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REPORTS OF CASES

DECIDED BETWEEN

MAY 29, 1975 and DECEMBER 18, 1975

IN THE

Supreme Court of Nebraska

JANUARY TERM 1975, and SEPTEMBER TERM 1975

VOLUME CXCIV

H. EMERSON KOKJER

OFFICIAL REPORTER

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By H. Emerson Kokjer, Reporter of the Supreme Court

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1975

NEBRASKA STATE BANK, A CORPORATION, APPELLANT, V. CHARLES R. DUDLEY ET AL., APPELLEES.
229 N. W. 2d 559

Filed May 29, 1975. No. 39635.

1. **Instructions: Trial.** Instructions to a jury should state clearly and concisely the issues of fact and principles of law which are necessary to enable it to properly and efficiently consider and make a determination upon the questions presented.
2. ———: ———. The proper method of presenting a case to a jury is a clear and concise statement by the court of the issues which find support in the evidence and not by substantially copying the pleadings of the parties and if, by doing the latter, it results in prejudice to the complaining party it is a sufficient ground for reversal.

Appeal from the District Court for Dakota County: JOSEPH E. MARSH, Judge. Reversed and remanded with directions for a new trial.

Leamer & Galvin, for appellant.

Donald E. O'Brien of O'Brien & O'Brien and Gary L. Johansen of Johansen, Clemens & Johansen, for appellees.

Heard before SPENCER, CLINTON, and BRODKEY, JJ., and FLORY and WHITE, District Judges.

FLORY, District Judge.

This is a replevin action brought by the plaintiff bank, appellant, against the defendants, appellees. The property involved was inventory and fixtures of a drug store and was replevied and sold before the replevin statutes were amended by the Nebraska Legislature in

1973. The trial on the merits was in March 1974. The replevin and sale were based on an admittedly unpaid promissory note and security agreement, the execution of which were admitted. By agreement of the parties the sole issue to be submitted to the jury was the right to possession at the time of the commencement of the action. The jury's verdict was for the defendants and the plaintiff appeals.

The evidence was conflicting as to whether or not the note was in default or had been extended, whether or not demands had been made for payment or possession, and whether or not plaintiff had a right to deem itself insecure.

The security agreement expressly provided: ". . . upon default Secured Party shall have the immediate right to the possession of the Collateral." It also defined default and further provided: "Upon Such Default and at any time thereafter, or if it deems itself insecure, Secured Party may declare all Obligations secured hereby immediately due and payable and shall have the remedies of a secured party under the Nebraska Uniform Commercial Code."

A cause of action accrues against a maker of a time instrument on the day after maturity and no demand is necessary. § 3-122 (1) (a), U. C. C.

Unless otherwise agreed a secured party has on default the right to take possession of the collateral without process or by action. § 9-503, U. C. C.

A clause in a chattel mortgage providing that the mortgagee may, at any time he feels insecure, treat the debt as due and take and sell the property, will not authorize the seizure and sale of the property unless the mortgagor is about to do, or has done, some act which tends to impair the security. J. I. Case Plow Works v. Marr, 33 Neb. 215, 49 N. W. 1119.

Instruction No. 2 given to the jury was for all practical purposes a verbatim recitation of plaintiff's petition. Its paragraphs were unnumbered and included in part:

"That there is now due and unpaid on said security agreement, original note and renewal note $11,161.86 together with interest thereon from May 22, 1972, at the rate of 9% per annum, and although payment has been demanded, no payments have been made; that the plaintiff deems itself insecure; that by reason of default of the payment of said note and by reason of plaintiff deeming itself insecure, plaintiff claims that it is now entitled to the possession of said property thereunder.

"That the defendants wrongfully detain said property and refuse to deliver the same to plaintiff or allow plaintiff to take possession thereof."

Instruction No. 3 given to the jury was for all practical purposes a verbatim recitation of defendants' answer. Its paragraphs were numbered and refer to specific numbered paragraphs of plaintiff's petition. The numbered paragraphs of plaintiff's petition were not designated in instruction No. 2.

Instruction No. 6 was as follows: "This is an action founded in replevin and the burden of proof is upon the plaintiff to establish *all of the material allegations of its petition* as set out in Instruction No. 2 herein and that plaintiff had the right to immediate possession of the property at the commencement of the action, and that the property was wrongfully detained by the defendants.

"Should you find that plaintiff has established each and all of the foregoing propositions by a preponderance of the evidence, then your verdict will be for the plaintiff.

"If you find that the evidence upon any one or more of the said propositions is evenly balanced or preponderates in favor of defendants, then the plaintiff cannot recover and your verdict should be for the defendants on the plaintiff's petition." (Emphasis supplied.)

Nowhere in the instructions were the material allegations of plaintiff's petition defined nor did the instructions define "right to immediate possession" or a wrongful detention by the defendants.

Instruction No. 9 was as follows: "Should you find from the evidence that the debt was in default and that the property was wrongfully detained by the defendants on the date plaintiff filed this action, then you must return a verdict in favor of the plaintiff.

"Should you find from all the evidence that the debt was not in default on the date plaintiff filed this action, then you are instructed that if you find from all the evidence that the plaintiff deemed itself insecure and that it had reasonable grounds to believe that it was insecure, your verdict shall be for the plaintiff. However, if you find that plaintiff felt itself insecure but you fail to find reasonable grounds for it to feel insecure, then you must find for the defendants."

Instruction No. 9 appears to limit the questions to be decided by the jury to those of default and whether the plaintiff had reasonable ground to feel itself insecure as opposed to instruction No. 6. The instructions contained none of the provisions of the Uniform Commercial Code concerning the rights and duties of secured creditors or the rule of law in J. I. Case Plow Works v. Marr, *supra*; nor did they contain any of the provisions of the security agreement. The copying of pleadings verbatim in the instructions has long been criticized by this court and we find in this case that the instructions were not only confusing but also lacked an accurate statement of the law.

Instructions to a jury should state clearly and concisely the issues of fact and principles of law which are necessary to enable it to properly and efficiently consider and make a determination upon the questions presented. Fulmer v. State, 178 Neb. 20, 131 N. W. 2d 657.

The proper method of presenting a case to a jury is a clear and concise statement by the court of the issues which find support in the evidence and not by substantially copying the pleadings of the parties and if, by doing the latter, it results in prejudice to the complaining party it is a sufficient ground for reversal.

We therefore reverse the judgment of the District Court and remand the cause with directions that plaintiff be granted a new trial.

REVERSED AND REMANDED WITH DIRECTIONS FOR A NEW TRIAL.

ALIS DUDDEN BELLAIRS, CHRISTINE DUDDEN ROSENBACH, BERDENA DUDDEN SATTLER, AND RAYMOND L. DUDDEN, APPELLEES, V. RICHARD A. DUDDEN AND JOAN M. DUDDEN, HUSBAND AND WIFE; BRENT A. DUDDEN; PERRY L. DUDDEN AND DONNA R. DUDDEN, HUSBAND AND WIFE; TODD A. DUDDEN; GARRETT B. DUDDEN AND MARTHA JANE DUDDEN, HUSBAND AND WIFE; AND DUDDEN ELEVATOR, INC., A CORPORATION, APPELLANTS.

230 N. W. 2d 92

Filed May 29, 1975. No. 39655.

1. **Trusts: Equity.** An action to enforce a constructive trust is an equitable action, and on appeal the Supreme Court will consider the record de novo.
2. **Attorney and Client.** An attorney is not barred from representing a subsequent client against a former client if the duties required of him do not conflict with those involved in the first employment.
3. **Fraud.** Essential elements required to sustain an action for fraud are that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for purpose of inducing the other party to act upon it; and that the other party did in fact rely on it and was induced thereby to act to his injury or damage.

Appeal from the District Court for Perkins County: JACK H. HENDRIX, Judge. Reversed and dismissed.

Bernard B. Smith and William S. Padley, for appellants.

Martin, Mattoon & Matzke and Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, for appellees.

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

STUART, District Judge.

The plaintiffs brought suit praying that the defendants be adjudged to be constructive trustees for certain debenture notes issued by Dudden Elevator, Inc. After trial to the court, judgment was entered that the debenture notes, or duplicates of such debentures, be returned to the plaintiffs and that such notes would be obligations of the defendant, Dudden Elevator, Inc., according to their terms. From that judgment the defendants appeal to this court.

A suit to enforce a constructive trust is an equitable action. Upon appeal we shall consider the record de novo. Peterson v. Massey, 155 Neb. 829, 53 N. W. 2d 912. Scholting v. Scholting, 183 Neb. 850, 164 N. W. 2d 918.

Barney A. Dudden and his first wife, Belle, had six children, Garrett B. Dudden, Alis Dudden Bellairs, Berdena Dudden Sattler, Orville Dudden, Raymond Dudden, and Christine Dudden Rosenbach. Garrett B. Dudden married Martha Jane, to which union were born two children, Richard A. Dudden and Perry L. Dudden. Richard A. Dudden married Joan M., to which union was born one child, Brent A. Dudden. Perry L. Dudden married Donna R., and to this union was born one child, Todd A. Dudden. For convenience the parties to this action will be referred to by their first names.

Barney engaged in wheat farming near Venango, Nebraska, and in 1927 purchased a grain elevator in Venango. In 1940 Garrett purchased a grain elevator in Venango and Garrett and Barney formed a partnership operating these two elevators. From that time until his death as a result of an automobile accident in July 1969, Barney and his son Garrett were very close in that they engaged in a common business, saw each other almost every day, and at all times shared an office in the elevator building. In 1951 the business was incorporated as Dudden Elevator, Inc. Belle and Martha Jane each received one share of stock and the rest of the stock was issued to Barney and Garrett in equal shares. Bar-

ney was designated as president of the corporation and served as such until shortly before his death. The two men divided their duties in that Garrett ran the elevator and Barney ran the farming operation. Other members of the Dudden family participated in this business, but none in management positions. Both these operations were very profitable and, as money was made, additional farms were purchased and six substantial concrete additions to the elevator were built in 1951, 1952, 1953, 1954, 1958, and 1959, with a total storage capacity of 2,500,000 bushels and at a cost of almost one million dollars. All the members of the Dudden family agree that this family business was dominated and controlled by Barney until his death. With advancing age Barney began to divest himself of property, and gave each of his children over 2,000 acres of land, except Garrett, who sometimes received shares of stock in the elevator rather than land. Barney also made substantial gifts to his grandchildren. As he had divested himself of the land, Barney also began to divest himself of the stock in the elevator and at the time of his death was only a minor stockholder. Besides divesting himself of most of his elevator stock, he also gave his children debenture notes payable by Dudden Elevator, Inc., as follows:

December 1, 1957 - $6,000
December 1, 1958 - $6,000
December 1, 1964 - $5,000
January 4, 1965 - $5,000

These debentures were all payable 10 years after their issuance. Since there were six children, this debt totaled $132,000.

In a period from 1960 to 1964 Alis, Berdena, Orville, Raymond, and Christine sold their stock in Dudden Elevator, Inc., to the Elevator, or to Garrett and his sons, daughters-in-law, and grandchildren.

Richard was graduated from law school in March of 1964 and began to practice law shortly thereafter, main-

taining a law office in Denver. Richard testified that he first became a stockholder in Dudden Elevator, Inc., on May 5, 1956, upon his graduation from high school and that he began to acquire further shares of stock in 1960 and acquired shares each year thereafter until 1968. Similar acquisitions of stock were made by Perry and the wives and children of these men so that on January 6, 1968, the stockholders of Dudden Elevator, Inc., were as follows:

Richard	239 shares
Perry	238 shares
Todd	61 shares
Brent	61 shares
Donna	60 shares
Joan	60 shares
Garrett	46 shares
Howard M. Hunter	7 shares
Martha Jane	6 shares
Barney	2 shares

As noted above the business was very profitable until the middle 1960's. Beginning about 1965, the federal government terminated its plan of paying local elevators for the storage of grain. This change of policy resulted in the Dudden Elevator, Inc., losing most of its grain storage, which was a substantial portion of its business. As a result the Dudden Elevator, Inc., suffered operating losses as follows:

Fiscal year ending in 1965 - $160,166.88
Fiscal year ending in 1966 - $125,131.67
Fiscal year ending in 1967 - $ 31,804.02

In addition, the first series of debenture notes became payable on December 1, 1967. During the latter part of 1967 Barney became convinced that Dudden Elevator, Inc., was in danger of financial failure and, although he was no longer a young man, the undisputed evidence is that he retained his mental vigor and acumen through this period and even until his accidental death. After consultation with Garrett and Richard, Barney instructed

Richard to call a meeting of the Dudden family in Richard's law office in Denver, on January 6, 1968. The events that occurred at this meeting led to this lawsuit, and it will hereafter be referred to as "the meeting." The meeting was called for the purpose of securing the return of the debenture notes. Richard prepared for the meeting by drafting statements of corporate conditions from figures furnished primarily by Howard M. Hunter who kept the books for Dudden Elevator, Inc. In addition, Richard consulted William T. Diss, a Denver C.P.A., regarding the tax consequences of the proposed transactions, and with the assistance of Mr. Diss prepared assignments of the debenture notes and other related documents.

Prior to the meeting Barney visited with some of his children regarding the proposed transactions. He expressed a great concern for the condition of Dudden Elevator, Inc., and stated that he did not want the elevator to fail during his lifetime. He made it known that he wanted the notes "cancelled off the books" of the elevator in order that it might be saved. He was much more emotional about the proposed transactions than was his custom, but there is no claim that he was other than totally competent. The meeting was attended by Barney; his children Alis, Berdena, Orville, Raymond, and Christine; his grandson, Richard; and Mrs. Laurent, a daughter of Barney's second wife. Garrett was not to be present "to save him embarrassment." The meeting was opened by Richard who presented documents regarding the financial condition of Dudden Elevator, Inc., and made certain explanations as to their contents. Assignments of the notes were presented and explained. Richard was then dismissed by Barney, and Barney then presided at the meeting. Barney again stated that he wanted the debenture notes canceled off the books and that it was his opinion that Dudden Elevator, Inc., was on very shaky financial grounds. He asked his children to reassign the debentures because "the ele-

vator was going under, and this was one of his babies * * * and he didn't want it to go under and by turning these debenture notes back it would help alleviate the financial situation." Richard was then called back into the meeting and the assignments were executed to effectuate the plan. The debentures were transferred to Barney, as trustee, and he then reissued debentures in the same total amount payable to the following persons:

Richard	30.641%
Perry	30.514%
Todd	7.821%
Brent	7.821%
Donna	7.692%
Joan	7.692%
Garrett	5.897%
Howard M. Hunter	.897%
Martha Jane	.769%
Barney	.256%

It should be noted that the debentures were issued to the stockholders of the corporation in the same ratio as they held stock. This transfer involved $126,000 worth of debentures rather than $132,000 since Berdena had previously been paid $6,000 on the debenture issued to her December 1, 1957.

At the meeting an "Analysis of Profits and Losses" was presented showing the corporate profits and losses for the years 1962 to 1967. There was also presented a "Stockholders' Deposits Accumulated" in which the debit and credit balances of various stockholders were set forth. These reports were accurate and no complaint is made with reference to them. However, there was also presented an "Analysis of Assets and Liabilities" which the plaintiffs assert omitted current assets, listed current liabilities twice, and omitted other assets so that the financial condition of the corporation was made to appear much worse than it actually was. The trial court correctly found that Dudden Elevator, Inc., was in a much better financial position than por-

trayed by this "Analysis of Assets and Liabilities" that was prepared for and presented at the meeting.

On January 19, 1971, Alis, Cristine, Berdena, and Raymond demanded a reconveyance to them of these debentures by a written notice to defendants, and thereafter on October 22, 1971, filed a petition for their return in the District Court for Perkins County. Orville did not join in this demand nor in the following legal action.

The plaintiffs contend that Richard occupied a fiduciary capacity since he had in the past done legal work for some of his aunts and uncles. In that connection the evidence shows that Alis had Richard incorporate her farm assets in 1964, prepare her will in 1966, and handle an irrigation well permit with the Colorado authorities in the fall of 1968 or the spring of 1969. Berdena had Richard incorporate her farm in 1964, draw her will in 1965, and he was advising with her in regard to the transfer of some stock in her farm corporation at the time of the meeting. Raymond was having Richard do legal work with regard to the sale of some houses in Venango at the time of the meeting. Christine had never employed Richard as an attorney. Richard had never represented any of the four plaintiffs in matters concerning the Dudden Elevator, Inc., nor in any capacity having to do with the business to be discussed at the meeting.

The duties of an attorney are set forth in the case of Adams v. Adams, 156 Neb. 778, 58 N. W. 2d 172, which states in part: "The fact than an attorney was incidentally connected with an adverse interest does not of itself disqualify him. He may act for a new client if his interest is not necessarily adverse to those of the former client, and if the attorney is not called upon to use or take advantage of the confidential communications of the former client for the benefit of the new one. The test of inconsistency is not whether the attorney has ever been retained by the party against whom he proposes to appear, but whether the acceptance of the new

retainer will make it necessary or convenient in advancing the cause of his new client to do anything which would injuriously affect his former client, and whether he will be obligated in the new relationship to use against his first client information received because of the former employment. An attorney is not barred from representing a subsequent client against a former client where the duties required of him do not conflict with those involved in the former employment." The trial court correctly found that Richard was guilty of no unprofessional conduct.

As stated by the trial court in his memorandum opinion: "The plaintiffs knew that what was being asked of them was adverse to their financial interests. The Court is convinced that the plaintiffs further knew that the Garrett B. Dudden family, and Richard Dudden himself, would be the principal beneficiaries of the transfer. Under those circumstances, they could not logically rely upon Richard Dudden as their attorney in the transaction, even though he had performed certain services for some of them in the past. This is * * * a case where his representation was clear and clearly adverse to plaintiffs. The plaintiffs did not rely, and could not rely, upon Richard Dudden as their attorney."

It is obvious that the plaintiffs knew that the family of Garrett had been accumulating stock for years and they also knew that none of the plaintiffs were then stockholders in the corporation. This, together with the absence of Garrett at the meeting "to save him embarrassment" and the dismissal of Richard from the room for the essential part of the meeting when Barney asked his children to assign the debentures certainly indicates that all concerned knew that the family of Garrett would be the principal beneficiary of the gifts about to be made. We find that there was no confidential or fidicuary relationship between Richard and the plaintiffs.

This then raises the question as to whether there was such misrepresentation of facts at the meeting that

plaintiffs would still be entitled to recover without the existence of such confidential or fidicuary relationship. Plaintiffs' petition prays that the defendants hold the debenture notes as constructive trustees for the plaintiffs. In order to have such constructive trust it is necessary to find that the debenture notes were obtained from plaintiffs by acts constituting fraud.

"The essential elements required to sustain an action for fraud are, generally speaking, that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage." Transportation Equipment Rentals, Inc. v. Mauk, 184 Neb. 309, 167 N. W. 2d 183. See, also, Buhrman v. International Harvester Co., 181 Neb. 633, 150 N. W. 2d 220; Campbell v. C & C Motor Co., 146 Neb. 721, 21 N. W. 2d 427.

The only "essential element" necessary to discuss is whether plaintiffs did in fact rely upon the untrue representations contained in the "Analysis of Assets and Liabilities." A further summary of the evidence is necessary. Alis testified that after Richard left the meeting, Barney told of the financial condition of the elevator; and he said he didn't want it to go under during his lifetime, that it would help if they would sign these debentures over, and that they would then have money to operate. She further admitted in her deposition that through the years she always complied with whatever her father directed or requested of her. She also said she realized it was her father's ability, effort, and good fortune that had made it possible for him to make substantial gifts to her. Her testimony included: "Q And that coupled with your respect for his judgment is why there was no hesitation on your part in meeting his request? A He asked for it and that's what we did." Berdena testified that she met her father the day before

the meeting and discussed with him the purpose of the meeting. Barney stated that her brother Garrett was in deep financial trouble and would need some assistance. She stated that at the meeting her father said the elevator needed assistance, and that he asked his children to reassign the notes to him so that the elevator would be free to borrow money to meet current obligations. Her testimony was that the situation was that her brother Garrett was in trouble and they were willing to help him. She admitted on cross-examination that she stated in her deposition she did not know whether the "Analysis of Assets and Liabilities" upon which the plaintiffs now base their claim of a misrepresentation was furnished to her at the time of the meeting. She stated she was satisfied to let her father work out the mechanics of this thing to do what had to be done, that she was perfectly willing that her father do what he could to help the elevator out of its financial difficulty, and that so far as she was concerned she never challenged or questioned any matters that Barney asked of her. Raymond testified that after Richard left the room at the meeting Barney said that he was very interested in having the debenture notes returned to him. He thought it would help save the elevator and put it on a profitable basis so that they could borrow money on it and that Barney was going to wipe them off the books. He stated that there was no dissent on the part of the children with regard to doing this and that, as a matter of fact, Barney's children were going to go along with what Barney wanted whether they liked it or not, or at least he was. He thought it was very possible that when the papers were handed out, irrespective of those papers, he was going to sign those debentures to his father when he asked; and he further admitted that he looked at the papers but he did not understand all of them. Christine testified that she met her father the day before the meeting in the coffee shop of the Auditorium Hotel in Denver and that Barney told her he wanted to

discuss these debenture notes, that she thought because of an earlier discussion with Garrett they were going to be extended and she just came right out and said, "I am perfectly happy to extend these notes. However, I think they should carry a little more interest." "Well," he said, "I set that interest up as a custom interest I have always paid, but I don't want them—they cannot be extended. I want you to return them to me." She told him at that time she would return them to him. She stated that after Richard left the room at the meeting, her father was a man who had real control of his emotions but he broke down a little bit; she stated that he asked them to return those notes because the elevator was in dire straights and unless this was canceled or removed from the books and no longer showed, the elevator could not borrow money; and that they desperately needed it and the elevator would go broke without return of those notes to him. With regard to assignments that were passed out at the meeting, Christine stated "I tried to look intelligent. I have never been able to read legal wording and at that time I didn't know what a Declaration of Trust was. But I trusted my Dad." With regard to the financial sheets which were distributed at the meeting, she stated "I don't understand the financial sheets; didn't really mean anything to me," and regarding the "Analysis of Assets and Liabilities" she said "I read them. I would say I didn't know what they meant." She stated that at the meeting she did exactly what she had told her father she would do when she met with him the day before.

