited by the improvements in the water extension district. The physical facts are not such that the property was not and could not be benefited. The collateral attack must therefore fail. We can in this collateral proceeding consider only the restricted issues authorized under the authorities we have earlier cited. As was stated in Wead v. City of Omaha, *supra*: ". . . we are justified in holding the action arbitrary and fraudulent only where the physical facts disclosed are such that the court can say, beyond question, that the action of the taxing authorities was arbitrary and therefore constructively fraudulent."

We point out in connection with the plaintiff's contention that the property cannot be specially benefited because connection costs exceed the special benefit, the statute under which the district was created, section 19-2402, R. R. S. 1943, specifically provides: "When such extension of the utility service involved is completed, the municipality shall compel all proper connections therewith of occupied properties in such utility district, and may provide a penalty for failure to comply with regulations of the municipality pertaining to such utility districts."

If, as the plaintiff argues, the cost of connection must be offset against the assessment, then, in many cases, there could be no assessment for special improvements at all. Such is not the law. The statute above clearly contemplates that the property owner shall pay the special assessment as well as the connection cost.

The statute makes no mention of increased fire protection as an element of special benefit. This court has, however, recognized that increased fire protection may be of special benefit to assessed property even in a case where the benefit results from street improvements affording better access for fire trucks. Chicago & N. W. Ry. Co. v. City of Omaha, 154 Neb. 442, 48 N. W. 2d 409. The plaintiff cites cases from other jurisdictions which hold otherwise. While the enabling statute does not define water service, we believe that improvements such as fire hydrants are a concomitant of water service and, where installed as part of a water district improvement, the increased fire protection may be considered as an element of benefit. It is certainly a more direct benefit in this case than in a case such as Chicago & N. W. Ry. Co. v. City of Omaha, *supra*. The judgment of the lower court was correct.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BRUCE L. ZOBEL, APPELLANT.

222 N. W. 2d 570

Filed October 24, 1974. No. 39433.

1. **Trial: Evidence.** The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness is usually within the discretion of the trial court, and the ruling concerning it is not reason for reversal of the judgment in the case in the absence of an abuse of discretion.
2. **Trial: Witnesses.** If a witness is cross-examined on a matter collateral to the issue, he cannot as to his answer be subsequently contradicted by the party conducting the examination.

3. ———: ———. The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea.
4. **Criminal Law: Sentences: Presentence Reports.** Unless it is impractical to do so, when an offender has been convicted of a felony, the court shall not impose sentence without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation.

Appeal from the District Court for Buffalo County: S. S. SIDNER, Judge. Affirmed in part, and in part reversed and remanded for resentencing.

Munro, Parker, Munro & Grossart, for appellant.

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

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

CLINTON, J.

Defendant was charged with the crime of delivery of a controlled substance. After trial by jury he was convicted and sentenced to confinement in the Nebraska Penal and Correctional Complex for a period not to exceed 1 year.

On appeal the following questions are presented: (1) Did the court err in limiting the cross-examination of a state undercover agent with reference to his alleged personal Satanistic practices and allegiance and in rejecting an offer of proof of impeaching testimony on the issue? (2) Did the court err in imposing sentence before receiving and considering a presentence investigation report as required by the provisions of section 29-2261, R. S. Supp., 1972?

We reject the defendant's contentions in connection with question number (1) and uphold them in connection with question number (2).

The case for the State rested wholly upon the testi-

mony of Rick L. Houchin, who had commenced working as an undercover agent for the Nebraska State Patrol, Division of Drug Control, about 10 days before the date of the offense charged. He testified to the fact of the purchase of the controlled substance from the defendant. The packaged substance allegedly sold was received in evidence following appropriate identification and expert testimony as to its nature.

The defense was a denial of a sale at any time and testimony that the defendant was not present at the time and place where it is claimed the sale and delivery took place. This alibi rested upon the testimony of the defendant, that of his wife, and of a family friend. Neither the defendant nor his wife had independent recollection of the day in question. However, their activities on that day were purportedly fixed, and their recollections refreshed by, a diary kept by the family friend. A page from the diary was first offered as corroborating evidence, but the offer was later withdrawn and the diary page was not received.

It is apparent that the jury verdict rested wholly upon its determination of the credibility of Houchin and the defense witnesses. The defense made a concerted, direct attack upon Houchin's reputation for truth and veracity by calling witnesses acquainted with him and his reputation in the community.