The evidence here clearly shows that reliance was not placed upon any statements of financial conditions delivered to plaintiffs at the meeting, but that the four plaintiffs relied completely upon their father's judgment in stating that the debentures should be returned, and that they had always done what he asked them to do and they were going to do the same thing at this time. Each of these plaintiffs had been the recipients of very

substantial gifts from the father, who was an unusually successful businessman, and who had dominated the business transactions of his family all his life. It is natural to expect that when Barney wished his children to return the notes which amounted to a small fraction of his total gifts to them, they would comply. However, after Barney's death, a year and a half later, there was no longer this dominating influence over them, and they felt free to change their minds about the gifts to their brother, Garrett, and his family. Since reliance upon a misrepresentation is an essential element to sustain an action for fraud, the plaintiffs' case must fail.

Finally plaintiffs complain that they were not aware their father would receive the debenture notes as a trustee and would in turn reissue the debenture notes to the stockholders of Dudden Elevator, Inc. They argue they thought they would assign the notes to their father and the notes would then be "cancelled off the books." They further point out that when the debentures were issued that Barney's "Deposit Accumulated" with the elevator had been reduced and they now assume when he returned them to the elevator that his "Deposit Accumulated" would be raised. It must be pointed out this is only an assumption by the plaintiffs. No one even intimated that this would be the case. In fact, everything that was said to them indicated this would be a gift to Garrett and his family. There is one additional assumption which would have to be made before this would make any difference to the plaintiffs—that is, that they would receive part of this additional deposit at some later time, or upon Barney's death. Of course, children have no vested interest in their father's estate.

The reasons for handling the transaction as it was handled seem extremely logical. Mr. Diss, the C.P.A., advised that there could be several different tax liabilities arising from this transaction:

1. A possible gift tax payable by the note holders upon surrendering the obligations.

2. Possible income tax payable by Dudden Elevator, Inc., based upon satisfaction of a debt.

3. Possible additional estate tax payable by the Estate of Barney if these notes became his property.

4. Possible additional income tax payable by the stockholders of Dudden Elevator, Inc., since this corporation had previously elected to report under Sub Chapter "S" of the Internal Revenue Code.

Taking all these matters into consideration, Mr. Diss recommended that the note holders give their notes to the shareholders of the corporation through the medium of a dry trust with Barney as trustee. This was the action taken. It resulted in exactly the same effect as though the notes had been assigned to Barney and he had canceled them, except the tax consequences as outlined above. This argument of plaintiffs is obviously specious and deserves no further discussion.

The judgment of the District Court should be reversed, and the plaintiffs' petition should be dismissed.

REVERSED AND DISMISSED.

ROBERT HICKMAN, APPELLANT, V. SOUTHWEST DAIRY SUPPLIERS, INC., A CORPORATION ET AL., APPELLEES.
230 N. W. 2d 99

Filed May 29, 1975. No. 39704.

1. **Issue Preclusion: Res Judicata.** The doctrine of issue preclusion recognizes that limits on litigation are desirable, but a person should not be denied a day in court unfairly.
2. ———: ———. Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action.
3. ———: ———. The basis of the doctrine of res judicata is that the party to be affected, or someone with whom he is in privity, has litigated or has had an opportunity to litigate the same matter in a former action.

Appeal from the District Court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded.

Mitchell & Beatty, Larry R. Demerath, and Timothy D. Whitty, for appellant.

Tye, Worlock, Tye, Jacobsen & Orr and John Icenogle, for appellees.

Heard before SPENCER, NEWTON, CLINTON, and BRODKEY, JJ., and WARREN, District Judge.

BRODKEY, J.

This is an action for personal injuries and damages sustained by the plaintiff, Robert Hickman, while he and his deceased wife, Marie Hickman, were riding as passengers in a pickup truck owned by plaintiff and his wife, and driven by their mutual friend, Audrey Grassmeyer. The truck collided at a county road intersection with a vehicle owned by the defendant, Southwest Nebraska Dairy Suppliers, Inc., and operated by its employee, defendant Milford Johnson. Plaintiff's wife was killed as a result of that accident. Thereafter, Lawrence F. Weber, duly appointed administrator of her estate, brought a wrongful death action in his own name as personal representative of the deceased wife against the same defendants named in this case for the benefit of the widower and next of kin, as provided in sections 30-809 and 30-810, R. R. S. 1943. Trial of that case was commenced in the District Court for Buffalo County, Nebraska, and at the close of the plaintiff's evidence the court directed a verdict against the plaintiff administrator and in favor of the defendants. An appeal to this court resulted in a reversal of the action of the District Court and a remand for trial on the issue of whether the negligence of the driver of the truck in which plaintiff and his wife were riding was imputable to the plaintiff; this court found that the driver, Audrey Grassmeyer, was guilty of negligence more than slight as a matter of law. See Weber v. Southwest Dairy Suppliers, Inc., 187 Neb. 606, 193 N. W. 2d 274 (1971). The case was then retried to a jury which returned a verdict against

the administrator plaintiff and in favor of these defendants. On appeal to this court, the jury verdict in the second trial of that case was affirmed. See Weber v. Southwest Nebraska Dairy Suppliers, Inc., 190 Neb. 389, 208 N. W. 2d 667 (1973).

In the present case the husband, Robert Hickman, seeks to recover on his separate cause of action for his own injuries and damages allegedly sustained by him in the accident, alleging that the negligence of these defendants was the cause of the accident and his resulting injuries and damages. The defendants filed an answer to plaintiff's petition and thereafter filed a motion for summary judgment, alleging among other things "that these defendants are entitled to a judgment as a matter of law for the reason that the prior adjudication of the facts in this matter in the case of Weber v. Southwest Dairy Suppliers, Inc., 190 Neb. 389, is *res judicata* as applied to this case, in that this case involves the same issues and subject matter and *almost* the same parties." (Emphasis supplied.) Defendants' motion for summary judgment was sustained by the District Court on June 17, 1974. In its order the court stated among other things: "Granted that these are two separate causes of action which could not be joined. We still have the question to determine where the parties were the same and the issues decided are the same that would have to be submitted in the case that is now before us, does the determination by the jury of these issues become a complete and final determination between the parties. We believe that the case of Voorhees v. Chicago & A. R. Co., 208 Ill. App. 86, where the Court said, 'A point which was directoy (sic) in issue in a former suit and was there judicially passed upon cannot again be drawn in question in any future action between the same parties or their proxies, whether the cause of action in the two suits be identical or different. Where a real party in interest has had a trial of his rights on the merits there should be an end to the litigation.'

"Also, along the same line, Keith v. Willers Truck Service, 266 N. W. 256 (S. D.)."

It should be noted in passing that the District Court in its order erroneously indicated that Robert Hickman, the plaintiff in the present action, was the administrator plaintiff in the prior wrongful death action. The fact is that Lawrence Weber was the administrator of the estate of Marie E. Hickman, deceased, and brought that action in his name, as plaintiff. See, Weber v. Southwest Dairy Suppliers, Inc., 187 Neb. 606, 193 N. W. 2d 274, 190 Neb. 389, 208 N. W. 2d 667.

Following the decision of the trial court sustaining defendants' motion for summary judgment in this case, plaintiff filed a motion for a new trial and rehearing, which motion was denied by the District Court. Plaintiff thereafter perfected his appeal to this court. We reverse and remand.

The issue in this case is whether the husband, Robert Hickman, is precluded under the doctrine of res judicata from bringing and maintaining the present action to recover for his own personal injuries and damages because of the verdict of the jury and judgment in favor of the defendants in the prior wrongful death action brought by the administrator of the estate of his deceased wife against these defendants. Under the traditional rule of res judicata, sometimes called claim preclusion, any rights, facts, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies. Simmons v. Mutual Benefit Health & Acc. Assn., 186 Neb. 26, 180 N. W. 2d 672 (1970); State ex rel. Weasmer v. Manpower of Omaha, Inc., 163 Neb. 529, 80 N. W. 2d 580 (1957); Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551 (1959). However, there is a closely analogous doctrine which has evolved from the traditional rule of

res judicata, and has been variously referred to as collateral estoppel or issue preclusion, which have also been referred to as extensions of the rules applicable to res judicata. Vincent v. Peter Pan Bakers, Inc., 182 Neb. 206, 153 N. W. 2d 849 (1967). See, also, American Province of the Servants of Mary Real Estate Corp. v. Metropolitan Utilities Dist., 178 Neb. 348, 133 N. W. 2d 466 (1965).

We think it is clear that the instant case must be considered under the doctrine of issue preclusion or collateral estoppel, rather than under traditional res judicata, or claim preclusion, as it is obvious that the husband's claim or cause of action for his own damages in this case is an altogether different and separate claim from that which was the basis of the action by the administrator of his deceased wife's estate, brought under the statutes above referred to. In order to properly dispose of this case under the doctrine of issue preclusion it is, therefore, necessary that we examine the questions of whether or not the parties in the two suits are the same, or, if not, whether privity exists between the plaintiffs in the two actions, and further, whether the plaintiff husband in this case had control of or actively participated in the litigation involving, and trial of, his wife's wrongful death action.

To begin with, it is clear that although the defendants in the two actions were the same, the plaintiffs were not. The plaintiff in the wife's wrongful death action was the administrator of her estate, Weber; whereas the plaintiff in the instant case was the husband, Robert Hickman. However, we think it is clear that even if the husband, Robert Hickman, had been appointed administrator of his wife's estate and had brought the wrongful death action as administrator, the doctrine of collateral estoppel or res judicata would probably not have been applicable to him in the present action. In American Province of the Servants of Mary Real Estate Corp. v. Metropolitan Utilities Dist., *supra,* it is stated

that: "In order that parties for or against whom the doctrine of res judicata is sought to be applied may be regarded the same in both actions, the general rule is that they must be parties to both actions *in the same capacity or quality.*" (Emphasis supplied.)

The nature and application of the doctrine of issue preclusion or collateral estoppel was discussed and explained by this court in the case of Vincent v. Peter Pan Bakers, Inc., *supra,* and we quote from the opinion: "The doctrine of issue preclusion recognizes that limits on litigation are desirable, but a person should not be denied a day in court unfairly. American Province Real Estate Corp. v. Metropolitan Utilities Dist., 178 Neb. 348, 133 N. W. 2d 466. The employer of plaintiff's decedent having fully litigated the common issues of negligence, the problem is reduced to the effect of the employment relationship.

" 'Initially, one might say that a non-party to Suit I should not be bound by the decision in that suit * * *. In fact, the concept of preclusion is spelled out in terms of the individual who has had the incentive and the opportunity to litigate fully the matter involved. * * *

" 'In the past, such preclusion has extended beyond those persons actually involved in Suit I. A stranger to the first suit has been precluded, as opposed to the winning party in Suit I, through the use of various rationales. * * *

" 'The courts have talked in terms of a close relationship, privity, between a participant in the first suit and the person to be precluded in the second. Involved seems to be the idea that the precluded party's interests were represented in the first suit, or that the precluded party should have no greater interest than did the participant in the first suit. * * * One party having had his day in court and having lost, the related party —the one in privity—is precluded. This is justified in terms of the relationship of the parties. * * *

" 'Apart from judgments which have effect qua facts,

it is clear that judgments can have conclusive effect against persons who were not parties to the original action. In attempting to decide how far the concept of preclusion should apply, it is well to consider the underlying rationale of judicial preclusion and preclusion generally. In all cases in which a person finds himself subject to preclusion generally, either (1) he has had the opportunity to litigate the matter or (2) his interests have been adequately represented in the litigation of the matter. * * *

" 'It would seem to be entirely reasonable to allow preclusion against non-parties to Suit I so long as they are adequately represented and protected in that suit. At this point there would seem to be a weighing process involved. Considered should be the saving of the time of the court, the adequacy of protection extended, and other relevant variable factors. * * *

" 'This idea of using a judgment against a person not a party to the first suit is not as well developed as is the use of a judgment by a non-party against a party to the first suit. * * * Since the whole area is in a state of flux, it is difficult to chart the development of the future, * * *.' 50 Iowa L. Rev. 27, Preclusion/Res Judicata Variables: Parties, pp. 59-60, 74-75."

We now examine whether or not privity existed between the plaintiff, Hickman, and the administrator plaintiff in the wrongful death action, or between the plaintiff and his deceased wife, Marie Hickman. In Schurman v. Pegau, 136 Neb. 628, 286 N. W. 921 (1939), this court defined the term privity as follows: " 'Privity depends upon the relation of the parties to the subject-matter, rather than their activity in a suit relating to it after the event. Participation in the defense because of general or personal interest in the result of the litigation does not make one privy to the judgment. Stryker v. Goodnow, 123 U. S. 527, 540.' Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 216, 89 N. E. 193.

" 'Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action.' Stamp v. Franklin, 144 N. Y. 607, 39 N. E. 634." See, also, Restatement, Judgments, § 83, Comment a, p. 389; Benson v. Wanda Petroleum Co., 468 S. W. 2d 361 (Tex., 1971).

It is the contention of the defendants that although Robert Hickman was not the named plaintiff in the Weber cases, *supra,* it was his interests and his interests only that were being represented by Weber as the administrator of the estate of plaintiff's deceased wife, Marie Hickman. It is true that in the Weber cases, *supra,* this court found that Robert Hickman was a widower, and the only heir of Marie E. Hickman who sustained pecuniary loss under section 30-810, R. R. S. 1943; and that the exclusive beneficiary of any recovery would be Robert Hickman. However, Robert Hickman was not a named party in the Weber cases. This necessitates an examination of sections 30-809 and 30-810, R. R. S. 1943, which represent Nebraska's version of the Lord Campbell's Act. It is clear that the Nebraska wrongful death statute vests the right of action exclusively in the personal representative, rather than the ultimate beneficiaries of it. See, § 30-810, R. R. S. 1943; Stevenson v. Richardson County, Nebraska, 9 F.R.D. 437 (1949), and Nebraska cases cited therein. Section 30-810, R. R. S. 1943, further provided, however: "The amount so received in settlement, or recovered by judgment, shall be reported to and paid into such court for distribution, subject to the order of such court, to the persons entitled thereto *after a hearing thereon* and after notice of such hearing and of the time and place thereof has been given to all persons interested by publication * * *." (Emphasis supplied.) This makes it clear that no apparent heir or beneficiary under the wrongful death statute has any vested right to any of the proceeds recovered in said action until after a hear-

ing has been held before the county court, and a determination made by the court as to who is entitled to receive the proceeds and how much. There is no vested interest in any person in the proceeds of such action at the time the suit is filed. It may well be that one who appears to be a probable recipient of benefits of a wrongful death action may turn out not to be so at all, and may not receive any of such benefits. See, for example, Goeres v. Goeres, 124 Neb. 720, 248 N. W. 75 (1933). Furthermore, we think it is clear that a recovery under the wrongful death statute is not for the benefit of the estate of the decedent, but is for the benefit of the heirs of the decedent in the amount of damages sustained by them, and the proceeds of the recovery are not assets of the decedent's estate. Moore v. Omaha Warehouse Co., 106 Neb. 116, 182 N. W. 597 (1921). This being so, there would also be no privity between the plaintiff herein and his deceased wife. The general rule is that there is no legal privity between a husband and wife in such a sense that a judgment for or against the one will conclude the other, where the action concerns their separate property, rights, or interests not derived from each other. 50 C. J. S., Judgments, § 798, p. 342.

The strict rule that a judgment is operative, under the doctrine of res judicata, only in regard to parties and privies is sometimes expanded to include as parties or privies a person who is not technically a party to a judgment or in privity with him, but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein, at least where such right is actively exercised. 46 Am. Jur. 2d, Judgments, § 535, p. 688. In this case, it is clear that the plaintiff could not have brought this action in his own name under the Nebraska wrongful death statute. Furthermore, even if the plaintiff had been appointed administrator of his wife's estate, he probably could not have joined his wife's wrongful death action with his

personal action in the same suit. Niklaus v. Abel Constr. Co., 164 Neb. 842, 83 N. W. 2d 904 (1957). Although defendants suggest, by way of innuendo, in their briefs that the plaintiff could have controlled his wife's wrongful death action, there is nothing in the record to substantiate in any way that he actually did so. It is true that plaintiff did testify as a witness in the trial of his wife's wrongful death action, nevertheless this fact would not in any way be controlling. In Cockins v. Bank of Alma, 84 Neb. 624, 122 N. W. 16 (1909), this court stated: "Counsel argue that, because at Cockins' request Porter & Griffen employed an attorney to assist in the defense of said cause, they are bound by the judgment. There is nothing in the record to indicate that Porter & Griffen were given the control of the suit, nor that they had any right to appeal from the judgment. They did not instigate the litigation nor did Cockins represent them therein. One may employ counsel to assist a litigant, or may testify as a witness in his favor or give other active support to his cause in court, without becoming a party to the record or bound by the judgment rendered. Schribar v. Platt, 19 Neb. 625; Williamson v. White, 101 Ga. 276; Loftis v. Marshall, 134 Cal. 394; State v. Johnson, 123 Mo. 43; Litchfield v. Goodnow's Adm'r, 123 U. S. 549."

In its order sustaining defendants' motion for a summary judgment in this case, the District Court cited and principally relied upon a 1917 Illinois case, Voorhees v. Chicago & A. R.R. Co., 208 Ill. App. 86. However, in 1962 the Supreme Court of Illinois decided the case of Smith v. Bishop, 26 Ill. 2d 434, 187 N. E. 2d 217, a case strikingly similar, both as to facts and legal principles involved, to the present case. It appears from the facts of that case the administrator of the estates of Theda Smith's daughters had previously brought a cause of action for the wrongful death of two infant children killed in an accident, charging negligence against the father of the children with whom the children were riding, and

against the driver of the milk truck with which the father's vehicle collided. In that case, as in the present case, verdict was for the defendants. Thereafter, the mother, Theda Smith, brought an action against the same defendants for her own personal injuries received in the same accident. In that case, as in the present case, a summary judgment was entered for the defendants on the ground of estoppel by verdict (collateral estoppel). The Supreme Court of Illinois reversed the judgment and remanded the cause to the trial court with directions to deny the motion for summary judgment. In its opinion, the court stated as follows: "In the case at bar it is obvious that the claim or cause of action for wrongful death of a child is not the same as the claim or cause of action for Mrs. Smith's personal injuries. The bar, if any, must therefore be by way of estoppel by verdict, in which it must be shown that the identical question—i.e., whether the truck driver was guilty of negligence and the deceased driver guilty of wilful and wanton misconduct—was decided in the wrongful death case. One of the plaintiff's arguments to avoid estoppel is that since the verdict was a general one it might have been based upon a failure to find damages, rather than upon a failure to find liability, and that there was therefore no determination of the specific issue involved here.

"We find it unnecessary to further consider this argument, since we think there is no identity of parties, within the meaning of the doctrine of *res judicata*. The basis of the doctrine is that the party to be affected, or someone with whom he is in privity, has litigated or has had an opportunity to litigate the same matter in a former action. (Hedlund v. Miner, 395 Ill. 217, 229-230; Newberry Library v. Board of Education, 387 Ill. 85.) The law is clear that one is not estopped or barred by a prior adjudication if he was not a party to such action and does not stand in the relation of privy to one who was a party. Ohio National Life Ins. Co. v. Board of Education, 387 Ill. 159.

"That Mrs. Smith was not a party to the wrongful death action is evident from the fact that she was not named as such therein, did not appear, and had no right to adduce testimony, cross-examine witnesses or otherwise control the prosecution thereof. (See Schafer v. Robillard, 370 Ill. 92; Orthwein v. Thomas, 127 Ill. 554, 571.) Nor was she in privity with the administrator of the childrens' estates, even though she was one of the next of kin and a beneficiary of the cause of action for wrongful death. A privy to a judgment is one whose succession to the rights of property thereby affected occurred after the institution of the particular suit, and from a party thereto. (Schafer v. Robillard, 370 Ill. 92; Orthwein v. Thomas, 127 Ill. 554.) Privity contemplates a mutual or successive relationship to the same property rights which were the subject matter of prior litigation. (Sweeting v. Campbell, 2 Ill. 2d 491, 496.) Mrs. Smith did not acquire her rights in this action from the administrator of the childrens' estates, nor is her relationship to such rights either mutual with or successive to that of the administrator. He had no beneficial interest but possessed sole right of action or control over the litigation. Mrs. Smith, as next of kin, had no right of action or control over the litigation but merely possessed a beneficial interest in the proceeds. In the case at bar, the fact that Mrs. Smith was a beneficiary in the wrongful death case did not make her a plaintiff therein. Nor did she succeed to the right of action or in any other manner become privy thereto so as to bring her within the rule of estoppel by verdict." We are greatly persuaded by the facts and reasoning of Smith v. Bishop, *supra*; and, although we concede that the authorities from other jurisdictions are divided on the questions involved, we believe the conclusions reached in that case are sound and represent the better view.

Due process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to a prior suit or as a

privy; and, where not so, that at least the presently asserted interest was adequately represented in the prior trial. Benson v. Wanda Petroleum Co., *supra*; Vestal, Preclusion/Res Judicata Variables: Parties, 50 Iowa L. Rev. 27 to 76 (1964). We do not believe that the plaintiff should be denied his day in court under the facts of this case, notwithstanding the possibility that the ultimate result may be the same as in the prior actions brought on behalf of the estate of his deceased wife. We, therefore, hold that plaintiff is not barred under the doctrines of res judicata or issue preclusion from prosecuting his action for personal injuries and damages, and we reverse the judgment of the District Court and remand the cause for such further proceedings as may be required.

REVERSED AND REMANDED.

SPENCER, J., dissenting.

I respectfully dissent because I believe the trial court properly sustained the motion for summary judgment. Recovery for the plaintiff is barred by issue preclusion.

Weber v. Southwest Nebraska Dairy Suppliers, Inc. (1971), 187 Neb. 606, 193 N. W. 2d 274, was an action brought by the administrator of the estate of plaintiff's wife, arising out of the same accident covered by the instant case. In that case we found that Robert N. Hickman was the sole and only person sustaining pecuniary loss in the death of his wife. The question involved was whether the negligence of the driver of the car, who was negligent as a matter of law, was imputable to Robert N. Hickman, the plaintiff herein. We held this was a jury question, reversed a dismissal at the close of plaintiff's evidence, and sent the case back for a trial on that issue. The jury returned a verdict for the defendants.

In 187 Nebraska at 611, we said: "We fail to perceive any distinction between a situation where the action is brought by a personal representative other than the beneficiary and one where the beneficiary himself is

the plaintiff, if in both situations he is the sole and only person who can be benefited by the action and is guilty of negligence as a matter of law."

In 187 Nebraska at 612, we held that if the jury should find that the negligence of Mrs. Grassmeyer was imputable to Robert N. Hickman then there could be no recovery therein. Robert N. Hickman was the only person who could have benefited from the previous action. If he could not recover in that case, he should not in this one. The issue in that case on liability, and the issue in the instant one, are exactly the same. The finding in 187 Neb. 606 should preclude a recovery herein.

CLINTON, J., joins in this dissent.

NEWTON, J., concurring.

I concur in the opinion of Brodkey, J. In doing so I appreciate that the authorities are not unanimous on the question presented. I note, however, that in only a very few instances have the courts extended the rule of collateral estoppel to cases such as this. For the most part the decisions appear to follow Restatement, Judgments, an analysis of which follows:

Section 85 provides: "(1) Where a judgment is rendered in an action in which a party thereto properly acts on behalf of another, the other is * * *

"(b) not bound by or entitled to the benefits of the rules of res judicata with reference to his interests not controlled by the party to the action."

The Comment on clause (b) states: "b. *Scope of Section.* Subsection (1) deals with situations in which the first action is brought or defended by a representative on behalf of a person who is not a party, and the second action is brought or defended either by a representative of such a person or by the person himself."

In Comment L on Subsection (1), clause (b), it is stated: "L. *Interests of beneficiary not in charge of fiduciary.* A fiduciary normally has no power to bind a beneficiary by any act except with reference to matters intrusted to him; as to other matters a judgment for or

against him does not affect the beneficiary. In actions brought by or against a fiduciary the rules of res judicata do not operate to create rights in favor of, or burdens against, the beneficiary or one on whose account the action was brought or defended with reference to matters which were not intrusted to the fiduciary. This is true where the fiduciary or his successor is a party to a subsequent action in which res judicata is claimed (see § 80) and also where the beneficiary is a party to such subsequent action."

Illustration 13 is as follows: "13. A is trustee for B of Blackacre. While driving his automobile, C loses control of the car and it crashes into a house on Blackacre in which B is, injuring both B and the house. A sues C for the harm to the house. Judgment is given for C on the ground that he was not negligent. B then brings suit against C for personal injury. The prior judgment in favor of C is not res judicata upon the issue of C's negligence and C does not have the defense that the injury to the house and to the person of B was a single cause of action."

Under Nebraska law the former action to recover for the death of plaintiff's wife could have been brought and controlled *only* by the administrator of her estate. See § 30-809, R. R. S. 1943. On the other hand, such administrator could not bring an action like the one now before us in which plaintiff seeks recovery for his own personal injuries.

STATE OF NEBRASKA, APPELLEE, V. CHESTER MCSWAIN, APPELLANT.
229 N. W. 2d 562

Filed May 29, 1975. No. 39731.

1. **Evidence: Telecommunications. There are exceptions to the general rule requiring identification of participants in tele-**

phone conversations. One is a class of cases comprising statements which themselves are facts constituting part of the transaction under investigation and which are admissible in evidence under the rule of res gestae. The motive, character, and object of an act are frequently indicated by what was said by the person engaged in the act; such statements are in the nature of verbal acts and are admissible in evidence with the remainder of the transaction which they illustrate. The purpose of admitting a verbal act or fact is to prove the nature of an act rather than to prove the truth of any alleged statement.

2. **Evidence: Conspiracy: Trial.** In conspiracy cases unusual latitude is permitted in the admission of evidence where the prosecution must depend upon circumstantial evidence to establish criminal intent, and the entire history of the conspiracy may be shown if the evidence tends to establish the ultimate fact.
3. **Evidence: Telecommunications.** Circumstances preceding or following a telephone conversation may serve to sufficiently identify the caller so as to render the telephone communication admissible.
4. **Evidence: Conspiracy: Trial.** In the reception of circumstantial evidence in a conspiracy prosecution, great latitude must be allowed, and jurors should have before them and are entitled to consider every fact which has a bearing on and a tendency to prove the ultimate fact in issue, and which will enable jurors to come to a satisfactory conclusion.

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

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

Paul L. Douglas, Attorney General, and Jerold V. Fennell, for appellee.

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

NEWTON, J.

The defendant Chester McSwain, a black male, was charged with conspiracy to obtain money by false pretenses. He was tried and convicted. On appeal he assigns as error the admission of evidence of telephone

conversations, of a statement that the caller was a black male, and of suspicious conduct by defendant's brother. We affirm the judgment of the District Court.

Rodney Oberle, payroll manager for the University of Nebraska at Omaha, received a phone call from a person who stated he was Dean Herzog. The caller stated Oberle should prepare a check to the First National Bank of $9,000 to reimburse the bank for money to be delivered. The caller stated the money was needed for a payroll and that he would pick it up. Oberle did not know a Dean Herzog but did know a Norman Herzog. Oberle testified the voice sounded like that of a black male. Oberle had never known payroll transactions to be handled in such manner and was unable to verify that any financial transaction was taking place in the University. He subsequently received a phone call from the bank and was informed a Mr. Herzog had requested that $9,000 be sent to the University. He later received another call from a person purporting to be Norman Herzog stating the transaction was okay at his end and inquiring if it was all right at Oberle's end. He said it was. Arrangements were made with the bank to deliver a moneybag. On delivery of the bag Oberle went to the cashier's department where he was approached by the defendant who said he was there to pick up the bag. They went to the payroll department where defendant received the bag and left the building. On leaving the building defendant was apprehended and dropped a leather pouch containing the moneybag. Oberle could not identify the defendant's voice as the one he heard on the telephone.

Norman Herzog, assistant director of radio-television engineering at the University, stated he had not called Mr. Oberle or the bank and had not authorized anyone else to do so. He did not know the defendant and had not authorized him to make the pickup.

An accounting clerk testified that she had received a call from a "Mr. Herzog" saying he had sent someone

to pick up the money and inquiring if he had been there. She could not identify the voice.

The defendant's brother was apprehended in the building after defendant's arrest and after a police officer had been informed he was acting suspiciously. On being questioned the brother stated his name was Donald Newton and that he had been with a girl who went out to register. There had been no such female registrant that afternoon. He also stated that his vehicle was in the library parking lot. He then stated the car was not there and that he had ridden out with his brother who was to pick him up. The address he gave was the same as defendant's and he proved to be defendant's brother Donald Newton McSwain.

A bank employee testified to receiving a call from a "Mr. Herzog" requesting delivery of the $9,000 payroll and arranging for it to be picked up by Wells Fargo. A cashier's check for $101 was placed in the bag with cut paper. He could not identify the voice as defendant's.

After delivery of the bag to Oberle a call was received from a female stating she was Mr. Herzog's secretary and inquiring if the package had arrived. She was told it had. The caller was not identified.

After defendant received the bag a male called asking about the delivery. The party said he was Mr. Herzog.

The telephone conversations were admissible. There are exceptions to the general rule requiring identification of participants in telephone conversations. "There is a distinct class of cases comprising statements which themselves are facts constituting part of the transaction under investigation and which are admissible in evidence under the rule of res gestae. The motive, character, and object of an act are frequently indicated by what was said by the person engaged in the act; such statements are in the nature of verbal acts and are admissible in evidence with the remainder of the transaction which they illustrate. The purpose of admitting a verbal act or fact is to prove the nature of an act rather than to

prove the truth of any alleged statement." 29 Am. Jur. 2d, Evidence, § 710, p. 773. See, also, Annotation, 13 A. L. R. 2d at 1412, et seq. In the present instance the calls were an inherent part of the plan to obtain money by false pretenses and essential to its success. It must be borne in mind that this is a matter of conspiracy and the strict rule of identity is not applicable. In conspiracy cases, unusual latitude is permitted in admission of evidence where the prosecution must necessarily depend on circumstantial evidence in order to establish criminal intent, and the entire history of the conspiracy may be shown even though other crimes may be involved, if the evidence tends even remotely to establish the ultimate fact. Jones v. People, 118 Colo. 271, 195 P. 2d 380.

In Gordon v. United States, 164 F. 2d 855 (6th Cir., 1947), it is held: "Admission of testimony which was so closely a part of the history of alleged conspiracy and of substantive act as to be part of an interwoven chain of relevant circumstances was discretionary."

In Schino v. United States, 209 F. 2d 67 (9th Cir., 1953), it is held: "In conspiracy case, wide latitude is allowed in presenting evidence, and it is within discretion of trial court to admit evidence which even remotely tends to establish conspiracy charged."

Another facet of the question presented is reflected in the fact that the defendant appeared to pick up the money arranged for in the telephone conversations and thereby established a direct connection between himself and the parties making the calls. It is generally held that circumstances preceding or following a telephone conversation may serve to sufficiently identify the caller so as to render telephone communication admissible. State v. Williamson, 210 Kan. 501, 502 P. 2d 777.

Complaint is made that a police officer stated he was informed of a stranger in the building who had been there for some time and was acting suspiciously. As above noted, when questioned, this individual gave con-

tradictory reasons for his presence, his means of transportation, and an incomplete name. He was also found to be the defendant's brother and his presence at the scene certainly presented an unusual and unexplained coincidence. As stated in People v. Cooper, 326 Mich. 514, 40 N. W. 2d 708, in the reception of circumstantial evidence in a conspiracy prosecution, great latitude must be allowed, and jurors should have before them and are entitled to consider every fact which has a bearing on and a tendency to prove the ultimate fact in issue, and which will enable jurors to come to a satisfactory conclusion.

In view of the fact that defendant's brother had no apparent reason for his presence in the building, unless it was in connection with the defendant's project, and his general evasiveness, we believe the evidence was properly admitted.

In regard to the opinion expressed by one witness that the telephone caller was a black male, the statement, although admitted without a proper foundation, was harmless error. The witness made it clear that he could not identify the voice on the telephone as defendant's. This statement did not serve to connect the defendant with the telephone calls. The connection was made when defendant picked up the moneybag pursuant to the calls.

The judgment of the District Court is affirmed.

AFFIRMED.

TED DEYLE, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, ET AL., APPELLEES.
229 N. W. 2d 565

Filed May 29, 1975. No. 39779.

1. **Streets: Highways: Access: Property. An abutting landowner has no vested interest in the flow of traffic past his premises,**

and a change in the flow of traffic resulting from the placing of medians in a street or highway is not compensable.

2. ———: ———: ———: ———. Before a landowner can prevent the imposition of controlled access he must establish by clear and unequivocal proof that the denial of access to his property is unreasonable, arbitrary, or discriminatory.

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

Ross, Schroeder & Fritzler and Ted L. Schafer, for appellant.

Paul L. Douglas, Attorney General, Warren D. Lichty, Jr., Gary R. Welch, and John E. Brown, for appellees.

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

BOSLAUGH, J.

The plaintiff is a landowner whose property lies west of and adjacent to State Highway No. 10 which is also Second Avenue in Kearney, Nebraska. In 1974 the State was in the process of constructing a four-lane highway with center medians along and adjacent to the plaintiff's property. The project commenced south of 31st Street and continued beyond 52nd Street. This action was brought to enjoin the Department of Roads of the State of Nebraska and its Director from constructing a median in the highway which would deny north-bound traffic on the highway access to the defendant's property at a driveway located at approximately 45th Street.

An abutting landowner has no vested interest in the flow of traffic past his premises, and a change in the flow of traffic resulting from the placing of medians in the center of Second Avenue was not a compensable taking or damaging of his property. See Painter v. State, 177 Neb. 905, 131 N. W. 2d 587.

The plaintiff's theory of the case was that the denial of a break in the median at 45th Street opposite the driveway to his property was arbitrary, capricious, and

unreasonable, and therefore, illegal. The State relies upon Hammer v. Department of Roads, 175 Neb. 178, 120 N. W. 2d 909, in which this court said that before a landowner can prevent the imposition of controlled access he must establish by clear and unequivocal proof that the denial of access to his property is unreasonable, arbitrary, or discriminatory.

The trial court found the plaintiff had failed to prove the defendants had acted in an arbitrary and capricious manner and dismissed the action. The sole issue on appeal is whether the evidence established the refusal to grant a median break at 45th Street was arbitrary and capricious.

The plaintiff's property is a 7-acre tract located near the north edge of Kearney, Nebraska. It has a frontage of approximately 500 feet on the west side of Second Avenue. The south property line is at 44th Street and the property extends to the north beyond 45th Street. The north 2 acres of the tract are leased to Deyle Construction Company, a corporation owned by the plaintiff. The driveway at 45th Street leads to a building in which the Deyle Construction Company operates a construction business and sells building materials, plumbing supplies, and other items. An interior decorating shop and paint shop is located at the back of the building.

Most of the traffic going to the Deyle Construction Company approaches from the south. A traffic count made by one of the plaintiff's employees during an 8-day period in February 1974, showed 258 vehicles coming from the south and 7 from the north. Because much of the property in the area north of 39th Street is undeveloped some of the streets shown on plats in the area have not been opened and other streets have not been dedicated. If there is no break in the median at 45th Street, traffic going to the Deyle Construction Company will be required to make a U-turn at a median break north of 45th Street or circulate on roads and streets

to the east of Second Avenue and make a left turn onto Second Avenue at a point north of 45th Street.

There is a median break at 44th Street which gives access to a driveway at the south property line of the plaintiff's property. However, there is no frontage road on the west side of Second Avenue and the plaintiff would be required to construct an access road across the south 5 acres of his property if traffic to the Deyle Construction Company were to use the median break at 44th Street for access.

The plaintiff had some difficulty in ascertaining whether the plans for the highway project included a median break at 45th Street. After it was determined that the plans did not include a median break at 45th Street, a request for a change to include such a break was made and there were several hearings or conferences with officials of the Department of Roads and the Highway Commission. Some changes were made in the plans at other locations and three additional median breaks below 44th Street were granted. The request for a median break at 45th Street was refused.

The plaintiff called a consulting engineer, Nathaniel W. Beezley, who had been employed as assistant engineer of design and as urban engineer by the Department of Roads from 1963 to 1968. He testified that the public was not afforded reasonable ingress and egress to the plaintiff's property because existing streets did not provide an adequate circulation system. Traffic approaching from the south was required to travel an unusually long distance to reach the plaintiff's property and industrial traffic was routed into residential areas. The witness proposed a median break at 45th Street opposite the driveway to the plaintiff's property as a solution to this difficulty.

The defendant's evidence showed the project was planned in cooperation with local authorities and information was obtained from city officials concerning future street development in the area. Specifically, the

State was advised there was a proposal to develop 42nd Street and 44th Street.

The final plans engineer for the Department of Roads testified concerning the purpose of highway medians and their function in highway design. He explained that controlled access on this project commenced at 44th Street. North of 44th Street median breaks were placed at approximately 2-block intervals. This was primarily a matter of safety. The longer medians provided adequate storage space for turn lanes and permitted higher speeds as traffic moved out of the congested area. He further testified that a median break at 45th Street would serve only one property owner at this time, and would interfere with the turn lane for south-bound traffic at 44th Street.

The evidence as a whole established the decision by the Department of Roads as to where median breaks would be placed was a matter of judgment and depended upon the consideration of a number of factors. As stated by the plaintiff's witness, Beezley, there is a conflict between the land service function and the through traffic function in highway design; and adjustments and accommodations must be made based upon the relative importance of each function at particular points. There is no scientific or mathematical method by which such decisions may be made. In the final analysis it is a judgment matter.

The plaintiff argues the Department of Roads could have selected 46th Street instead of 44th Street as the point at which controlled access would begin and the effect upon through traffic would have been minimal. While this might be true at this time, the effect will become greater as the area develops and traffic turning from the highway increases in volume. Again, it is a matter of judgment as to where controlled access should be imposed. By the nature of things it is usually a close question at the point of transition.

The trial court noted that the Department of Roads

might have made an error in judgment in granting a particular median break south of 39th Street. This did not make the refusal to grant a median break at 45th Street arbitrary and capricious.

We conclude that the evidence failed to show the denial of the request for a median break at 45th Street was arbitrary and capricious. The judgment of the District Court is, therefore, affirmed.

AFFIRMED.

IN RE ESTATE OF WILMA R. ANDERSON, DECEASED. MARGARET A. WONDRA, APPELLANT, V. PLATTE VALLEY STATE BANK & TRUST COMPANY, TRUSTEE, ET AL., APPELLEES.

230 N. W. 2d 182

Filed May 29, 1975. No. 39795.

1. **Parent and Child: Taxation: Domicile: Decedents' Estates.** The fact that the minor stepdaughter of a testatrix was physically absent from the home and household of the testatrix attending school, during a part of which time she lived with maternal relatives in another state and was physically present in the testatrix' home only during vacation time, did not of itself prevent the stepdaughter from being a member of the household of and having her permanent home in the home of the testatrix for 5 continuous years within the meaning of section 77-2004, R. R. S. 1943.
2. **Wills.** The cardinal rule in construing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to law. The intention is to be determined from the language of all the pertinent provisions of the will and, where applicable, the circumstances under which the will was made.
3. ———. Generally speaking, a residuary clause of a will is that clause which disposes of property, not usually specifically described, which has not been disposed of by the other provisions of the will. Such a clause commonly, but not always, refers to the "rest, residue or remainder," or uses language of similar import. As a matter of mechanical arrangement

the residuary clause is often last, but need not necessarily be. The mere fact that property is particularly described does not necessarily exclude it from the residuary estate.

Appeal from the District Court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded for further proceedings consistent with this opinion.

Brian R. Watkins and H. B. Muffly, for appellant.

Gary L. Hogg, Tye, Worlock, Tye, Jacobsen & Orr, Nate C. Holeman, and Munro, Parker, Munro & Grossart, for appellees.

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

CLINTON, J.

This is an appeal involving the estate of Wilma R. Anderson, deceased. Two issues are here for determination. The first is whether or not the appellant, Margaret A. Wondra, stepdaughter of Wilma R. Anderson and the principal beneficiary of her will, is within the category of persons entitled to the $10,000 exemption and the 1 percent inheritance tax rate provided by section 77-2004, R. R. S. 1943, or whether she comes within the category described in section 77-2006, R. R. S. 1943. The second issue involves the construction of the will of the decedent and requires a determination as to which provision of the will describes the residuary estate of the testatrix upon which, under the terms of its first article, the burden of the estate and inheritance tax falls.

Both the county court and the District Court determined that Margaret was not, under the evidence, within one of the categories described in section 77-2004, R. R. S. 1943. Both courts determined that only the "Residual Trust," created by provision A 2 of article VI of the will, was the residuary estate upon which by reason of article I the burden of the estate in inheritance taxes must fall. We reverse and remand with directions.

The appellees are Buffalo County, which has an inter-

est by reason of the inheritance tax involved, and two cousins of the decedent who are the beneficiaries of the "Farm Trust" created by provision A 1 of article VI of the will and whose interests will bear a portion of the tax burden if both trusts constitute the residuary estate.

Section 77-2004, R. R. S. 1943, applies to certain close relatives, including lineal descendents and to "any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent; Provided, that no one shall be considered a person to whom the deceased stood in the acknowledged relation of a parent unless he shall have been a member of the household of the deceased and shall have had his permanent home in the home of the deceased for at least five continuous years during his minority." Both the county court and the District Court found that the testatrix for a period of more than 10 years stood in the acknowledged relation of parent to Margaret. The lower courts found, however, that under the evidence Margaret had not been a member of the household of and had not had her permanent home in the home of the testatrix for a continuous period of 5 years during the minority of Margaret within the meaning of the proviso. In arriving at that conclusion the courts below were called upon to construe a provision of the statutes without having the benefit of any previous construction by this court and without the benefit of the construction of any similar proviso by a court of last resort of any other jurisdiction. Thus they were forced to rely solely upon the general rule of strict construction of statutes exempting property and legacies from taxation. Todd v. County of Box Butte, 169 Neb. 311, 99 N. W. 2d 245.

It is clear from the evidence that from the time the testatrix married Margaret's father until the death of the testatrix on August 21, 1971, there did exist between the testatrix and Margaret the acknowledged relationship of mother and daughter. The lower courts so

found and it is unnecessary to detail the evidence which fully supports such a finding. The determination of the issue at hand turns wholly upon whether or not the conditions of the proviso were met.