The attack on credibility was continued through cross-examination where the defense sought to establish Houchin's status as a devotee of Satan. The following occurred: "Q Mr. Houchin, have you attempted to interest other young people in Satanism and the worship of Satan?" Objection was made and the objection sustained. This ruling, it appears, was clearly proper. The defendant then made an offer which is in part as follows: "It is the position of the Defendant that the truth and veracity of this witness is a material element of this case. The line of questioning [by] counsel for the Defendant was" to develop that the witness "*was a Priest of Satan,* . . .

that we would produce witnesses in our case in chief to substantiate these questions, if not answered by the defendant . . . that we would further produce evidence that in order to be a Priest of Satan or a sorcerer, that a necessary element is to foreswear allegiance to God and Christ and accept evil, the embodiment of evil or Satan as omnipotent and that all that is good and truthful is foresworn as part of that allegiance." (Emphasis supplied.) Objection was made to the offer and it was sustained. Cross-examination then continued and the following questions and answers were received without objections. "Q Mr. Houchin, have you ever made an oath rejecting the power of God and Christ and accepting Satan as omnipotent? A No, sir. I have never done that in my entire life. Q Have you ever said that you had done such a thing to any person? A I don't believe I ever said that to anyone." The following question was then asked: "Have you ever said to any person that you were a Priest of the Devil?" Objection was made and sustained. Then two more questions directed to the alleged practice of Satanic rites by the defendant were asked. To each question objection was made on the grounds of irrelevance and immateriality and each objection was sustained. The defendant renewed his previous offer, objection to it again being sustained.

It is clear that the only possible relevance this general subject might have depended upon whether the witness' alleged beliefs affected his disposition to tell the truth. Of the questions asked, accepting at face value the defendant's offer of proof indicating that Satanism entails the rejection of "all that is good and truthful," it is clear that only the two questions which were answered and the one immediately following had any direct relevance on the point of how the witness' claimed beliefs affected his veracity.

As these principal questions were answered by the witness in the negative, was the defendant entitled to introduce impeaching testimony?

It has long been the rule in this state, and is apparently the rule in most jurisdictions, that impeachment by specific acts which bear upon the character trait of veracity is not permitted. Boche v. State, 84 Neb. 845, 122 N. W. 72. The reason is to avoid the pursuit of collateral issues. Boche v. State, *supra*. The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness is usually within the discretion of the trial court and the ruling concerning it is not grounds for reversal in the absence of an abuse of discretion. Hampton v. Struve, 160 Neb. 305, 70 N. W. 2d 74. If a witness is cross-examined on a matter collateral to the issues, his answer cannot be subsequently contradicted by the party conducting the examination. Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701. The witness' alleged activities in the cult of Satan were clearly collateral. The material fact, of course, was the truth of his testimony as to the facts of the crime. If a fact could be proved as a part of the offerer's case, it is material and not a collateral fact. Griffith v. State, *supra*. The court did not abuse its discretion in limiting the pursuit of the collateral facts to the questions which were answered.

The record discloses that, at the time of sentencing, the trial court had not ordered nor received, and therefore could not consider a presentence investigation report as required by the provisions of section 29-2261, R. S. Supp., 1972. We have recently held that this statute must be complied with. State v. Jackson, *ante* p. 39, 218 N. W. 2d 430. The sentence is vacated and the cause remanded with directions to have prepared and give due consideration to such a presentence investigation report.

The judgment of conviction is affirmed and the cause is remanded for resentencing in compliance with section 29-2261, R. S. Supp., 1972.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR RESENTENCING.

WHITE, C. J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. VICTOR LEADINGHORSE, APPELLANT.

222 N. W. 2d 573

Filed October 24, 1974. No. 39434.

1. **Post Conviction.** An evidentiary hearing is not always necessary in order to dismiss a post conviction motion, however, such a hearing is usually advisable to avoid protracted litigation.
2. ———. The Post Conviction Act specifically authorizes the trial court to examine the files and records and to determine whether or not a prisoner may be entitled to the relief he seeks. If the trial court finds from such examination that the proceeding is without foundation, an evidentiary hearing may be properly denied.
3. **Post Conviction: Sentences: Presentence Reports.** The presentence report could be relevant only to the sentence imposed upon the defendant. Sentences imposed within statutory limits furnish no basis for post conviction relief.
4. **Criminal Law: Attorneys at Law.** To meet the test of effectiveness trial counsel should perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and he should conscientiously protect the interests of his client.

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

Alan Saltzman, for appellant.

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

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

SPENCER, J.

This is an appeal from the refusal of the District Court to grant a post conviction motion to vacate defendant's judgment and sentence. Defendant was convicted on a plea of guilty to sodomy and was sentenced to 15 years imprisonment in the Nebraska Penal and Correctional Complex. Judgment was affirmed on direct appeal. State v. Leadinghorse (1971), 187 Neb. 386,

191 N. W. 2d 440. The trial court, after a hearing for that purpose, determined that no evidentiary hearing was required and denied defendant's motion to vacate. We affirm.