Evidence discloses that the plaintiff was born in Kearney, Nebraska, on December 20, 1915, and was an only child. Her parents were Ira Anderson and Ada Roslind Mercer Anderson. Her natural mother died in 1921. On June 19, 1924, Margaret's father married Wilma Ruth Crosley, the testatrix. At that time Margaret was 8½ years old. Immediately after the marriage Margaret, her father, and stepmother made their home with the testatrix' mother who was referred to as grandmother Crosley. Margaret thereafter referred to the testatrix as mother. The Crosley house remained the home of Mr. and Mrs. Anderson thereafter throughout their marriage until the death of Margaret's father many years later. The grandparents Mercer lived nearby. There was apparently some friction between the grandparents Mercer and grandmother Crosley because the latter thought Margaret was being spoiled by the former. In the summer of 1926 the grandparents Mercer took Margaret on a vacation trip to Oregon to the home of a maternal aunt. The Mercers left Margaret at her aunt's home with the consent of her father. Exactly how this came about is somewhat uncertain, but it is a reasonable inference that it was partly because Margaret liked it there where there were other children in the home and partly in order to relieve the tension between grandparents and to remove Margaret from any conflict. Margaret's father bore the entire cost of Margaret's support while she lived in Oregon and communication on a parental basis continued between Margaret and her father and stepmother during that time. About 2 years after Margaret's arrival in Oregon the grandparents Mercer moved to Oregon and Margaret moved from her aunt's home to that of the Mercers. She lived with them, continued in school, and was supported by her father.

In the spring or summer of 1930 Margaret's father and the testatrix made a trip to Oregon. Margaret then went with them on a vacation through the west and came back to Kearney with them where she stayed the remainder of the summer. In the fall she returned to Oregon for school. The same support arrangements and communications continued. Thereafter Margaret spent the school year in Oregon and the summers of 1931, 1932, and 1933 in Kearney. By the spring of 1934 she had completed her freshman year at the University of Oregon and then returned to Kearney for the summer. That fall she entered the University of Nebraska and attended at the University for 2 years, returning home to Kearney for the summer vacations, the holidays, and the various school breaks. On August 23, 1936, a few months before she reached 21 years of age, she married and thereafter had her own home.

The courts below concluded that although physical absence from the home and household of the acknowledging parent, while the child attended college, did not interrupt the continuity of her home with the testatrix, that the earlier physical absence while attending high school did. We, for reasons we elaborate later, conclude otherwise. Even if, for sake of argument, we accept Margaret's continued absence from Kearney from 1926 to 1930 as an interruption of the relationship to home and household of the testatrix, we believe that in the summer of 1930 the necessary relationship was reestablished within the meaning of the proviso and continued until Margaret married in August of 1936, a period of more than 5 continuous years.

The statutory requirement is that the child "shall have been a member of the household of the deceased and shall have had his permanent home in the home of the deceased" for at least 5 continuous years during minority. One usually thinks of the terms "household" and "home" as being free of ambiguity, but this is not true. The precise meaning can vary depending upon

the context in which the terms are used. This may be shown by the following examples. In Crossfield v. Phoenix Ins. Co., 77 N. J. Super. 476, 187 A. 2d 20, a burglary insurance policy case, it was held that temporary absence from the home does not interrupt the household membership, but that absence does if there is no intent to return to the family home. In Mazzilli v. Accident & Cas. Ins. Co. of Winterthur, 35 N. J. 1, 170 A. 2d 800, it was held that residence under the same roof is not always required for a person to be of the same household. In Umbarger v. State Farm Mut. Auto. Ins. Co., 218 Iowa 203, 254 N. W. 87, it was held that family and household are "substantially synonymous terms." In that case a boarder was held not to be a member of the household. In Fay v. John Waldron Corp., 117 N. J. Law 123, 187 A. 140, a workmen's compensation case, the question was whether the decedent's children were members of his household. The children's mother died. The father placed the children with his sister and he also lived with her for a time. The sister married and moved elsewhere taking the children with her. Because of his employment the decedent could visit the children only on weekends. He supported the children continuously. The children were held to be members of his household. In Herbst v. Hansen, 46 Wis. 2d 697, 176 N. W. 2d 380, an automobile insurance case, it was held that, while residence under one roof is a factor to be considered in determining whether persons are members of the same household, a temporary absence with intent to return does not necessarily sever the relationship. We cite the foregoing cases simply to demonstrate that in order to determine as exactly as possible the meaning of such terms as used in the statute, we must bear in mind the purpose which the Legislature sought to accomplish.

It is significant that the Legislature used the term "permanent home." This, it seems, can only be in contradistinction to a temporary home. It is clear that if

Margaret had a "*permanent* home" it was with her father and the testatrix. It is clear that neither her residence with her aunt for about 2 years nor her residence with her grandparents Mercer was intended by anyone as anything but a temporary arrangement. Only her father could control the matter, and he did. The Crosley home was his home until his death in 1946. That was also the home of the testatrix. It was also Margaret's permanent home from 1930 until her marriage.

It seems clear that the language the Legislature used was intended to prescribe a somewhat objective standard for determining the genuineness of the relationship. This is borne out by the legislative history of the statute and the proviso. From 1901 to 1953 this statute included among the classes of persons coming within it "any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent." In 1953 this language was omitted, leaving just the specifically described close relatives enumerated. In 1957 the quoted language was restored to the statute and the proviso at issue here was added. At that time the chairman of the Judiciary Committee of the Legislature stated the bill's purpose in the following language: "In the present law, a foster child or step-child is classed as a non-relative and allowed only a $500 exemption. This bill would allow a $10,000 exemption to a qualified foster child or step-child upon the theory that such person who had been accepted in a home for a reasonable time should have the same exemption privileges as close relatives in the same family. . . . The time qualification period is set at 10 years, and the foster child must have lived in the household of the deceased for 5 continuous years of his minority. This safeguard tends to deter irresponsible parties claiming exemptions." In 1948 in the case of In re Estate of Dowell, 149 Neb. 599, 31 N. W. 2d 745, we interpreted the language later restored in 1957 to include persons

who would be coming within its terms even though not related by blood and had in that case applied the phrase to include a foster child.

In construing the statute as we do here, we do not believe we depart from the rule of strict construction of Todd v. County of Box Butte, *supra*. In that case the language taken in context was clear and could not be properly interpreted other than as it was.

In In re Downey's Estate, 182 N. Y. S. 223, the sole question was whether a legatee's stepmother had stood for not less than 10 years in the relation of parent to the legatee. The legatee was 5 when her father and stepmother married. She lived with them at least until she was 16. From her 7th to 10th year she attended a boarding school, going home on vacations. The New York court stated: "The fact that the legatee during a part of the time was absent from the home of her father . . . I do not consider at all inconsistent with the relationship in question." In Herbst v. Hansen, *supra*, although involving an adult person and a context different from this case, the decision stands for the proposition that temporary absence does not always terminate household membership. That statement would seem to be true a fortiori in the case of a minor, who cannot independently determine her own home and household.

We hold, therefore, that Margaret was a member of the household of the testatrix and had her permanent home in the home of the testatrix for at least 5 continuous years during her minority within the meaning of section 77-2004, R. R. S. 1943.

The second question to be determined is whether the residuary estate of the testatrix consisted of all the property passing under article VI of the will, or merely that part of the property which passed into the "Residual Trust."

The cardinal rule in construing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to law. Dover v. Grand Lodge of Nebraska Ind. Order of Odd Fellows, 190 Neb. 169,

206 N. W. 2d 845. The intention is to be determined from the language of all the pertinent provisions of the will and, where applicable, the circumstances under which the will was made. Berning v. National Bank of Com. Tr. & Sav., 176 Neb. 856, 127 N. W. 2d 723.

Part of the ambiguity in the will of the testatrix arises from the language of article VI and part arises from certain language in article I, which is otherwise reasonably clear. Article I is as follows: "I direct that all of my just debts, funeral and testamentary expenses be paid as soon after my decease as conveniently may be done. I direct that all estate, inheritance, transfer, legacy or succession taxes, or death duties, which may be assessed or imposed with respect to my estate, or any part thereof, wherever situated, whether or not passing under my Will, including the taxable value of all policies of insurance on my life, and of all transfers, powers, rights or interest includable in my estate for the purpose of such taxes and duties, shall be paid out of my residuary estate, and if it be insufficient for such purposes, then out of my personal estate as an expense of probate and without apportionment."

Articles II, III, and IV make specific devises and bequests. Article V grants an option to purchase certain stock with the proviso that if the option is not exercised, "such stock shall become a part of my residuary estate."

Article VI contains an introductory paragraph as follows: "I give, devise and bequeath all of the rest, residue and remainder of my property and estate whether real, personal or mixed, wheresoever situated and to which I may be entitled in two trusts, to the Trustee hereinafter named to be held, administered and disposed of as follows." Then follow two subdivisions designated A and B. Subdivision A, after an introductory clause, contains two subdivisions designated 1 and 2 which create respectively the "Farm Trust" and the "Residual Trust." The introductory clause of A reads: "Said trusts shall continue for ten years," and then directs the trustee to

administer the property for the trust period and at the end of that period to distribute the property as thereafter provided.

Subdivision 1 of A reads: "My Trustee shall receive and hold in trust my farm to be known as the 'Farm Trust', described as follows:" (here follows the legal description of the farm). This subdivision then goes on to provide that the net income be distributed "equally to my cousins William C. Boon, Jr. and Carol Martin." It provides that if either dies during the trust, the income goes to the children of the deceased, if any, otherwise to the surviving cousin. If both die, the income becomes part of the "Residual Trust." Provisions identical to the foregoing are made for distribution of the corpus in the same contingencies. The last paragraph of subdivision 1 provides that, upon termination of the farm trust, distribution may be made in cash or in kind. It further provides that if the beneficiaries desire distribution in kind they shall notify the trustee "in writing on or before the date of termination," otherwise the trustee "shall proceed to sell" and distribute in cash.

Subdivision 2 provides in part: "The rest, residue and remainder of my estate, real, personal or mixed, . . . to be known as my 'Residual Trust' ", shall be managed, the income to be distributed "semi-annually to Phillip H. Proctor and Margaret Wondra equally." If Proctor dies during the trust the entire income goes to Margaret. If Margaret predeceases the testatrix or dies during the trust period, then her share of the income goes to her children or grandchildren by representation. It specifically names the children. This trust also expires 10 years after the death of the testatrix and is to be distributed to Proctor and Margaret in equal shares. The possible deaths of Proctor or Margaret are anticipated and in such event provision for distribution of corpus is made the same as in the case of income. Distribution is authorized in cash or in kind.

Article B prohibits any "donation or contribution from

either of the above trusts" and recites that the testatrix has made during her lifetime such contributions and donations as she desires.

Articles VII, VIII, and IX are administrative or definitional and do not shed any light as to the testatrix' intention with reference to the issue before us.

Article X defines the powers of the executor and trustee, the Platte Valley State Bank & Trust Company. Briefly summarized, the powers which might arguably shed some light on the testatrix' intention are: (1) To retain property received regardless of its form, including real estate. (5) To sell "property, real or personal, held in trust." (9) To borrow money "and pledge or mortgage any trust assets as security." (22) To exercise extremely broad powers with reference to farms, including operating the same in the corporate form.

The will was executed on August 10, 1971. The testatrix died on August 21, 1971.

Generally speaking, a residuary clause of a will is that clause which disposes of property, not usually specifically described, which has not been disposed of by the other provisions of the will. 96 C. J. S., Wills, § 796, p. 215. Such a clause commonly, but not always, refers to the "rest, residue or remainder," or uses language of similar import. 96 C. J. S., Wills, § 796, p. 217. As a matter of mechanical arrangement the residuary clause is often last, but need not necessarily be. 96 C. J. S., Wills, § 796, p. 217. The above indicia are, of course, not conclusive, but are, without doubt, helpful in determining the intention of the testator.

As is evident from our summary of the will provisions, the only reason we need determine the residuary estate is because it is that part of the property which bears the tax burden. The issue could be stated in another form: What property did the testatrix intend should bear the tax burden?

The introductory language of article VI earlier quoted is the usual and customary language introducing a resi-

duary clause and, standing by itself, would appear determinative. The ambiguity, however, arises when the language of other provisions is considered. The primary ambiguity arises from that part of article I which, after placing the tax burden on the residuary estate, says: "and if it be insufficient for such purposes, then out of my personal estate as an expense of probate and without apportionment." This language, when considered together with the fact that the initial corpus of the "Farm Trust" consists wholly of real estate can, with considerable force, be said to support the conclusion that the testatrix did not intend to burden the farm property with the tax obligation. Such a conclusion is reinforced by the further fact that the introductory language creating the "Residual Trust" also uses the language, "The rest, residue and remainder of my estate." Despite the reintroduction of this residuary estate language in A 2, we would have no hesitance in concluding that all the property passing under article VI is the residuary estate, except for the contingent direction to pay the taxes from the personal property if the residuary estate is insufficient. Is that particular phrase a "throw away" line and a mere inadvertence? Such a conclusion ought not to be casually reached.

Let us now look at considerations founded upon other provisions of the will which tend to lessen the force of the arguments founded upon the contingency direction. The will contains no provision requiring that the farm be preserved in kind as the trust corpus. The will, in fact, contains express authority authorizing the sale of the trust property and the will gives the beneficiaries no absolute veto on that power of the trustee. When the time approaches for distribution, the beneficiaries, then entitled to the distribution of the farm trust, may ask for and receive distribution in kind of the trust corpus in whatever form it may then be.

The power given to the executor and trustee to borrow upon and mortgage trust assets is significant. It

constitues a recognition that there may be obligations which can be satisfied by borrowing rather than by liquidation. Did the testatrix consider the death taxes among those obligations?

It is evident that Margaret is the principal beneficiary under the will. She received specific devises and bequests under articles II, III, and IV, as well as the "Residual Trust," subject, in the case of the trust, to the tax obligations which burden it. In the event Proctor predeceases the testatrix, Margaret (or her lineal descendants) receives the specific bequests of real estate made to Proctor in article IV. Margaret or her descendants receive the residuary trust if Proctor dies before distribution. If both Margaret and Proctor predecease the testatrix the specific bequests of real estate made to them in article IV become part of the "Residual Trust." Did the testatrix intend that the real estate be free of tax if it passes under article IV, but bear, as part of the residuary estate, the tax burden if it becomes part of the residual trust and passes to Margaret's descendants?

If the residuary estate consists of all property passing under article VI, then all four beneficiaries of the estate bear some portion of the tax burden and in proportion to their interests under article VI. If only the "Residual Trust" bears the tax burden, then that burden rests wholly on the testatrix' principal beneficiaries, those who apparently were foremost in her mind as evidenced by their otherwise favored position under the terms of the will. What did the testatrix intend? If the testatrix intended the "Residual Trust" only to be liable for all the death taxes, it would have been simple and precise to have said so in article I, rather than there using the more general term residuary estate, which term, except for the contingency provision of article I, would clearly refer to all the property passing in article VI.

This brings us back full circle to the significance of what we have referred to as the contingency provision.

That provision is in a sense anamolous and surplusage for there is in fact no significant amount of personal property which is not included in the "Residual Trust." The sole exception is a modest amount of household furnishings and personal effects which are the subject of the specific bequests in article III. The conclusion we draw is that the contingency provision in this will is not significant, much less conclusive, in determining the intention of the testatrix on the matter at issue. This conclusion is reinforced by the fact that the general terms used in the will in describing classes of property disposed of are not always used with precision. Provision A 2 refers to the property passing into the "Residual Trust" as containing real estate. No real estate is in fact included and could not be save for a change in the form of the testatrix' assets after the making of the will, or in the event of the death of both Margaret and Proctor before that of the testatrix. The contingency provision, as we earlier noted, refers to payment of death taxes from personal property which does not exist apart from that in the "Residual Trust."

It may be argued that the "Farm Trust," which consists of specifically described real estate, is a specific devise just as are the bequests in certain preceding articles and is therefore not part of the residuary estate. If the testatrix had so intended it would seem that she would have placed the same in a separate article and not included it in "The rest, residue and remainder of my estate." The mere fact that property is particularly described does not necessarily exclude it from the residuary estate. 96 C. J. S., Wills, § 797, p. 218. Let us use a homely example. Assume that a testator's residuary estate happens to consist of only black, blue, white, and red marbles. He says: I give all the rest, residue, and remainder of my estate as follows: (a) To John all the black marbles. (b) To Mary the remaining marbles. John's bequest is specifically described; Mary's is not. Yet both are part of the residuary estate.

For the reasons set forth, we conclude that it was the intention of the testatrix that all the property passing under article VI was her residuary estate and was to bear the tax burden. The factors which lead us to this conclusion we have analyzed and we now summarize: (1) The mechanical arrangement of the provision of the will and the language introducing article VI describe the usual residuary estate provisions. (2) If the testatrix had intended to charge the "Residual Trust" with the tax burden, it would have been accurate and precise to use that term in article I, but she did not. She chose to refer to the residuary estate. (3) The will provisions do not mandate the preservation of the farm in kind, but actually contemplate its change in form as the corpus of the "Farm Trust." (4) The will provisions, considered as a whole and taken together with the testatrix' relationship to her beneficiaries as evidenced by the will, indicate that it was the specific bequests and devises under articles II, III, and IV which were intended to be free of the tax burden. (5) The significance which the contingency provision of article I might otherwise have is lost because it seemingly refers to personal property which did not exist except for the residual trust. The contingent provisions for paying taxes from the personal estate is inconsistent with the facts of the property holdings of the testatrix as known to her when she made the will.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

IN RE APPLICATION NO. 30466.

REVEREND JOSEPH C. MYERS ET AL., APPELLEES, V. THE BLAIR TELEPHONE COMPANY, A CORPORATION, APPELLANT.

230 N. W. 2d 190

Filed May 29, 1975. No. 39854.

1. **Public Utilities: Public Service Commissions: Telecommunica-**

tions: Constitutional Law: Administrative Law. Under Article X, section 7, Constitution of Nebraska, and section 75-126, R. R. S. 1943, exclusive power and jurisdiction to inquire into allegations or complaints, concerning unjust discrimination in the charging of rates, is vested in the Public Service Commission.

2. Public Utilities: Public Service Commissions. The Public Service Commission is empowered to, and was created with the intention that it would, regulate public utilities insofar as the powers and operations of such utility affect the public interest and welfare. Consequently, it does have authority to supervise the operation of a utility to the extent of seeing that the utility provides the service for which it is exacting payment.
3. ———: ———. A public utility is obligated to serve all its ratepayers fairly and without undue discrimination. In seeing that the utility meets this obligation, the Public Service Commission is not directing how funds of the utility are to be used.
4. ———: ———. The primary object of the regulation of public utilities by the Public Service Commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but, first and at all times, to serve the interests of the public.
5. ———: ———. As a matter of elemental justice, consumers of utility services are entitled to the same protection against confiscation of property or arbitrary action on the part of the utility as are the utilities.
6. Constitutional Law: Public Service Commissions: Administrative Law. Unlike some public service commissions, the Nebraska Public Service Commission, in the different aspects of its constitutional functions, exercises legislative, administrative, and judicial powers.
7. Administrative Law: Public Service Commissions. The powers of the Public Service Commission are regulatory in nature and the judicial powers lodged in it are remedial of and ancillary to its regulatory powers.
8. Administrative Law: Public Service Commissions: Public Utilities. The Public Service Commission, as a part of its power and duty to establish rates which will provide an adequate return and to regulate the services of utilities, must have the authority to compel the utility to render the service for which it induced the commission to fix an adequate rate.
9. ———: ———: ———. Inherent in the power of the Public

Service Commission is its right to force a utility to give the service for which its rates have been fixed. As a corollary to that power must be the right, where the service is woefully inadequate, to require the utility to rebate some portion of the rates set for reasonably adequate service.

Appeal from the Nebraska Public Service Commission. Affirmed.

John R. O'Hanlon of O'Hanlon & Martin, for appellant.

No appearance for appellees.

Bert L. Overcash of Woods, Aitken, Smith, Greer, Overcash & Spangler, for amicus curiae.

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

SPENCER, J.

This action was initiated by 100 subscribers who are on the Kennard, Nebraska, exchange, against the Blair Telephone Company, hereinafter referred to as company. The application, filed February 12, 1974, asked for a determination of a dispute between them and the company concerning charges made for local exchange service which they alleged was totally inadequate. A public hearing was held May 16, 1974. The Public Service Commission, hereinafter called commission, entered its order on September 16, 1974. After extensive findings which sustain the complaint that the service rendered by the company was woefully inadequate, the commission decreed substantially as follows:

1. That the local main station rates at the Kennard, Nebraska, exchange of the Blair Telephone Company be reduced by 60 percent effective January 1, 1974, and to continue at such level until the company proves to the commission that the service is adequate.

2. That the Blair Telephone Company complete the installation of all one-party service at Kennard on or before March 1, 1975, and report to the commission

monthly as to construction progress, including the funds expended therefor, and the reason for any extension of time granted to the contractor by the company.

3. That the company report to the commission monthly showing the summary of reports of trouble at the Kennard exchange.

4. That the company report to the commission immediately any outages at the Kennard exchange affecting 20 percent or more of the subscribers.

5. That the company report to the commission monthly the total number of man hours expended within the Kennard exchange for repair services, and the total number of hours spent for routine maintenance.

6. That the company assign numbers to its long distance, information, and trouble operators within 15 days from the date of the order.

The company sets out 11 assignments of error. In its brief, however, all its discussion is centered on the 60 percent reduction in rate made retroactive to January 1, 1974. We affirm.

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

Section 75-109, R. R. S. 1943, provides: "The commission shall have the power to regulate the rates and services of, and to exercise a general control over, all common carriers, which term is hereby defined as all carriers, including contract carriers, engaged in the transportation of freight or passengers for hire, or furnishing communication services for hire in Nebraska intrastate commerce." This essentially is merely a reiteration of the constitutional provision.

Section 75-111, R. R. S. 1943, provides: "The commission shall investigate any and all cases of alleged neglect or violation of the laws of this state by any common carrier subject to the provisions of sections 75-101 to 75-801, doing business in this state, or by the officers, agents or employees thereof, and take such action with reference thereto as may be provided by law."

Section 75-119, R. R. S. 1943, provides, so far as material herein: "When any common carrier or other interested person petitions the commission alleging that a rate * * * is unreasonably high or low, unjust or discriminatory, notice shall be given to the common carriers affected in accordance with the commission's rules for notice and hearing."

Section 75-126, R. R. S. 1943, provides, so far as material herein: "(1) Except as otherwise provided in this section, no common carrier shall: * * *

"(c) subject any type of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever; * * *."

Section 75-133, R. R. S. 1943, provides: "Whenever the commission has reason to believe that any common carrier is violating any of the provisions of sections 75-101 to 75-801, it shall at once institute an inquiry and fix a time and place for hearing thereon, upon its own motion, and shall make any order or orders as may upon such hearing be deemed just and reasonable."

From the above statutory provisions it is evident that the commission has the power to regulate the rates and services of the company and to exercise a general control over all telephone companies. This includes the authority to investigate any and all cases of inadequate services and to provide any available remedy.

So far as we have been able to determine, the Legislature has made no specific provision which would cover the situation before us. In the absence of specific legislation, the powers and duties of the commission, as enumerated in the Constitution, are absolute and un-

qualified. State ex rel. State Railway Commission v. Ramsey (1949), 151 Neb. 333, 37 N. W. 2d 502. Such powers are plenary and self-executing, in the absence of specific legislation on the subject. Dahlsten v. Harris (1974), 191 Neb. 714, 217 N. W. 2d 813. Section 75-127, R. R. S. 1943, does provide for criminal penalties covering violations by any common carrier or officer, agent, or employee, but we do not interpret this to be exclusive.

The company first argues that a public utility is entitled to rates for its service that may normally be expected to yield a fair return upon the reasonable value of the property that is being used for public convenience. We agree, and have so held on many occasions, but that is not the question before us. Under Article X, section 7, Constitution of Nebraska, and section 75-126, R. R. S. 1943, exclusive power and jurisdiction to inquire into allegations or complaints, concerning unjust discrimination in the charging of rates, is vested in the Public Service Commission. See Allen v. Omaha Transit Co., Inc. (1971), 187 Neb. 156, 187 N. W. 2d 760. The company was operating under rates previously set by the commission. We must presume these rates gave the company just compensation or a fair return upon the reasonable value of its property at that time. We must also presume these rates were set to provide reasonably adequate telephone service. The company herein was not attempting to get a further increase. It was attempting to prove the adequacy of its service for the agreed rates.

The company's second contention is that the commission in rendering a decision reducing rates must include findings of fact upon which that decision is based. The commission filed detailed findings, including a finding of 2,041 trouble reports over an 11-month period. It also specifically found that investigation by the commission staff subsequent to the hearings did not reveal any improvement in the high level of trouble reports. There is no merit to the company's second argument.

Thirdly, the company argues that the power of the commission to regulate and control telephone companies is limited by the consideration that it is not the owner of the property of the utility or clothed with the general power of management incident to ownership. True, the commission has no authority to supplant the managers or directors of public utilities or to substitute its discretion for theirs. However, the commission is empowered to, and was created with the intention that it would, regulate public utilities insofar as the powers and operations of such utility affect the public interest and welfare. Consequently, it does have authority to supervise the operation of a utility to the extent of seeing that the utility provides the service for which it is exacting payment.

It is the duty of the commission to see that the utility is not unjustly enriched by actions inimicable to public interest. As the United States Supreme Court said almost 60 years ago: "Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render." New York & Queens Gas Co. v. McCall (1917), 245 U. S. 345, 38 S. Ct. 122, 62 L. Ed. 337. We paraphrase by saying they may not continue to exact rates set for reasonably adequate service for service that wholly fails to meet that standard.

A public utility is obligated to serve all its ratepayers fairly and without undue discrimination. In seeing that the utility meets this obligation, the commission is not directing how funds of the utility are to be used. Rather, it is requiring the utility to render the service for which the rate was set, or, as was done here, to refund a portion of the rate charged for the inferior service. As we said in Furstenberg v. Omaha & C. B. St. Ry.

Co. (1937), 132 Neb. 562, 272 N. W. 756: "The primary object of the regulation of public utilities by the railway commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but, first and at all times, to serve the interests of the public."

The company's last assignment of error is that its rate of return should not be confiscatory so as to deprive the utility of property without compensation. We fully agree, and have so held. As a corollary thereto, however, neither should the utility be permitted to confiscate the ratepayers' fees without giving the reasonably adequate service for which those rates were set. The commission can no more permit the utility to have confiscatory rates for the service it performs than it can compel a utility to provide service without just and equitable compensation. As a matter of elemental justice, consumers of utility services are entitled to the same protection against confiscation of property or arbitrary action on the part of the utility as are the utilities.

Amicus curiae call our attention to a Missouri case, Straube v. Bowling Green Gas Co. (1950), 360 Mo. 132, 227 S. W. 2d 666, 18 A. L. R. 2d 1335, holding the commission has no authority to promulgate a refund. That case is not in point here. It is a minority decision and involves a refund from a supplier. Additionally, under Missouri law, its commission is strictly an administrative agency. Generally, unlike some public service commissions, the Nebraska Public Service Commission, in the different aspects of its constitutional functions, exercises legislative, administrative, and judicial powers. Allen v. Omaha Transit Co. (1971), 187 Neb. 156, 187 N. W. 2d 760. The powers of the commission are regulatory in nature and the judicial powers lodged in the commission are remedial of and ancillary to its regulatory powers. Village of Louisville v. Chicago, B. & Q. R.R. Co., (1964), 177 Neb. 491, 129 N. W. 2d 454.

In our view of this proceeding, if the rates for the

Kennard service were reasonable when set originally by the commission, and for the purpose of this proceeding we must assume they were, then we must agree with the commission that the consumers were vastly overcharged for the services they were actually receiving.

All the powers and jurisdiction of the Public Service Commission must be found within the constitutional provision creating it. This provision should not be construed so narrowly as to defeat its purpose. Rather, it should be liberally construed to effectuate the purpose for which the commission was created, which is primarily to serve the public interest. It seems to us to be axiomatic that the commission, as a part of its power and duty to establish rates which will provide an adequate return and to regulate the services of utilities, must have the authority to compel the utility to render the service for which it induced the commission to fix an adequate rate. We hold that inherent in the power of the commission is its right to force a utility to give the service for which its rates have been fixed. As a corollary to that power must be the right, where the service is woefully inadequate, to require the utility to rebate some portion of the rates set for reasonably adequate service. To hold otherwise would permit a utility to profit by its own intentional or unintentional neglect. The record indicates that the service was so inadequate in this instance that the remedy chosen by the commission was the only one which would keep the company from confiscating the rates paid by the ratepayers for wholly inadequate service.

The order of the Public Service Commission on the record herein is not arbitrary or unreasonable, and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PATRICK RONALD RUSSELL, APPELLANT.
230 N. W. 2d 196

Filed June 5, 1975. No. 39656.

1. **Criminal Law: Insane Persons.** In this state the test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act.
2. **Criminal Law: Insane Persons: Trial: Evidence.** A defendant in a criminal action is presumed sane until evidence of insanity is produced. The State then has the burden of proving beyond a reasonable doubt that the defendant was sane at the time the crime was committed.
3. ———: ———: ———: ———. The question of whether the legal sanity of the accused has been established beyond a reasonable doubt at trial is one of fact to be determined by the trial court when a jury has been waived. Where there is substantial evidence to sustain the finding of the trial court on that issue, that determination will not be disturbed on appeal.
4. **Criminal Law: Waiver: Confessions.** Where an in-custody interrogation of a defendant fully complied with the procedures laid down in Miranda v. Arizona, appellate courts should be slow to mandate additional responsibilities.
5. **Criminal Law: Waiver: Confessions: Trial: Evidence: Constitutional Law.** The evidentiary use of a defendant's incriminating statement violates due process if it can be shown that the statement obtained is not the product of a rational intellect and a free will. The determination of those issues necessitates the consideration of the totality of the circumstances.
6. **Criminal Law: Waiver: Confessions: Trial: Infants.** A confession or statement cannot be held invalid merely because the accused was 17 years of age nor merely because he had a history of intermittent mental illness. Under the facts here the totality of the circumstances supports the conclusion that the defendant's statement was given voluntarily, knowingly, and intelligently and was not constitutionally defective.
7. **Attorney and Client: Public Defender.** General duties imposed on a public defender by statute do not automatically make him counsel for any individual in a criminal proceeding until appointment to represent a specific individual in a particular criminal proceeding has been made by a judicial officer.
8. **Criminal Law: Statutes: Time: Trial.** While procedural statutes

do apply to pending litigation, they have no retroactive effect upon any steps that may have been taken in an action before such statutes were effective.

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

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

Paul L. Douglas, Attorney General and Ralph H. Gillan, for appellee.

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

MCCOWN, J.

The defendant, Patrick Ronald Russell, after trial by the court without a jury, was convicted of the crime of first degree murder and sentenced to life imprisonment.

On November 10, 1973, Joseph Matthew Edmonds, an 8-year-old boy, was reported missing in Omaha, Nebraska. A police investigation was started on the following day. On Tuesday, November 13, 1973, at approximately 3:30 p.m., the boy's body was found on the floor of a bedroom in a vacant apartment at 1619 California Street in Omaha, Nebraska. A length of telephone cord was around his neck and medical evidence established that death was caused by strangulation approximately 72 hours before the discovery of the body.

A coincidental chain of events led to the interrogation and implication of the defendant. At approximately 3 p.m. on the afternoon of November 13, the daughter of the owner of an automobile observed an individual attempting to break into her father's automobile in downtown Omaha. An officer of the Omaha police department was called and the defendant, a 17-year-old boy, was interrogated when he was located in a nearby store. The car owner declined to press charges for the break-in, and the police officer decided not to pursue the matter, but did make out an information report and

took note of the defendant's address. The officer also noted that the defendant appeared to be in a deranged mental condition, although he appeared to understand the officer's questions.

When the officer returned to central police station at about 4 p.m., he discovered that the body of the Edmonds boy had just been found and noticed that the address was close to the address he had just noted as the defendant's address. The officer's information report generated additional investigation of the defendant. Early that evening two officers of the police department went to the residence where the defendant lived with his mother and brother, and said they wanted to take the defendant to the police station to talk to him about the automobile break-in. The residence was in the same apartment complex where the boy's body had been found. There is some conflict in the evidence at this point, in that the police officer testified the defendant's mother was told that if she wanted to go to the station with the defendant she could, but that she declined. The defendant's mother stated that when she asked if she should come, the officers said that they would bring him right back. The defendant agreed to go with the officers. He was taken to the police station to the criminal investigation bureau. At that time he was given the Miranda warnings and a rights advisory form which he completed and signed. Officer Thompson then interrogated the defendant for a little more than an hour. That conversation was not recorded.

At approximately 8:20 p.m. a formal interrogation began. An Officer Miller again gave the defendant the full set of Miranda warnings from a rights advisory form and the defendant responded "yes" to all the waiver questions and signed the second rights advisory form. The questioning was conducted by Officer Miller and by the county attorney, and the interrogation was tape recorded and both the tapes and the transcript of them

are in the record. The interrogation continued for a little more than an hour until 9:37 p.m.

The defendant's statement was that he had met the Edmonds boy on two or three previous occasions when Edmonds had been playing with the defendant's younger brother. On Saturday, November 10, 1973, the defendant met the Edmonds boy and after some conversation the Edmonds boy accompanied him to a store to purchase some feed for a pet animal. They did some window shopping and looking around before the two returned to the apartment complex. They noticed that a basement apartment was open and they went into the apartment at about 2:30 p.m. There they found some coffee and donuts which they sat down and consumed. The defendant stated that the two engaged in some homosexual activities instigated by the Edmonds boy for a short time. After some extended conversation, the defendant said that the Edmonds boy called the defendant and defendant's grandmother names. This incensed the defendant. The defendant took a knife out of his pocket and cut the cord from a telephone in the apartment. He then told the boy to close his eyes and he slipped the cord around the boy's neck, jerked the cord, and kept the cord on the boy's neck until his face "got nice big bright red." At this point the defendant's statement was that he removed the cord from the boy's neck and the boy went from the kitchen to the bedroom gasping for breath and fell on the floor. The defendant also stated that he cut the telephone cord up and threw it on the floor; that the Edmonds boy pulled his own jacket over his face; but he also said that when he left the apartment, the Edmonds boy had a piece of telephone cord around his neck. The defendant stated that he thought the Edmonds boy died from the cord being pulled around his neck. He also said that before he left the apartment he attempted to wipe away his fingerprints and those of the Edmonds boy. He left the apart-

ment somewhere between 4 and 4:30 p.m. on November 10, and did not return to the apartment thereafter.

The pathologist who performed the autopsy testified that the twisted piece of telephone cord around the Edmonds boy's neck was very tight and that there was a ligature strangulation mark around the neck, with hemorrhages under the neck, and discoloration around the anterior surface of the neck. He testified the cause of death was asphyxia due to ligature strangulation around the neck.

Other witnesses and technicians testified as to numerous items of physical evidence. The telephone cord had been cut from the phone in the vacant apartment, and latent fingerprints of the defendant were found on the stove in the kitchen. There was also evidence that entrance to the vacant apartment had been gained through the back door using a coathanger.

Jury trial was waived and the parties stipulated that evidence on the defense plea in abatement and on the motion to suppress the defendant's statements could be adduced as part of the trial on the issue of guilt, with rulings reserved until the conclusion of trial. It is therefore appropriate to summarize the evidence dealing with the defendant's mental condition.

The defendant was 17 years of age on July 22, 1973. He had been a psychiatric patient for the first time at age 14 because of his withdrawn behavior, and was hospitalized for treatment for approximately a month. One of his doctors recommended the Omaha Home for Boys, and the defendant resided there for about 2 years, returning to live with his mother in July 1973. In August 1973, an assistant public defender was appointed by the juvenile court to represent the defendant on three assault and battery charges. All three charges involved sexual attacks on young boys ranging from 4 to 8 years of age. Pursuant to a plea bargain, two charges were dismissed and an admission made by the defendant to the third charge. On October 30, 1973, the

defendant was placed on probation on the third count contingent on his being accepted into the Job Corps.

Psychological tests administered by psychologists reflected substantially consistent results. Prosecution psychological tests showed a full scale I.Q. of 95 and a performance I.Q. of 108. The defense psychologist recorded a full scale I.Q. of 88 and a performance I.Q. also approximately 10 points lower than that of the prosecution tests. The psychologists agreed that the defendant was dull normal or low average, and that he was not mentally retarded.

Two psychiatrists testified for the prosecution. Both had examined the defendant under court order. They concluded that the defendant was not legally insane and did not suffer from any major mental illness or psychiatric disorder of either moderate or severe degree. Both concluded that the defendant was able to comprehend Miranda rights questions and did not believe that the defendant's ability to intelligently waive his rights was impaired. An experienced and qualified psychiatrist for the defense, on the other hand, testified that the defendant was mentally deficient and a chronic schizophrenic. In his opinion, the defendant was legally insane at the time of the alleged homicide. He also doubted the defendant's ability to knowingly and intelligently waive his rights under the rights advisory form.

The District Court, after trial, denied the defendant's plea in abatement; overruled the motion to suppress the defendant's statements; found that the defendant knowingly and intelligently waived his rights; and that the statements of the defendant were freely and voluntarily made. The trial court determined that the State had proved the defendant's sanity beyond a reasonable doubt; found him guilty of murder in the first degree; and imposed a sentence of life imprisonment.

A basic foundational issue in this case involves the defendant's contentions that he was insane and therefore not responsible for his acts, nor capable of waiving

his constitutional rights. In this state the test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. State v. Jacobs, 190 Neb. 4, 205 N. W. 2d 662.

A defendant in a criminal action is presumed sane until evidence of insanity is produced. The State then has the burden of proving beyond a reasonable doubt that the defendant was sane at the time the crime was committed. In this case the evidence as to sanity and mental condition was in direct conflict. Testimony of the expert witnesses was in many respects contradictory. The testimony of other witnesses as to the defendant's appearance and conduct, both before and after the actual time of the murder, gave the court, sitting as a jury, the opportunity to relate that testimony to the experts' testimony that was given in this case. The question of whether the legal sanity of the accused has been established beyond a reasonable doubt at trial is one of fact to be determined by the trial court when a jury has been waived. Where there is substantial evidence to sustain the finding of the trial court on that issue, that determination will not be disturbed on appeal. State v. Klatt, 187 Neb. 274, 188 N. W. 2d 821. The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support the findings. State v. Newson, 183 Neb. 750, 164 N. W. 2d 211.

The major thrust of defendant's attack upon the conviction here is directed at the failure to suppress the incriminating statement made by the defendant. Defendant contends that trickery was used in taking him to the police station; that he was a juvenile less than 18 years of age, and was mentally incapable of understanding the advisory rights warnings and of waiving his constitutional rights; and that the statements were taken in the absence of his counsel and his mother.

Therefore it is argued that the totality of the circumstances demonstrates the defendant did not knowingly and intelligently waive his privilege against self-incrimination and his right to retained or appointed counsel; and that his statements were therefore involuntary and should have been suppressed.

The record here is undisputed that the in-custody interrogation of the defendant fully complied with the procedures laid down in Miranda. Under such circumstances appellate courts should be slow to mandate additional responsibilities. See United States v. Poole, 495 F. 2d 115 (D. C. Cir., 1974). The record of the interrogation, reinforced by the tapes, is devoid of any indication of coercion unless it can be said that custodial surroundings in themselves constitute coercion. If the defendant's contentions were to be accepted, it would be impossible for a 17-year-old boy with any history of mental illness to waive his constitutional rights or to make a voluntary statement which would be admissible at trial. We find no acceptable basis upon which to reach such a conclusion. The time required for the interrogation was comparatively short and it was conducted in the early evening hours. The evidentiary use of a defendant's incriminating statement violates due process if it can be shown that the statement obtained is not the product of a rational intellect and a free will. The determination of those issues necessitates the consideration of the totality of the circumstances. Davis v. North Carolina, 384 U. S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895. In cases involving related or analogous circumstances courts have found that the totality of circumstances supported the conclusion that the statements made were voluntary. See, United States v. Poole, *supra*; United States v. Singleton, 361 F. Supp. 346 (1973); United States ex rel. Brown v. Rundle, 450 F. 2d 517 (3d Cir., 1971); United States ex rel. Rush v. Ziegele, 474 F. 2d 1356 (3d Cir., 1973); Commonwealth v. Cannon, 453 Pa. 389, 309 A. 2d 384 (1973); Schade v. State, 512 P. 2d 907

(Alas., 1973). A confession or statement cannot be held invalid merely because the accused was 17 years of age nor merely because he had a history of intermittent mental illness. In the case before us the totality of the circumstances supports the conclusion of the trial court that the defendant's statement here was given voluntarily, knowingly, and intelligently, and was not constitutionally defective.

In a secondary attack on the admissibility of the defendant's statement, it is contended that section 29-1804.03, R. S. Supp., 1974, which places the duty on the public defender to represent all indigent persons charged with, or under arrest for, criminal offenses makes the public defender the counsel for the defendant in this case at the time the defendant was interrogated. It is also contended that because an assistant public defender was still acting as counsel for the defendant in a separate juvenile offense, the public defender therefore was also counsel for the defendant in this case at the time the critical interrogation took place.

It seems obvious that general duties imposed on a public defender by statute do not automatically make him counsel for any individual in a criminal proceeding until appointment to represent a specific individual in a particular criminal proceeding has been made by a judicial officer. It is equally clear that the appointment of counsel in a specific criminal or juvenile proceeding does not operate as a continuing or automatic appointment to act as counsel in any other separate criminal or juvenile proceeding which may thereafter be commenced against the same defendant. The provisions of DR 7-104 relied on by the defendant only prohibit lawyers from communication with a party known to be represented by a lawyer *in that matter*. That rule does not prohibit communication by a county attorney with a defendant in a criminal case simply because that defendant is known to be represented by counsel in some other matter. The defendant's contentions with respect

to representation by counsel are entirely unsupported.

Finally, by a plea in abatement, the defendant challenges the jurisdiction of the District Court by asserting that the defendant was entitled to the benefits of sections 43-202.01 and 43-202.02, R. S. Supp., 1974. Those procedural statutes deal with specific standards to be followed by a county attorney in determining whether to file criminal charges against a minor in juvenile court or in adult court. The sections did not become effective until some two months after the defendant's trial, but the defendant claims the benefit of such statutes upon the theory that the benefits of the statutes should be granted as though they constituted a statutory mitigation of punishment for murder. The defendant relies upon State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225. Obviously the amendatory statutes here do not serve to mitigate the sentence imposed. They are simply procedural. The prior procedures followed in this case were specifically approved by a majority of this court in State v. Grayer, 191 Neb. 523, 215 N. W. 2d 859. While procedural statutes do apply to pending litigation, it is a general proposition of law that they have no retroactive effect upon any steps that may have been taken in an action before such statutes were effective. All things performed and completed under the old law must stand. See New Orleans Public Service, Inc. v. Brown, 369 F. Supp. 702. Here the entire trial had already been completed in the District Court before the amendatory procedural act became effective. Defendant's plea in abatement was properly denied.

The defendant's remaining assertions of error are without merit. The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH HAYES HARRIS, APPELLANT.
230 N. W. 2d 203

Filed June 5, 1975. No. 39670.