The sole issue herein is the refusal of the trial court to grant an evidentiary hearing. An examination of defendant's motion indicates that it is premised on the following allegations: (1) His sentence to 15 years imprisonment is cruel and unusual punishment and in violation of the United States and Nebraska Constitutions; (2) his sentence is unconstitutional since its basis is predicated on a presentence psychiatric report; (3) he was denied effective assistance of counsel; (4) his plea of guilty was involuntary and unintelligent; and (5) he was in effect sentenced for charges which were dropped pursuant to a plea bargain.

An evidentiary hearing is not always necessary in order to dismiss a post conviction motion, however, such a hearing is usually advisable to avoid protracted litigation. We said in State v. Reyes (1974), *ante* p. 153, 219 N. W. 2d 238: "The Post Conviction Act specifically authorizes the trial court to examine the files and records and to determine whether or not a prisoner may be entitled to the relief he seeks. If the trial court finds from such examination that the proceeding is without foundation, an evidentiary hearing may be properly denied." Accordingly, we consider defendant's motion in the light of the files and records herein.

Defendant alleges that his sentence to 15 years imprisonment constitutes cruel and unusual punishment. The maximum penalty for the offense for which he was committed is 20 years. § 28-919, R. R. S. 1943. The severity of defendant's sentence was specifically raised in his direct appeal. It was held not to be excessive under the circumstances and in light of defendant's previous record (State v. Leadinghorse (1971), 187 Neb. 386, 191 N. W. 2d 440). Defendant seeks to avoid our rule that

a defendant who has appealed a conviction cannot secure a second review of the identical proposition examined in that appeal by resorting to a post conviction procedure, by framing the question in a constitutional context.

He bases his present claim on the premise that the act of sodomy was consensual. The opinion on the direct appeal states: "The record would indicate that the offense was forcefully perpetrated on a teen-age boy while both parties were confined in the Buffalo County jail. Appellant at the time was waiting trial on two separate felony offenses, one of which involved assault on a 12-year-old boy."

Regardless of its severity, a sentence of imprisonment which is within the limits of a valid statute ordinarily is not a cruel and unusual punishment in the constitutional sense. This rule is universal and well established, as attested by the collection of state and federal cases in 33 A. L. R. 3d, § 5, p. 359. We are not constrained to hold that a sentence within the limits of the sodomy statute constitutes cruel and unusual punishment.

Defendant's second attack is directed to the presentence hearing and particularly to a psychiatric evaluation furnished a short time prior to the commission of the act for which defendant was convicted and sentenced. The evaluation was made on September 22, 1970, at a time when defendant was in custody on two other felony charges. On January 4, 1971, defendant was charged with two counts of sodomy. The guilty plea was to one of those counts. We have examined the report of the psychiatrist. While he viewed the defendant as having an anti-social personality disorder with alcoholism, and emphasized that he considered him homicidal, we consider the report well within the range specified in Williams v. New York (1949), 337 U. S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337, for consideration at a sentencing hearing.

Defendant implies that he was entitled to a presentence report in writing prepared after conviction. This is now required by section 29-2261, R. S. Supp., 1972. However,

this statute did not become effective until August 27, 1971. Defendant's sentence was imposed on January 12, 1971, or before the adoption of the statute in question. Actually, the court had an F.B.I. report and files of defendant's past offenses before him. These were given to the defendant to read to see if there were any mistakes or exceptions or corrections to be called to the court's attention. The psychiatric reports were also marked as exhibits at the presentence hearing, and the court was told by defendant's counsel that he had read both reports.

In State v. Birdwell (1972), 188 Neb. 116, 195 N. W. 2d 502, we stated: "The presentence reports could be relevant only to the sentences imposed upon the defendants. Sentences imposed within statutory limits furnish no basis for post conviction relief."

Defendant's next claim, ineffective assistance of counsel, presents a much closer question. This is premised on defendant's allegation that his counsel failed to establish at the hearing that the act of sodomy was consensual; that he failed to ask the court to take judicial notice of the high incidence of homosexual activity in jails; that he failed to challenge the psychiatric reports or to request the court to order additional psychological testing and interviewing before determining the sentence; that he failed to advise defendant he was likely to receive a sentence near the statutory maximum; that he failed to insure the plea was voluntary and intelligent; that he failed to make a motion for reduction of sentence; and that he misrepresented his conversation with defendant's mother.

Defendant cites State v. Reyes (1974), *ante* p. 153, 219 N. W. 2d 238, in support of his contention that he should have been granted a hearing on his allegation of ineffective assistance of counsel. This is hard to understand since ineffective assistance of counsel was alleged in that case and the trial court denied the motion without an evidentiary hearing, and this court affirmed. In

Reyes we held that in evaluating the issue of ineffective assistance of counsel, the assistance must be so inept as to jeopardize the rights of the defendant and shock the court by its inadequacy. Reyes was decided subsequent to defendant's sentence and is controlling herein. Our present test would be that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client. We find that defendant's trial counsel meets this test.

As to defendant's present claim the sodomy was consensual, the record clearly indicated otherwise. On the record, the failure of trial counsel to call the victim to the presentence hearing in an attempt to establish consent by the teenage boy cannot be unduly criticized. Undoubtedly it would have created problems on the acceptance of the plea bargain, and would most likely have further confirmed the use of force.

Ineffective assistance of counsel is charged because of failure to challenge the psychiatric reports, or to ask for further testing. Exactly how counsel was to challenge the reports is not stated, nor is there any allegation as to what might be achieved by further testing. The report stated that defendant was competent to stand trial and to participate in his own defense, which probably was the reason for requesting the evaluation.

The claim that counsel's failure to tell defendant he was likely to receive a maximum sentence shows counsel was ineffective is absurd on the record. The court had told him he could be sentenced up to 20 years. He had a previous felony record, and had spent time in penal institutions.

A motion to reduce sentence would have been an exercise in futility. Counsel did prosecute an appeal in an attempt to reduce the sentence.

Assuming, as we must do, that defendant's counsel told him his mother wanted him to plead guilty, should his motion to vacate be sustained? If defendant were an

inexperienced teenage boy who would be affected by his mother's opinion, this misrepresentation of fact would be a serious dereliction of duty. However, defendant was at least 26 years old at the time of his plea. He had spent several of his previous years in a training school or penal institution. To believe that a man of his age and experience would be induced to plead guilty by a purported message from his mother would be too much of a strain on credulity.

The other allegations of ineffectiveness of counsel have either been answered heretofore or are frivolous. Defendant had two other pending felony charges and a very bad past record. Defense counsel worked out a plea bargain which resulted in the dismissal of other felony charges. Defendant readily agreed to this procedure. On the basis of the record, defendant received effective assistance of counsel.

Defendant's fourth allegation is that his plea of guilty was involuntary and unintelligent. The court ascertained that the defendant had been represented by counsel in the other cases; that he had had a sufficient time to consult with counsel; the nature of the charge and the penalty were explained to the defendant; and he was advised of his right to a jury trial and the fact that the State would provide for the cost of his defense. He was told by the court that he could be sentenced up to 20 years, and was asked if anyone had promised him any amount less than that. He was asked if by pleading guilty he meant that he had done the act for which he was being prosecuted, and he answered "Yes." His answer indicated he knew the penalty and no promise had been made.

Defendant alleges that his jailors teased him with food and made derogatory remarks about his ethnic background and his value as a person, which contributed to his plea of guilty. No suggestion is made that his jailors were coercing him to plead guilty by these tactics. If the charges are true, the conduct of the jailors was reprehensible and should have been brought to the attention

of the trial court, but that cannot at this late date be considered sufficient to vacate the judgment and sentence.

Defendant alleges his mental state was so greatly impaired by his reaction to drug withdrawal as to preclude any guilty plea from being voluntary and intelligent. As previously noted, the record discloses a psychiatric evaluation in September while defendant was being held on two other felony charges. He was subsequently arraigned and trial set on those charges. He was continuously in custody from September until his plea on January 12, 1971, which would indicate the frivolousness of his contention. On the record it cannot be said that the defendant's plea was coerced in any manner. We agree with the trial court the record demonstrates it was not involuntary and unintelligent.

Defendant's last allegation is that he was sentenced for charges which were dropped as a result of his plea bargain. The question of the excessiveness of defendant's sentence was specifically reviewed by this court in his direct appeal. We there found that the trial judge did not abuse his discretion in the sentence meted out to defendant. The question of whether or not the trial judge considered the other two felonies is locked within his own mind. The same trial judge presided at the proceeding on the motion to vacate. Defendant's record was bad. The trial judge was fully aware of it. Regardless of changing moral standards, if a maximum penalty is ever justified, as we believe it is, we cannot say on the record that the trial judge abused his discretion in the sentence imposed on the defendant.

For the reasons stated, we find that the trial judge did not abuse his discretion in refusing to grant an evidentiary hearing on the motion to vacate the judgment and sentence. The judgment is affirmed.

AFFIRMED.