1. **Homicide: Proximate Cause: Criminal Law.** In a prosecution for homicide the act of the accused must be a proximate cause of death but need not be the direct, immediate cause. It is sufficient if the direct cause resulted naturally from the act of the accused, as where the direct cause was a disease or infection resulting from the injury inflicted by the accused.
2. ———: ———: ———. In a prosecution for homicide it is not a defense to one whose act has contributed to the death that improper treatment on the part of physicians, nurses, or the victim also contributed thereto; but one who has inflicted an injury is not responsible for homicide where death results solely from erroneous treatment by another.
3. ———: ———: ———. The proximate cause of a death is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the death, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the death.
4. ———: ———: ———. An efficient intervening cause is a new and independent cause, itself a proximate cause of the death, which breaks the causal connection between the original illegal act and the death.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

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

Paul L. Douglas, Attorney General, and Jerold V. Fennell, for appellee.

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

CLINTON, J.

After trial to the jury the defendant, Joseph Hayes Harris, was found guilty of murder in the first degree by reason of having killed Camille Hugg in the per-

petration or attempted perpetration of a robbery. A judgment of guilty was entered on the verdict and the defendant, pursuant to the provisions of sections 28-401 and 29-2520 to 29-2524, R. S. Supp., 1974, was sentenced to imprisonment for life.

The issues for consideration on this appeal are: (1) Was the evidence sufficient to permit the jury to find that acts done by the defendant during the attempted robbery were, in legal contemplation, the cause of the death of the victim; and (2) the correctness of the instruction by which the issue of causation was submitted to the jury. We affirm.

The evidence permitted findings as follows. On the evening of October 28, 1973, Camille Hugg, age 81, was the victim of an attempted purse snatch by two young men. She resisted, clung to her purse, was knocked to the ground by her assailants, was kicked, and suffered a broken hip either from the fall or the blows. One of her assailants was the defendant, the other being Abe Clark Lytle, whose case is also before this court on appeal. The victim was hospitalized for treatment of her hip fracture, surgery was performed, and a pin inserted. She later died on December 17, 1973, without having been released from the hospital.

The primary theory of the defense was that the victim's death was not caused by the acts of the assailants, but was the result of intervening events and causes, including infection not related to the injury.

A summary of the evidence will suffice for determination of the first issue. Thomas Joseph Gurnett, M.D., one of the treating physicians, testified on behalf of the State. He had been Camille Hugg's physician since May 17, 1965. His last examination of her, preceding her hospitalization on October 16, 1973, occurred in June of 1971. At that time he had given her a general physical examination. She then had diabetes, well controlled by insulin, a mild hypertension, and a skin disorder involving both hands. She was at that time in generally

good physical condition. The doctor had known her a long time through professional medical contact as she was a retired nurse anesthetist. He was of the opinion that if there had been any substantial physical ailment after July 1971 she would have consulted him, but she did not. Immediately following her injury on October 28, 1973, Camille Hugg was taken to Douglas County Hospital where she was first seen by Dr. Tomczak who is in charge of the emergency room at that institution. His examination showed that the victim's heart sounds were normal and her lungs clear. She was mentally alert and oriented, but anxious. She had bruises on an arm and signs of a left hip fracture which was later confirmed by X-ray. Traction was applied to the injured extremity. An electrocardiac examination showed slight pulse irregularity. Her blood pressure was also slightly elevated. She appeared to be her stated age. He ascertained that she had controlled diabetes, but was otherwise in good health. A urine culture demonstrated no infection.

On October 31, 1973, the patient was transferred to another hospital where she was seen for the first time after the accident by Dr. Gurnett. He attended and saw her daily after that until her death. His initial examination at this time indicated that she appeared to be in the same condition of health as in 1971, except for the broken hip, a mild bladder infection, and complaints of a pain which he believed, because of the nature of the pain and the fact that it gradually subsided, indicated a fracture of the sternum. He testified that in a person of the age of Camille Hugg a hip fracture "can be life threatening." In consultation with an orthopedic surgeon it was determined that surgery was necessary and that the fracture should be treated by internal fixation with a pin. This method would eliminate the necessity of a body cast. Such surgery was performed on November 4, 1973. Shortly after the surgery the patient de-

veloped a rapid irregular heartbeat. This was treated and the beat returned to normal.

The doctor testified that dangers associated with hip fracture and surgery in an elderly patient are respiratory difficulties, secondary pneumonia, circulatory problems, lack of fluid balance, and pressure sores. In this patient's case, pneumonia developed, circulatory problems developed, stress ulcer formed, a small bloodclot from the lower extremities lodged in a lung before abating, abdominal and bowel distress developed, infection of the parotid gland developed, probably caused by the debility from illness, and kidney failure developed, as did an overwhelming systemic infection. By November 17, 1973, the hip was healed. On December 17, 1973, the patient died.

On the question of the cause of death Dr. Gurnett testified on direct examination as follows: "Q. Now, Doctor, I'll ask you if you have an opinion based on reasonable medical certainty from your examinations, findings, treatment, noting of the complications that set in, as to the cause of death of Camella Hugg on December 17th. A. Yes, sir, I do. Q. Could you relate that for us in summary fashion? A. I have the opinion that since Mrs. Hugg was up and about and doing well, not contacting me for medical treatment or advice, that following the fracture of her hip which occurred as the result of an injury, that the complications which I have described came in the wake of that injury, and all were directly related to the injury itself. It is my considered opinion that her death was secondary to the injuries and the following complications of that injury." On redirect examination he testified: "Q. Doctor Gurnett, would the complications that you spoke with reference to both on Direct and more fully on Cross Examination have occurred if Mrs. Hugg had not fractured her hip and been hospitalized? A. I do not believe they would have." The substance of Dr. Gurnett's testimony was that if the victim had not suffered the broken hip the

complications would not have occurred and she would not have died.

An autopsy was performed on the body on December 17, 1973. It generally verified the various complications testified to by Dr. Gurnett, except that of the generalized infection, and in addition showed that Camille Hugg had suffered a small myocardial infarction within 10 days of her death. The pathologist also testified that the tests used to determine whether general infection existed were unreliable and therefore were inconclusive. The pathologist did not search for evidence of a fracture of the sternum. Upon cross-examination, defense counsel sought to elicit from the pathologist an opinion that Miss Hugg died from the hip surgery. The answer was: "No, sir, I don't think I can say that."

The evidence tending to support the defendant's theory that the victim's death was caused by intervening events was most ably brought out by the presentation of pertinent medical records and a skilled cross-examination. The record of the trial indicates thorough and conscientious pretrial preparation by defense counsel. The fact that defense counsel's efforts in this area were knowledgeable is evidenced by the responses from the expert witnesses. All aspects of the evidence which tended to support a conclusion of death caused by independent and intervening causes were clearly highlighted in the cross-examination. A summary of these highlights is not necessary.

It would appear that the evidence raised a factual question for the jury to determine, under proper instructions from the court, whether the victim's death was caused by acts of the accused or by independent intervening acts or causes. This court has, on several occasions since 1883, been called upon to consider the legal sufficiency of the evidence and the rules of law applicable to such issues. Denman v. State, 15 Neb. 138, 17 N. W. 347, was a prosecution for second degree murder. In that case the defendant struck the victim with a

knife, inflicting a wound on the arm, which in and of itself was not mortal. An infection, described as erysipelas, ensued and the victim died 2 days after the wounding. This court said: ". . . if but for the wound death would not have ensued, it is no defense that because of the wound fever or erysipelas set in and was the immediate cause of death." That opinion approved an instruction on causation given by the trial court. That instruction we will discuss when we reach the second issue before us. Hamblin v. State, 81 Neb. 148, 115 N. W. 850, involved a prosecution for first degree murder. The victim was shot in the spine and suffered paralysis below the point where the spinal cord was damaged. In the course of treatment a glass catheter was inserted to permit elimination of urine. The catheter broke and a portion remained in the urinary tract. An operation was necessary to remove it. Infection developed and the victim died. The wounding took place on August 3, 1906, and the death occurred on January 14, 1907. The evidence in that case indicated that the wound probably would have been fatal in any event. However, the court went on to say that even if unskillful treatment contributed to the death it was no defense. This court also said: ". . . if a new and independent cause of death intervenes and of itself takes the life of one mortally wounded, it will be considered the cause of the death, and the person inflicting the first wound could not be held accountable for the murder, however subject he might be to a prosecution for the felonious assault. But, as in a case of this kind, when the wound inflicted was mortal *or dangerous* and directly contributed to the death, the first wrongdoer will not be absolved from accountability for his act." (Emphasis supplied.) In Phegley v. State, 113 Neb. 138, 202 N. W. 419, this court said that if the death of the victim was caused solely by the operation performed to treat the wound, the defendant would not be accountable "unless such operation was deemed by the physician at-

tending her necessary and proper in treating her for injuries" suffered in the assault. In Benton v. State, 124 Neb. 485, 247 N. W. 21, it was held, in a prosecution for manslaughter committed by means of negligent operation of an automobile, that the fact that negligence of a victim may have also contributed to the accident and death was no defense. The statements of the applicable principles of law announced in the foregoing cases appear to state the general rule. See, also, 40 C. J. S., Homicide, § 11, p. 851. "The act of accused must be a proximate cause of death but need not be the direct, immediate cause. It is sufficient if the direct cause resulted naturally from the act of accused, as where the direct cause was a disease or infection resulting from the injury inflicted by accused. . . . It is not a defense to one whose act has contributed to the death that improper treatment on the part of physicians, nurses, or the victim also contributed thereto; but one who has inflicted an injury is not responsible for homicide where death results solely from erroneous treatment by another." 40 C. J. S., Homicide, § 11, pp. 854, 855. See, also, 40 Am. Jur. 2d, Homicide, § 13 et seq., p. 304. We have most recently cited Denman v. State, *supra,* and Hamblin v. State, *supra,* in State v. Hare, 190 Neb. 339, 208 N. W. 2d 264. The evidence in this case under the foregoing rules clearly presented a factual question for determination by the jury.

The second issue is whether the jury was properly instructed on the issue of causation. The defendant objected to the following instruction on the basis that it made applicable a tort standard of causation rather than a more strict standard claimed to be applicable to prosecutions for homicide. The instruction given was as follows: "You are instructed that to constitute a homicide committed while perpetrating or attempting to perpetrate a robbery there must be, in addition to the death of a human being, a robbery or an attempted robbery which proximately caused that death.

"The proximate cause of a death is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause produces the death, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the death.

"This does not mean that the law seeks and recognizes only one proximate cause of a death, consisting of only one factor, one act, one element or circumstance, or the conduct of only one person. To the contrary, the acts of two or more persons may work concurrently as the efficient cause of a death, and in such a case, each of the participating acts is regarded in law as a proximate cause.

"An 'efficient intervening cause' is a new and independent act, itself a proximate cause of the death, which breaks the causal connection between the original illegal act and the death."

The defendant relies upon People v. Scott, 29 Mich. App. 549, 185 N. W. 2d 576 (1971); and Commonwealth v. Root, 403 Pa. 571, 170 A. 2d 310, 82 A. L. R. 2d 452 (1961). In those two cases the court said that in a homicide case the tort concept of proximate cause was not applicable and a "more direct" causal connection was required for conviction. In each case the court held that a verdict should have been directed for the defendant because, as a matter of law under the evidence, the "more direct" cause did not exist. Both cases were prosecutions for involuntary manslaughter involving negligent operation of motor vehicles. In the Pennsylvania case the defendant and the victim were racing on a two-lane highway. The victim, in attempting to pass the defendant's vehicle, drove into the left-hand lane and collided with a truck coming from the opposite direction. In the Michigan case the defendant was fleeing to avoid arrest and a police vehicle chasing him collided with a bus at an intersection killing a police officer. In neither of these cases was the court directly

concerned with the form of the instructions to be given to the jury. Both courts were drawing a policy line on proximate cause under a particular set of facts. This is what all courts do both in tort and criminal cases when they say that, as a matter of law, the evidence is insufficient to make a jury question on the issue of proximate cause. Understandably, neither court made an attempt to state a rule defining what "more direct" means. In each case the discussion indicates that the court was concerned with avoiding a statement of a rule for criminal prosecutions which would adopt recent "extensions" of proximate cause concepts in civil torts. Nothing these two courts said offers any guidelines whatever for instructing a jury, nor do they have any application under the evidence of this case. Defendant urges that we reverse, but he makes no suggestion whatever as to what an appropriate instruction upon retrial should be.

In Denman v. State, *supra,* we approved the following instruction by the District Court: " 'If you find from the evidence that the defendant inflicted a wound upon the person of Thomas Coakley, as charged in the indictment, then if such wound so inflicted by the defendant caused or directly contributed to the death of said Coakley, then the prisoner cannot be excused, because other causes may have also contributed to his death. If death ensues from a wound given in malice, but not in its nature mortal, but which from want of helpful applications, or from natural causes, develops a fever or an erysipelatous inflammation, and that fever or erysipelatous inflammation be the immediate cause of the death, yet the person who gave such wound cannot be thereby excused; for that the wound, though it was not the immediate cause of the death, yet if it is the mediate cause and the fever or erysipelatous inflammation is the immediate cause, the wound, being the cause of the fever or the erysipelatous inflammation, is the cause of the immediate cause, and the person who inflicted

such wound is responsible for the result of such wound according to the circumstances of the case.' " In Phegley v. State, *supra,* an intervening cause instruction as follows was approved: " 'If a new and independent cause of death intervenes and of itself takes the life of one who has been wounded, then it will be considered the cause of death, and the person inflicting the first wound could not be held accountable for murder however subject he might be to a prosecution for felonious assault, and therefore if there is any reasonable doubt as to whether the death of Laura B. Phegley was caused solely by the operation performed upon her, then the defendant would not be accountable for such death, unless such operation was deemed by the physician attending her necessary and proper in treating her for injuries claimed to have been made by the defendant.' "

The jury in the case before us was instructed that the State was required to prove beyond a reasonable doubt the elements of the crime, including, of course, that the acts of the defendant caused the victim's death. The defendant relies also upon a dictum found in Parrish v. State, 14 Neb. 60, 15 N. W. 357, which states that if except for the operation the victim would have recovered the jury must acquit. Assuming that is a correct statement of the law, it has no application here. There is in the record no evidence whatever, even by way of the slightest inference, that Camille Hugg would have recovered had the operation not been performed.

The instruction given by the trial court was appropriate to the evidence in this case, was in substance the same as that approved in the earlier cases, and enabled the defendant to effectively argue to the jury and have it consider the defendant's theory of independent intervening cause, namely, that the surgery, treatment, and infection were the cause of death.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. AMERICAN THEATER CORPORATION, A NEBRASKA CORPORATION, DOING BUSINESS AS PUSSY CAT THEATER, APPELLANT.

230 N. W. 2d 209

Filed June 5, 1975. No. 39706.

1. **Criminal Law: Obscenity: Statutes: Constitutional Law.** The criteria for determining obscenity set forth in the Nebraska obscenity statutes and as construed by this court are not violative of the First and Fifth Amendments to the United States Constitution, nor does such judicial construction as it applies to pre-Miller v. California offenses constitute such statutes ex post facto laws.
2. **Criminal Law: Obscenity: Trial: Scienter.** Where a movie film is publicly shown, knowledge of its contents by the exhibitor is sufficiently demonstrated so as to establish scienter necessary in criminal cases.
3. **Constitutional Law: Obscenity: Trial: Appeal and Error.** In reviewing a jury verdict involving rights of free expression under the First Amendment to the United States Constitution, the reviewing court shall make an independent judgment as a matter of law as to the obscenity vel non of the particular work.

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

Robert Eugene Smith, Gilbert H. Deitch, and Stern, Harris, Feldman, Becker & Thompson, for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

Heard before BOSLAUGH, NEWTON, CLINTON, and BRODKEY, JJ., HASTINGS and RIST, District Judges, and KUNS, Retired District Judge.

HASTINGS, District Judge.

Defendant, a corporation operating the Pussy Cat Theater in Omaha, was charged in municipal court under section 28-921, R. S. Supp., 1972, with distribution of obscene material, tried to a jury, found guilty, and

sentenced. On appeal on the record, the District Court also found defendant guilty, imposed a fine of $500, and overruled the motion for a new trial. We affirm.

The evidence is undisputed that a so-called "private showing" of the movie Deep Throat had been arranged at defendant's theater by telephone solicitation among a group of 75 to 90 people. These people paid $7 per couple to the defendant's manager who then placed their names on a list of those who would be authorized to enter the particular portion of the theater where the film would be shown. When it became apparent that the police intended to take action against the film and the defendant, an attempt was made to alter the showing in progress by switching films and forcibly to prevent the police from seizing the film.

Although defendant lists numerous assignments of error, only three are argued, the first being in three parts, and to which our consideration must be limited.

First, defendant claims that sections 28-920, et seq., R. R. S. 1943, and specifically section 28-921, R. S. Supp., 1972, are repugnant to its rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States; the trial court erred in not properly instructing the jury on the standards of obscenity as defined in Miller v. California, 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419; and then, apparently, had the trial court done so, the defendant was subjected to an ex post facto law because Miller, *supra,* changed the law between the date of the offense and the date of the trial.

Considering the second part of defendant's first assignment, it contends in its brief that the trial court denied its proposed instruction No. 1 which set forth the proper standards of obscenity taken from Miller v. California, *supra,* "and instead gave a definition that excluded the phrase 'whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by state law.' " Failure to give defendant's re-

quested instruction No. 1 does not appear in defendant's brief under the topic, "Assignments of Error." Under the rule announced in Ripp v. Riesland, 180 Neb. 205, 141 N. W. 2d 840, an error discussed but not assigned in appellant's brief, which is not a plain error, will not be considered on appeal. What is additionally vexatious is that no requested instruction No. 1 appears anywhere in the transcript. In any event, an examination of the court's instructions reveals that it did properly instruct the jury on this issue. By instruction No. 5 the jury was told that it must find beyond a reasonable doubt that defendant willfully and knowingly circulated an obscene, lewd, indecent, and lascivious movie; and that in order to reach that decision, it ". . . must find beyond a reasonable doubt that all of the following numbered propositions coalesce, that is, unite unto a whole: . . . (2) That the movie 'Deep Throat' depicts or describes in a patently offensive way sexual conduct that is specifically defined by the Statutes of Nebraska. . . ." Instruction No. 6 defined prurient interest as a ". . . shameful or morbid interest in sex, nudity or excretion which goes beyond the customary limits of candor." Instruction No. 7 set forth the pertinent portions of section 28-921, R. S. Supp., 1972, forbidding the circulation of ". . . any obscene, lewd, indecent, or lascivious . . ." material and describing ". . . the standard for judging obscenity to be applied as a guide by finders of fact in considering the evidence is whether to the average person the dominant theme of said material or conduct which is at issue in such civil action or criminal proceedings, taken as a whole, . . . is to excite lustful thoughts, or a shameful or morbid interest in nudity, sex or excretion which goes substantially beyond the customary limits of candor."

Apparently defendant's claim is that the statutes of Nebraska proscribing "obscene, lewd, indecent, or lascivious" movie films do not constitute specifically defined

sexual conduct. This court in State v. Little Art Corp., 191 Neb. 448, 215 N. W. 2d 853, quoted the following language from United States v. 12 200-Ft. Reels of Film, 413 U. S. 123, 93 S. Ct. 2665, 37 L. Ed. 2d 500 (1973): " 'If and when such a "serious doubt" is raised as to the vagueness of the words "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" as used to describe regulated material in 19 U. S. C. § 1305 (a) and 18 U. S. C. § 1462, see United States v. Orito, post, at 140 n. 1, we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in Miller v. California, ante, at 25 . . . .' " We went on to say: "We find that the Nebraska statutes fully comply with the requirements of Miller v. California, supra, and other related cases."

There not only were no "plain errors" in the trial court's instructions setting out the Miller standards, but they were correctly given. We further find that the criteria for determining obscenity set forth in sections 28-920, et seq., R. R. S. 1943, and as construed by this court in State v. Little Art Corp., *supra,* are not vague and indefinite so as to be repugnant to defendant's rights under the First, Fifth, and Fourteenth Amendments, nor is defendant being subjected to an ex post facto law. "We further find that in once more affirming the conviction of defendant, no retroactive application of the law is involved. At the time of the violation by defendant our statutes were in full force and effect. Their meaning and purpose were clear. We have not given them a new or different construction but have simply affirmed and called attention to their clear meaning and intent." State v. Little Art Corp., *supra,* at p. 452. In any event, defendant insists that it was tried on Roth-Memoirs standards rather than Miller standards as contained in its requested instruction No. 1. We have already pointed out that the trial court's instruction No. 5 was nearly identical with the defendant's proffered instruction as

closely as we can reconstruct it from its brief. Assuming only for the sake of discussion that the trial court should have given the pre-Miller instruction taken from Roth-Memoirs, this would fall into the category of invited error from which the defendant can take no advantage. See Lovings v. State, 158 Neb. 134, 62 N. W. 2d 672, cert. den., 348 U. S. 850, 75 S. Ct. 77, 99 L. Ed. 670, wherein we said: "Instruction No. 7 about which defendant complained was identical with instruction No. 3 requested by him. It not only correctly recited the provisions of section 29-106, R. R. S. 1943, but also defendant has placed himself in a position where he has no right to complain about the giving of it."

Defendant's second assignment of error contends that the statute, complaint, and evidence failed to specify, allege, and prove scienter or guilty knowledge. The applicable statute, section 28-921, R. S. Supp., 1972, as set forth in part in instruction No. 7, stated: "Whoever knowingly sells . . . or otherwise circulates . . . ." The complaint, so much of which is necessary, was set forth in instruction No. 2: "The Complaint in this case, in substance, charges that . . . the defendant . . . did knowingly sell . . . ." Instruction No. 5 required the jury to find that the ". . . defendant . . . did willfully and knowingly sell . . . ." The efforts of defendant's employees to switch films in the middle of the show and forcibly to prohibit the police from seizing the film, plus the very fact of its showing under such surreptitious circumstances, leaves no doubt as to the quantum of proof. "In this case the films were being publicly shown by the defendant and knowledge of their contents or character by defendant's employees was inescapable." State v. Little Art Corp., 189 Neb. 681, 204 N. W. 2d 574.

Finally, in its third assignment of error, defendant charges that the film was not obscene as a matter of law as it existed during the period of time of the alleged offense. Defendant, in its brief, "requests the Court to perform its judicial duty under Jacobellis v.

Ohio, 378 U. S. 184, to determine the obscenity vel non of the publications (sic) prosecuted as being obscene." Apparently, reference is to the following language of Jacobellis v. Ohio, 378 U. S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793: "Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." In other words, the court suggests that the usual test in reviewing a jury verdict, i.e., is the finding supported by sufficient evidence, is not applicable in First Amendment cases and since it is only "obscenity" that is excluded from constitutional protection, the question whether a particular work is obscene is an issue which must be decided by the court as a matter of law, in reviewing such cases.

United States v. Groner, 494 F. 2d 499 (5th Cir., 1974), suggests that the review we should make should be based upon both the Roth-Memoirs (Roth v. United States, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, and Memoirs v. Massachusetts, 383 U. S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1), standards and the Miller (Miller v. California, *supra*), test. "As that case (United States v. Thevis, 484 F. 2d 1149) demands, the proper review procedure for determining whether pre-Miller material is obscene is to test the material under both the Roth-Memoirs standard and the Miller standard." The Roth-Memoirs test includes (1) the dominant theme taken as a whole appeals to a prurient interest in sex, (2) the material is patently offensive because it affronts contemporary standards relating to representation of sexual matters, and (3) it is utterly without redeeming social value. The Miller standard requires that (1) the average person applying contemporary community standards would find the work as a whole appeals to a prurient interest in sex, (2) the work depicts in a patently

offensive way sexual conduct specifically defined by law, and (3) the material lacks serious literary, artistic, political, or scientific value.

This court has viewed the film "Deep Throat" and is prepared "to perform its judicial duty" as requested in defendant's brief. The following quotation from United States v. One Reel of Film, 481 F. 2d 206 (1st Cir., 1973), contains an accurate and lucid description of the film in question: "The court went on to make findings as to the content and nature of 'Deep Throat.' It found that it contains scenes of explicit heterosexual intercourse, including group sex, and emphasizes various scenes of explicit penetration, fellatio, cunnilingus, female masturbation, anal sodomy, and seminal ejaculation. It found that: "[t]hey dominate the film in depiction and running time to such extent that, following the opening innocuous few minutes (probably not more than eight) until 'The End' flashes on the screen, scenes of sexual acts cascade one upon the other with minor interruptions. All these are accompanied by musical sounds and some dialogue, and enlivened on two occasions with bells ringing, bombs and rockets bursting. Camera angles and close-ups give maximum emphasis in time and dimensions to the genitalia during the sexual exhibitions.

"We are thus left with a rarity: a film so single-minded as to fail even the older Roth-Memoirs test—unless one is tempted, as plainly a majority of the Supreme Court is not, to find redeeming social value in the explicit portrayal, without more, of sexual congress itself."

We find that the film is hard-core pornography and is obscene under both the Roth-Memoirs test and the more recent, and less stringent, Miller test.

The judgment of the District Court is affirmed.

AFFIRMED.

IN RE GUARDIANSHIP OF TODD ALLEN LA VELLE, A MINOR. MARIE CLYMER ET AL., APPELLEES, V. GERALD D. LA VELLE, APPELLANT.

230 N. W. 2d 213

Filed June 5, 1975. No. 39775.

1. **Infants: Parent and Child: Domicile.** The domicile of an unemancipated, legitimate infant is the same as that of the father and will be deemed to have continued the same until it is shown to have been legally changed in circumstances warranting the change.
2. ———: ———: ———. The habitation or residence of a minor child is, by operation of law, determined and fixed by that of the parent legally entitled to the custody and control of the child unless the parent has voluntarily surrendered such right.
3. ———: ———: ———. It is a well-settled general rule that an infant's domicile, upon the death of both parents, is ordinarily determined by the domicile at death of the last surviving parent, and remains the same until changed by operation of law or the proper act of a guardian.
4. **Infants: Parent and Child: Wills: Guardian and Ward.** Section 38-112, R. R. S. 1943, provides for the appointment of testamentary guardians by a surviving parent with all the powers of a guardian appointed by the court.
5. ———: ———: ———: ———. The testamentary appointment of a guardian for a minor child by the last surviving parent will be upheld unless the best interests of the child require otherwise.

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

Barney & Carter, for appellant.

Ginsburg, Rosenberg, Ginsburg & Krivosha, R. P. Cathcart, and Ray Svehla, for appellees.

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

PER CURIAM.

This is an appeal in the matter of the guardianship of a minor orphan. Appellant contests the jurisdiction of the county court of Polk County, Nebraska, to en-

tertain the guardianship proceeding. The county court and District Court affirmed the Polk County court jurisdiction. We affirm the judgment of the District Court.

Todd Allen La Velle was born on February 2, 1969. His mother passed away in 1971 and his father on May 17, 1973. The family home was in Polk, Polk County, Nebraska. After his mother's death Todd stayed with Mr. and Mrs. Robert Clymer days and with his father nights. Mrs. Clymer is the sister of Todd's father. They also live in Polk, Nebraska. Mr. and Mrs. Clymer were appointed guardians of Todd.

Following the death of Todd's father a married sister of Todd's, Connie Holsteen, took him to her home in another county with the understanding that she would return him to the home of Mr. and Mrs. Clymer. She failed to return him but filed a consent to act as his guardian in the Polk County court proceeding. She had been nominated as guardian by her brother Gerald La Velle who objected to the jurisdiction of the court.

The record further discloses that Todd's father left a last will and testament which has been admitted to probate and which contains a testamentary appointment of Mr. and Mrs. Clymer as guardians of Todd.

Section 38-102, R. R. S. 1943, provides that the guardian of a minor may be appointed by the county court of the county in which he is an inhabitant or resident. An "inhabitant" is one who resides actually and permanently in a given place and has his domicile there. See Black's Law Dictionary (4th Ed.), p. 921. "Domicile" is that place where a person has his true, fixed, and permanent home. See Black's Law Dictionary (4th Ed.), p. 572. See, also, Hanson v. Hanson, 150 Neb. 337, 34 N. W. 2d 388. It is evident that Todd's father was an inhabitant of Polk County and there maintained his residence and domicile.

The domicile of an unemancipated, legitimate infant is the same as that of the father and will be deemed to have continued the same until it is shown to have

been legally changed in circumstances warranting the change. See Hanson v. Hanson, *supra*. The habitation or residence of a minor child is, by operation of law, determined and fixed by that of the parent legally entitled to the custody and control of the child unless the parent has voluntarily surrendered such right. See, In re Guardianship of Peterson, 119 Neb. 511, 229 N. W. 885; Walker v. Gehring, 172 Neb. 398, 109 N. W. 2d 724. The foregoing authorities establish that Todd was a resident and inhabitant of Polk County at the time of his father's death. None of the interested parties can be classified as "natural guardians" of Todd with authority to change his residence or domicile. "It is a well-settled general rule that an infant's domicile, upon the death of both parents, is ordinarily determined by the domicile at death of the last surviving parent, and remains the same until changed by operation of law or the proper act of a guardian." Annotation, Domicile - Orphaned Infant, 32 A. L. R. 2d, § 2, p. 865. In this instance there was no change by operation of law or the proper act of a guardian.

The testamentary appointment of the Clymers as Todd's guardians cannot be ignored. Todd's father was obviously concerned for his welfare and was in the best position to act in Todd's best interests. He knew intimately both the Clymers and his daughter Connie Holsteen. Section 38-112, R. R. S. 1943, provides for the appointment of testamentary guardians by a surviving parent with all the powers of a guardian appointed by the court. It is generally held that such an appointment will be upheld unless the best interests of the child require otherwise. See, 39 Am. Jur. 2d, Guardian and Ward, § 15, p. 19; Annotation, 67 A. L. R. 2d 803.

The lower courts found the Clymers to be fit and proper persons to become guardians of Todd and there is nothing in the record to indicate the contrary. We conclude that Todd remained a resident and inhabitant of Polk County; that the Polk County court had juris-

diction in this proceeding; and that the appointment of the Clymers as guardians was proper. The judgment of the District Court is affirmed.

AFFIRMED.

NEWTON, J., participating on briefs.

PHILIP SCHMER, APPELLEE AND CROSS-APPELLANT, V. HAWKEYE-SECURITY INSURANCE COMPANY, APPELLANT AND CROSS-APPELLEE.

230 N. W. 2d 216

Filed June 5, 1975. No. 39811.

1. **Insurance: Subrogation.** Ordinarily, subrogation under an insurance policy depends upon a payment having been made under the policy.
2. **Insurance: Subrogation: Parties.** Where there has been no payment under an insurance policy, the insured has no duty to bring an action against a third party.
3. **Attorney and Client: Fees.** In determining the value of legal services rendered by an attorney, it is proper to consider the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised and the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.
4. ———: ———. The amount of attorney's fees allowed generally rests in the sound discretion of the court.

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

Deutsch & Hagen, for appellant.

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

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

BOSLAUGH, J.

This is an action on an insurance policy issued by the

defendant to the plaintiff. A 37-foot Trainliner grain trailer owned by the plaintiff was damaged by an explosion in Norfolk, Nebraska, on February 19, 1962. The explosion occurred when Riley C. Gilleland attempted to light a propane heater in a truck parked next to the plaintiff's trailer. The insurance policy provided coverage for direct and accidental loss of or damage to the trailer caused by explosion.

The jury returned a verdict for the plaintiff in the amount of $3,025.40. The defendant has appealed.

The trailer which was damaged was a frameless, hopper bottom, aluminum trailer that had been purchased new on February 6, 1962. A dispute arose as to the amount of the plaintiff's damage. The defendant contended the trailer could be straightened in a frame machine the same as a trailer constructed of steel. The plaintiff was advised that more extensive and expensive repairs were required because of the design of the trailer and the fact it was constructed of aluminum.

On May 4, 1962, the plaintiff employed James Brogan to represent him in regard to this matter. Brogan was unable to negotiate a settlement with the defendant and commenced this action on November 10, 1965. Brogan withdrew his appearance for the plaintiff in 1966.

In the negotiations with Brogan the defendant encouraged Brogan to pursue the plaintiff's claim against Gilleland. It is apparent that the defendant wanted the plaintiff to collect from Gilleland and thus avoid making any payment under its policy. The defendant also wanted to avoid a controversy with Gilleland's insurer over the amount of the damage. The defendant's claims representatives were instructed to make sure that Gilleland's insurer would honor the defendant's subrogation interest before any settlement was made with the plaintiff.

In November 1965, Brogan told the defendant he was going to file suit against Gilleland. Brogan testified the representatives of the defendant told Brogan he

would be paid a contingent fee of one-third the amount he saved the defendant.

An action against Gilleland was filed on February 19, 1966. A summons was served upon the Secretary of State as provided in section 25-530, R. R. S. 1943, but an affidavit of notification was not filed until March 25, 1968. The service on Gilleland was held to be defective in Schmer v. Gilleland, 185 Neb. 54, 173 N. W. 2d 391. Any further action was barred by the statute of limitations. § 25-207, R. R. S. 1943.

The defendant contends the plaintiff's failure to obtain service on Gilleland was equivalent to a release and discharge of Gilleland and was a defense to this action under the policy. Much of the argument is devoted to the question of whether the negligence of Brogan could be imputed to the defendant. We find it unnecessary to determine that issue because we are of the opinion that the plaintiff had no duty to bring an action against Gilleland until there had been some payment by the defendant to the plaintiff under the policy.

There is a difference between the release or compromise of a claim against a third party and a failure to bring an action against the third party. One of the reasons why people buy insurance is to avoid the necessity of litigating claims against third parties.

The defendant's right to subrogation depended upon payment under the policy. The subrogation clause provided, "In the event of any payment under this policy the Company shall be subrogated" to the insured's rights of recovery. No right of subrogation would arise until the claim had been paid. 16 Couch on Insurance (2d Ed.), § 61:46, p. 267. Subrogation rights follow and do not precede payment. Associated Truck Lines v. Employers' Fire Ins. Co., 275 Mich. 74, 265 N. W. 780.

The defendant in this case is in the same position as if the plaintiff had never filed an action against Gilleland. If payment had been made under the policy, then perhaps the plaintiff would have been obligated to allow

the defendant to sue Gilleland in the plaintiff's name and at its expense. Because the defendant had made no payment to the plaintiff, there was no duty upon the plaintiff to sue Gilleland. Insurance Co. of North America v. Newtowne Mfg. Co., 187 F. 2d 675. The defendant is complaining about the breach of a duty that never existed. Thus, the plaintiff's failure to commence an action against Gilleland within the time permitted by the statute of limitations was no defense in this action.

The remaining issue that must be determined relates to the allowance of attorney's fees. Under section 44-359, R. R. S. 1943, the plaintiff was entitled to a reasonable sum as an attorney's fee, in addition to the amount of his recovery, to be taxed as part of the costs. The trial court allowed the sum of $3,076.17 as an attorney's fee and expenses. The defendant contends this amount was excessive. By cross-appeal the plaintiff contends the amount was inadequate.

In determining the value of legal services rendered by an attorney, it is proper to consider the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised and the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. Allen v. City of Omaha, 136 Neb. 620, 286 N. W. 916. The amount of the allowance generally rests in the sound discretion of the court. Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133.

The affidavit attached to the motion of the plaintiff's attorney filed in the trial court alleged in detail the correspondence involved in handling the case. It included an itemized time sheet and a statement of expenses incurred. The amount claimed was $6,349.60 including expenses of $615.66. The trial court allowed the

sum of $2,460.51 plus $615.66 expenses. We find no abuse of discretion in regard to the amount of the allowance.

The judgment of the District Court is affirmed. The plaintiff is allowed the sum of $1,000 for the services of his attorney in this court.

AFFIRMED.

MAX TAVLIN, APPELLEE, V. LEE PASSIN TAVLIN, APPELLANT.
230 N. W. 2d 108

Filed June 5, 1975. No. 39816.

1. **Contracts: Husband and Wife.** Section 30-106, R. S. Supp., 1974, requires that an antenuptial contract to be effective shall be in writing, signed by both parties to such marriage, and acknowledged in the manner required by law for the conveyance of real estate or executed in conformity with the laws of the place where made. Antenuptial agreements are only valid in this state if made in conformity with this section.
2. **Divorce: Alimony: Property.** The District Court has power to consider all the property accumulated by the joint efforts of both husband and wife, and to adjust their respective property rights.
3. **Divorce: Alimony.** The fixing of alimony rests in each case within the sound discretion of the trial court.
4. ———: ———. The problems of alimony awards are not subject to solution by mathematical formula. This is particularly true where a marriage is of very short duration. The court will take into consideration the estate of each party at the time of the marriage, their respective contributions since, the duration of the marriage, their age and condition of health, and all other pertinent facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties on the circumstances present in that case.
5. **Divorce: Trial: Appeal and Error.** While in a divorce action the case is to be tried de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.

6. **Divorce: Property: Appeal and Error.** This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.
7. **Attorney and Client: Fees.** The award of attorneys' fees is discretionary with the District Court.
8. ———: ———. Where the trial court has made a property division and allowance of alimony, it may well feel to allow additional attorneys' fees would unbalance the division it had in mind. The trial court is in a much better position to make this decision. We will not disturb it in the absence of an abuse of discretion.

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

Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellee.

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

SPENCER, J.

This is an action for dissolution of a marriage brought by the petitioner-husband. The District Court dissolved the marriage and made a property division. The respondent-wife prosecutes this appeal. Her three main complaints are as follows: (1) The trial court erred in determining that there was no antenuptial agreement; (2) the trial court erred in its division of the property between the parties; and (3) the trial court erred in not granting respondent attorney's fees. We affirm.

The parties to this action were married March 6, 1971. Petitioner had been married once before and at the time of the marriage was 64 years of age. Respondent had been married twice before and at the time of this third marriage was 46 years of age. Petitioner's first marriage ended in divorce after 30 years. Respondent's first marriage ended in divorce after 2 years. Her second marriage ended in divorce after 3 years.

While the respondent impliedly questions the marriage is irretrievably broken, she does concede that it certainly had stormy interludes. No purpose will be served by discussion on this point. Suffice it to say that we are in full agreement with the trial court, the marriage is irretrievably broken.

Respondent first argues that she proved the existence of an antenuptial agreement covering the property of the parties. Respondent contends that because of her experience in her previous marriages as well as the petitioner's obligation from his first marriage, she insisted on being made a full partner in petitioner's business and personal assets as a condition of the marriage. She further contends that petitioner agreed to this demand for an antenuptial arrangement several months before the marriage took place. Shares of stock were purchased or transferred into common ownership; substantial life insurance policies were purchased on the life of petitioner with respondent as beneficiary; and a joint bank account was opened. The trial court found that there was no antenuptial agreement, and we agree. The record is devoid of any document or writing which appears to be an antenuptial agreement. Respondent testified petitioner stated his intention to make her his "partner in life." He also opened up a joint bank account with her and put some property in their joint names. This, however, does not establish an antenuptial agreement. The complete answer to respondent's contention is that section 30-106, R. S. Supp., 1974, requires that an antenuptial contract to be effective shall be in writing, signed by both parties to such marriage, and acknowledged in the manner required by law for the conveyance of real estate or executed in conformity with the laws of the place where made. Antenuptial agreements are only valid in this state if made in conformity with this section.

Respondent's second assignment is that the trial court erred in its division of the property between the par-

ties. Petitioner maintains that she is the owner of one-half of all the property. Some of the property appears to have been conveyed to the petitioner and respondent as joint tenants prior to the marriage and some appears to have been conveyed subsequently. The stock certificates for the business corporation were transferred after the marriage. While the bill of sale appears to recite that it is dated May 1, 1970, the evidence would indicate otherwise and the trial court obviously so found. The record reflects that petitioner's corporation was not formed until May 1, 1970, and all the documents establishing the sale from petitioner in his sole capacity to the corporation took place on May 1, 1970. Respondent did not become petitioner's wife until March 1971, and the document runs from petitioner personally to petitioner and respondent as husband and wife.

Prior to the marriage petitioner gave respondent a check for $15,000 which was put into a bank account at the Irving Trust Company in New York City, in the name of the respondent and her mother. Subsequently, petitioner gave respondent $4,500 which was put into the same account. The sum of $18,500 was withdrawn from this account to purchase jewelry which respondent had at the time of the divorce. Before the marriage respondent also received a $4,000 fur coat from the petitioner which she still had at the time of the trial. Petitioner also gave respondent some insurance policies on his life, with the respondent as owner and beneficiary. As of the time of the trial, one policy had a cash value of $7,927.75 and the other a cash value of $6,708.83. Subsequently, respondent was given two other policies on petitioner's life. One of these was cashed by respondent on September 7, 1973, for the cash value of $6,010.50. The other had a cash value in excess of $7,200.

Aside from the gifts from petitioner, the only property brought into the marriage by the respondent was some minor household appliances. Respondent was very evasive on the property brought by her into the marriage.

She could not recall her earnings in the years immediately before the marriage; she could give no estimate of her earnings in 1969 or 1970. Her explanation was that she would have to refresh her recollections from the records and the records were lost. It is of significance that although she brought little in the way of property to the marriage she was living in a luxury apartment in New York City at the time of the marriage.

It is undisputed that the respondent made little, if any, contribution to the acquisition of the assets held at the time of the trial. It is likewise clear that petitioner's estate did not increase but rather diminished during the 2-year marriage. His net worth at the time of trial, considering his obligation from the previous marriage, was between $350,000 and $400,000. What we said in Fotinos v. Fotinos (1969), 184 Neb. 486, 168 N. W. 2d 698, is pertinent herein: "The correct rule in Nebraska is expressed in Bartunek v. Bartunek, 109 Neb. 437, 191 N. W. 671. In that case this court said: 'Under the authority of Myers v. Myers, 88 Neb. 656, and Bristol v. Bristol, 107 Neb. 321, the district court has power to consider all the property accumulated by the joint efforts of both husband and wife, and to adjust their respective property rights. By the voluntary conveyance of the home farm to the wife without consideration except love and affection, she has become vested with the legal title to the major portion of the joint accumulation; but the court will look behind this and decree according to the equities of the situation.' "

In the property distribution, the trial court granted respondent all interest in the life insurance policies held by her on the life of petitioner; all interest in the property referred to as "California real estate investment"; all cash in her possession or in bank accounts in her name alone or with members of her family; all items of jewelry and furs; all items of personal property in her possession, including an automobile; and in addi-

tion thereto, alimony in the amount of $20,000, or property of the approximate value of $80,835.

Respondent testified to the existence of various bank accounts opened in her own name with funds given her by petitioner, or otherwise obtained from funds of petitioner. In her reply brief respondent takes violent exception to a statement in petitioner's brief that respondent had written checks for some $56,000 on checking accounts in her name, as disclosed by the exhibits. Only a few checks are in evidence and they do not begin to total this amount. However, the deposits in one account in respondent's name during the period of the marriage total slightly in excess of $56,000. The evidence discloses that the respondent had at one time or another some eight bank accounts, including one in California. Petitioner testified that he was unaware of the existence of some of these accounts. Of the checks in evidence none appear to be for household requirements but all indicate they were for respondent's personal benefit.

The fixing of alimony rests in each case within the sound discretion of the trial court. Young v. Young (1974), 192 Neb. 735, 224 N. W. 2d 361. As we have observed many times, the problems of alimony awards are not subject to solution by mathematical formula. This is particularly true where a marriage is of very short duration. The court will take into consideration the estate of each party at the time of the marriage, their respective contributions since, the duration of the marriage, their age and condition of health, and all other pertinent facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties on the circumstances present in that case.

In the instant case the respondent brought nothing into the marriage except property given to her by the petitioner. At the time of the trial the petitioner was 67 years of age and the respondent 48. Their marriage lasted 25 months. During that time the parties made at

least one trip to Europe and the respondent made several trips to visit relatives and friends. The checks in evidence indicate that she did considerable shopping in New York City. Respondent was less than candid in accounting on some financial transactions. From the record we can do no more than surmise that the trial court was not entirely satisfied with respondent's explanations.

While in a divorce action the case is to be tried de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Seybold v. Seybold (1974), 191 Neb. 480, 216 N. W. 2d 179.

This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. This case does not meet that criteria. The parties had a stormy marriage of approximately 25 months. Petitioner put most of his property in joint tenancy with the respondent. Respondent contributed nothing to these assets. They were assets which petitioner had acquired long prior to his marriage to respondent. While both petitioner and respondent were evasive in their answers, it is apparent that the trial court accepted petitioner's version of the marriage rather than the respondent's. The trial court did not abuse its discretion. The division of property and the allowance made to the respondent to permit her to reestablish herself is adequate on the record.

Respondent's third assignment is directed to the fact that both parties are required to pay their own attorneys' fees. The award of attorneys' fees is discretionary with the District Court. Badberg v. Badberg (1975), 193 Neb. 844, 229 N. W. 2d 552. Where the trial court has made a property division and allowance of alimony, it may well feel to allow additional attorneys' fees would unbalance the division it had in mind. The trial court is in a much better position to make this decision. We

will not disturb it in the absence of an abuse of discretion. We affirm the action of the trial court and make no allowance for the services of respondent's attorney in this court.

The judgment is affirmed. Costs are taxed to the petitioner.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JACK G. JACOBSEN, APPELLANT.
230 N. W. 2d 219

Filed June 5, 1975. Nos. 39825, 39826.

1. **Appeal and Error: Courts.** Sections 41 to 51 of Laws 1972, L.B. 1032, pp. 347 to 351, now sections 24-541 to 24-551, R. S. Supp., 1974, govern appeals to and trials in the District Court of judgments of the county and municipal courts and do not pertain to appeals from the District Court to the Supreme Court.
2. **Appeal and Error: Records: Rules of Supreme Court.** The rules for preparation, settlement, allowance, certification, filing, and amendment of the bills of exceptions on appeal to the Supreme Court from the District Court are governed by Rule 7, Revised Rules of the Supreme Court, 1974, enacted pursuant to the authority of section 25-1140, R. R. S. 1943.
3. **Appeal and Error: Pleadings: Evidence.** In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented to this court is the sufficiency of the pleadings to sustain the judgment of the trial court.
4. **Appeal and Error: Records: Trial: Rules of Supreme Court.** When a case is tried in the District Court upon the record from a lower tribunal, that record must be certified as the bill of exceptions in accordance with the Revised Rules of the Supreme Court, 1974, before it can be considered on appeal to this court.
5. **Constitutional Law: Statutes.** For a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court. If it is not raised in the trial court, it may not be considered by this court.

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

Paul E. Watts, J. Joseph McQuillan, Gerald E. Moran, George R. Sornberger, and Robert C. Sigler, for appellant.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

CLINTON, J.

Defendant, Jack G. Jacobsen, was found guilty in the municipal court of the city of Omaha on charges of operating a motor vehicle during a period when his operator's license was under suspension, contrary to the provisions of section 60-430.01, R. R. S. 1943, and of having made an improper turn. He was sentenced to 30 days in the county jail and given a year's suspension of his driver's license on the first charge, and sentenced to 7 days in the county jail on the second charge. He appealed to the District Court where the findings of guilty were affirmed. The sentences were also affirmed except that the 7-day jail sentence was reduced to 1 day. Defendant then appealed to this court and the two cases are consolidated here.

The errors assigned are: (1) The court below erred in finding the defendant had received "sufficient" notice of the fact that his license had been suspended; and (2) the evidence is insufficient to support the findings of guilty on the two charges.

A fundamental procedural defect makes it impossible for us to hear the matter on the merits of the errors assigned. In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented to this court is the sufficiency of the pleadings to sustain the judgment of the trial

court. State v. Kortum, 176 Neb. 108, 125 N. W. 2d 196.

The transcripts in these cases show that after entry of judgment in the District Court the defendant filed in the usual form in that court praecipes for bills of exceptions. These praecipes came to the attention of the court reporter, the transcripts showing a signed acknowledgment by the reporter of receipt of the requests. On these receipts the reporter apparently has written, "Nothing taken in District Court by reporter." There is before us no bill of exceptions and this is acknowledged by counsel in their brief.

It would appear counsel has assumed that the enactment of sections 24-541 to 24-551, R. S. Supp., 1974, sections 41 to 51 of Laws 1972, L.B. 1032, pp. 347 to 351, has somehow changed the rules for preparation, settlement, allowance, certification, filing, and amendment of the bill of exceptions upon appeal to this court. Sections 24-541 to 24-551, R. S. Supp., 1974, govern appeals to and trials in the District Court from judgments of the county and municipal courts. These sections in no way govern the rules applicable to the necessity of and preparation, etc., of bills of exceptions on appeal to this court from the District Court even though the trial in the District Court may have been heard solely upon the record of the testimony and evidence in the county or municipal court.

Appeals to this court are governed by certain sections of Chapter 25 of the 1943 Reissue Revised Statutes. Section 25-1140, R. R. S. 1943, says: "Upon appeal from the district court to the Supreme Court, the party appealing may order a bill of exceptions by filing in the office of the clerk of the district court a praecipe therefor within the time allowed for filing a notice of appeal. The procedure for preparation, settlement, signature, allowance, certification, filing, and amendment of the bill of exceptions shall be regulated and governed by rules of practice prescribed by the Supreme Court." Pursuant to that section of the statutes this court has

enacted Rules 7 a through j, Revised Rules of the Supreme Court, 1974. These rules provide in part as follows: "The bill of exceptions shall be certified by the court reporter as being correct and complete in accordance with the praecipe.

"2. If the court reporter is unable to prepare and certify a bill of exceptions, a bill of exceptions shall be prepared under the direction and supervision of the trial judge and shall be certified by the judge and delivered to the Clerk of the District Court." Rules 7 d 1, 2. The bill of exceptions may be amended "at any time prior to the time the case is submitted to the Supreme Court." Rule 7 e. Such amendment would, no doubt, include supplying the omission of the certificate of the necessary officer, either the court reporter or the judge as the case may be. See O'Conner v. Fields, 79 Neb. 840, 113 N. W. 528, decided under earlier and different statutes and rules.

A bill of exceptions, properly certified, has always been a necessary condition for review by this court of an order of the court below when the errors assigned require an examination of the evidence. Denise v. City of Omaha, 49 Neb. 750, 69 N. W. 119; Everts v. School Dist. No. 16, 175 Neb. 310, 121 N. W. 2d 487; Hilligas v. Farr, 171 Neb. 105, 105 N. W. 2d 578; State v. Kortum, *supra*. In the absence of a bill of exceptions, it is presumed that an issue of fact presented by pleadings is established by the evidence. Sawyer v. Kunkel, 166 Neb. 303, 88 N. W. 2d 906 (also decided under an earlier statute).

The reason for the rule is, and has been, to assure that this court reviews the case upon the evidence actually received and considered in the trial court. The purpose of the certificate, of course, is to insure authenticity.

There appears in the transcript in this case a record of the testimony apparently received in the municipal court. Section 24-541, R. S. Supp., 1974, provides: "In all cases not otherwise specifically provided for, either

party may appeal from the final judgment of the county or municipal court to the district court of the county where the judgment was rendered. All such appeals shall be de novo on the record except those matters referred to in section 30-1601, which matters shall be appealed de novo. *In matters appealed de novo on the record, the district court may, in its discretion, receive additional evidence* if the court determines that such evidence is reasonably necessary to determine the issues, make findings of fact and render judgment thereon. The district court may affirm, modify, or vacate the judgment, or may remand the case to the county or municipal court for a new trial." (Emphasis supplied.)

Apparently the situation we have here is in principle identical with that before the court in Ratay v. Wylie, 147 Neb. 201, 22 N. W. 2d 622, an appeal of a case originating in the Workmen's Compensation Court and tried in the District Court on the record made before the compensation court. When a case is tried in the District Court upon the record from a lower tribunal, that record must be certified as the bill of exceptions in accordance with the rules hereinbefore cited before it can be considered on appeal to this court. Ratay v. Wylie, *supra.*

As a part of his assignment of error No. (1) above, the defendant argues the unconstitutionality of section 60-430.01, R. R. S. 1943. Even if we assume that assignment No. (1) is broad enough to cover that question, there is still nothing in the record, either in the transcript or the uncertified "bill of exceptions" to indicate this contention was ever called to the attention of and ruled upon by the trial court. For a question concerning the constitutionality of a statute to be considered in this court, it must be properly raised in the trial court. If it is not raised in the trial court, it may not be considered by this court. State v. Hert, 192 Neb. 751, 224 N. W. 2d 188.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRED BIXENMANN, APPELLANT.
230 N. W. 2d 113

Filed June 5, 1975. No. 39842.

Appeal from the District Court for Hall County: LLOYD W. KELLY, JR., Judge. Affirmed.

John A. Wolf, for appellant.

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

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

CLINTON, J.

Defendant entered a plea of guilty to a charge of auto theft and was sentenced to a term of 3 years in the Nebraska Penal and Correctional Complex. He appeals and asserts the sentence is excessive. We conclude otherwise.

Defendant is 25 years of age. He is, by his own admission, a regular user of controlled substances. His past record indicates at least four jail terms and one term in the penitentiary of another state on a felony charge. At the time the plea of guilty was entered the State dismissed, apparently as part of a plea bargain, a charge of robbery.

It clearly appears that the trial court did not abuse its discretion.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ENOCH ROBINSON, APPELLANT.
230 N. W. 2d 222

Filed June 12, 1975. No. 39692.

Post Conviction: Trial. In a post conviction case the burden is upon the petitioner to show a basis for relief.

Appeal from the District Court for Thurston County: WALTER G. HUBER, Judge. Affirmed.

John W. McClellan, Jr., for appellant.

Paul L. Douglas, Attorney General, and Chauncey C. Sheldon, for appellee.

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

McCOWN, J.

This is a post conviction action. The defendant, Enoch Robinson, was found guilty of first degree murder on March 24, 1969, and sentenced to life imprisonment. This post conviction proceeding to set aside the judgment and sentence was filed on December 26, 1973. On May 3, 1974, after numerous hearings and extensive testimony, the District Court for Thurston County overruled defendant's motion to vacate judgment and sentence, and this appeal followed.

Defendant's original conviction was affirmed by this court on direct appeal. State v. Robinson, 185 Neb. 64, 173 N. W. 2d 443. Various challenges to that conviction in both state and federal courts were unsuccessful. The current post conviction challenge is made in three principal areas. The defendant first asserts that the prosecution deliberately suppressed certain FBI reports and did not give them to the defendant's counsel. The evidence wholly fails to establish that contention. In fact, the uncontradicted evidence of both the sheriff and the county attorney who tried the case was that these reports were made available to defendant's counsel at

the time of trial. In a post conviction case the burden is upon the petitioner to show a basis for relief. State v. Rapp, 186 Neb. 785, 186 N. W. 2d 482. The defendant failed to sustain the required burden of proof on this issue.

The defendant, an Indian, asserts as the next primary contention that Indians were systematically excluded from defendant's jury. That contention rests on the fact that six additional talesmen were summoned by telephone in this case. Evidence was introduced that Indians in Thurston County do not have telephones. None of the talesmen summoned were Indians. There is no showing in the record, however, of any pretrial challenge to the method of selecting the jury, nor to the jury array, nor to the jury as drawn. The defendant made no objection at the time nor is any complaint made now against the character or the conduct of the jurors summoned as talesmen. Where no objection or complaint was made at time of trial against the method of selection or character or conduct of talesmen summoned to fill the jury panel, allegations of error will not be considered on appeal in the absence of a showing of prejudice. See, Pribyl v. State, 165 Neb. 691, 87 N. W. 2d 201; State v. Nelson, 189 Neb. 144, 201 N. W. 2d 248.

Finally, the defendant alleges that his trial counsel was incompetent. Evidence on this issue rests almost entirely upon the testimony of some persons that defendant's trial counsel did not personally interview them prior to defendant's original trial. The defendant also testified that his counsel conferred with him on only a few occasions for a comparatively brief time prior to trial. Defendant's testimony is substantially contradicted by his own letter to his trial counsel commending and thanking him for his effective performance. That trial counsel is now deceased and unable to defend himself. The court was entitled to take judicial notice of the very considerable experience in criminal trial work and the recognized accomplishments of the trial counsel involved

in this case. The record of the original trial, as well as the present record, establishes that trial counsel here performed at least as well as a lawyer with ordinary training and skill in the criminal law, and conscientiously protected the interests of his client. See State v. Nokes, 192 Neb. 844, 224 N. W. 2d 776.

The District Court properly overruled the motion to vacate judgment and sentence and the judgment is affirmed.

AFFIRMED.

MARY CARPER, FORMERLY MARY ROKUS, APPELLANT, V. WALTER ROKUS, APPELLEE.
230 N. W. 2d 468

Filed June 12, 1975. No. 39800.

1. **Divorce: Parent and Child: Infants.** A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action.
2. ———: ———: ———. The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
3. **Divorce: Parent and Child: Infants: Time.** An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must be found upon new facts and circumstances which have arisen since the entry of the decree.

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

David A. Jacobson and Vincent Valentino, for appellant.

Paul E. Watts and Gerald E. Moran, for appellee.

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

CLINTON, J.

This is an appeal from an order of the District Court for Sarpy County, Nebraska, changing custody of the three small sons of the parties from the appellant mother to the appellee father. We affirm. The appellant here argues: (1) The best interests of the children require that they remain with her and the evidence is insufficient to show such a change of circumstances as would justify the change of custody. (2) The court erred in refusing to receive evidence of the father's conduct with relation to the children occurring previous to the default divorce and award of custody to the mother in May of 1971.

The parties were married in March 1963 and divorced on May 7, 1971. At that time the custody of Richard, born September 2, 1964; Larry, born September 15, 1965; and David, born December 1, 1968, was awarded to the appellant wife. Divorce was by default and the court made a finding of fitness on the part of the mother, but made no finding in this respect with reference to the father. The latter regularly exercised his rights of visitation, paid the child support ordered by the court, and on occasion made additional payments. On February 14, 1974, the appellant married Rick Carper, age 21 and 7 years her junior. Previous to the marriage the two lived in the appellant's home with her children for a period of about 2 weeks. Shortly after the marriage, she, her husband, and the three boys moved to Arkansas. The appellant did not obtain the permission of the court to move the children from the jurisdiction. In Arkansas they lived for a time with the husband's parents and later in a rented home. On June 30, 1974, she, with her husband and the boys, returned to Omaha, having shortly before determined to take a "belated honeymoon." Appellant left the children (and $80 for support) with a friend, who herself had six children aged 15 to 6. The

friend was at the time attending a business school and would be absent from the home from 9 a.m. to 2 p.m. During that time all the children would be left in charge of the friend's two oldest daughters. On July 1, 1974, appellant left with her husband for Colorado. They contemplated a "hitch-hiking" honeymoon with back-packs and tent and were so equipped, but shortly after starting, they apparently took bus transportation.

On July 3, 1974, or thereabouts, the babysitter friend, whose support came from aid to dependent children, received notice terminating her residential lease for nonpayment of rent. The friend then called and requested the appellee father to come get his children, which he immediately did. Appellant was apparently informed about this turn of events that same day when she called the friend to make inquiry concerning the children. The appellant completed the planned 2-week honeymoon trip and then returned to Nebraska. This custody action commenced by the father followed.

The appellant's husband remained in Pueblo, Colorado, where he still was at the time of trial. The appellant testified at one point in the course of trial that she was separated from her husband, but earlier she testified that when he called her she would go to him. Appellant was unemployed up until the last day of trial. She testified that she had obtained employment as a sales clerk which would have begun that day except for the trial.

There is evidence in the record which calls into question the stability of a household of which Rick Carper would be the head.

The 35-year-old appellee father, who has not remarried, is a receiving clerk for Western Electric and has been so employed for 6½ years. His income is adequate to support himself and the boys. After taking custody of the boys on July 3, 1974, he moved from his efficiency apartment to the home of his parents. If he is awarded custody, his mother, age 56, will quit her employment

in order to cook and otherwise care for the boys who have been with their father and his parents since July 3, 1974. The father testified at trial, affording to the appellant full opportunity to explore the question of the father's present fitness. The court denied to the appellant the opportunity to explore events preceding the entry of the decree of divorce and the original award of custody.

"A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. . . . The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence." Bennett v. Bennett, 189 Neb. 654, 204 N. W. 2d 379.

The evidence we have recited justifies the trial court and this court in finding that the remarriage of the mother to Rick Carper, her rather irresponsible conduct thereafter, and the instability which the remarriage introduces into the lives of the boys constituted such a change of circumstances that the best interests of the boys are served by the change of custody to the father with reasonable rights of visitation afforded the mother.

The appellant asserts that the court erred in not receiving evidence relative to the relationship of the father and the boys previous to the divorce. The evidence proffered but refused was to the effect that the boys, or some of them, were part of a "big brother" program while their father was still married to their mother; that program apparently is one where paternal companionship is afforded boys without a father at home. Beyond this, the offer was further totally lacking in specificity as to details of the relationship between the father and the boys.

The appellant urges that we adopt the following rule: In cases involving the modification of custody provisions of a default divorce decree where no evidence was heard by the divorce court regarding the fitness for custody of the defaulting party and where no specific finding of the fitness of the defaulting party was made by the divorce court, the court must consider all facts and circumstances existing prior to and at the time of judgment in making a subsequent determination of custody. She cites and relies upon Warren v. Warren (Iowa), 191 N. W. 2d 659; Annotation, 9 A. L. R. 2d 623; and Bliffert v. Bliffert, 14 Wis. 2d 316, 111 N. W. 2d 188. In the latter case the court said: "The rule of res judicata previously recognized by this court in custody matters does not apply where the fitness of a parent has not been determined." She further contends that this court has to some extent modified the strict application of the principle of res judicata in general custody cases and cites Bartlett v. Bartlett, 193 Neb. 76, 225 N. W. 2d 413; and Fisher v. Fisher, 185 Neb. 469, 176 N. W. 2d 667. The rule ordinarily applied by the court is: An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must be founded upon new facts and circumstances which have arisen since the entry of the decree. Adamson v. Adamson, 190 Neb. 716, 211 N. W. 2d 895.

It is difficult to lay down any precise rules as to the extent that the strict application of the principles of res judicata is to be relaxed in change of custody cases involving children. This is because there are contending policy considerations. A primary consideration is always the welfare of the child. The promotion of that welfare may require change of custody. On the other hand, opening up to reexamination occurrences previous to the award sought to be changed tends to promote undesirable litigation and to disrupt the stability of the child's environment. In view of the lack of specificity of the offer of proof, we do not believe the trial court

erred in declining to depart in this case from the usual rule.

AFFIRMED.

SOUTH MAPLE STREET ASSOCIATION, A GROUP OF TAXPAYERS, PROPERTY OWNERS, AND NEIGHBORS, APPELLANT, V. BOARD OF ADJUSTMENT, CITY OF CHADRON, NEBRASKA, APPELLEE.

230 N. W. 2d 471

Filed June 12, 1975. No. 39807.

1. **Administrative Law.** Section 84-1405, R. S. Supp., 1974, specifically authorizes administrative agencies to hold executive sessions under certain conditions.
2. **Zoning: Trial.** In the absence of a special requirement, the board of adjustment is not required to include findings of fact or a statement of the reasons for its decision in the order entered upon an application made to the board.
3. **Administrative Law: Rules.** An administrative agency is not required to set out statutory provisions in its rules and regulations.

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

Judy L. Raetz, for appellant.

Bump & Bump and William L. Howland, for appellee.

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

NEWTON, J.

This is an error proceeding involving a zoning decision in the city of Chadron, Nebraska, permitting the expansion of a trailer court. On denial of a conditional use permit by the city planning commission, an appeal was taken to the city Board of Adjustment where the permit was granted. The District Court affirmed the Board of Adjustment decision, as do we.

There are three assignments of error. One, a meeting of the Board of Adjustment in executive session was improper; two, the board failed to make written findings of fact and conclusions of law; and three, there was an unconstitutional delegation of authority as there were insufficient standards contained in the ordinance.

The session held by the Board of Adjustment appears to be proper and unchallenged except that after conducting a public hearing the Board went into executive session. On its return a vote was taken and the permit granted. Section 84-1405, R. S. Supp., 1974, specifically authorizes administrative agencies to hold executive sessions under certain conditions. It is not contended that the conditions were not complied with in this instance.

Section 84-915, R. R. S. 1943, requires that decisions of an "agency," "be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law." Chapter 84, article 9, R. R. S. 1943, is applicable only to agencies of the state government. "In the absence of a special requirement, a board of adjustment is not required to include findings of fact or a statement of the reasons for its decision in the order entered upon an application made to the board." Crane v. Board of County Commissioners, 175 Neb. 568, 122 N. W. 2d 520.

It appears that the city zoning regulations contemplated the use of the area in question for a mobile home park and when a conditional use permit is granted for such purpose, it sets requirements for such use. The order entered does not result in a variance from a zoning regulation. Section 19-910, R. R. S. 1943, defines the powers of a board of adjustment. The applicable city ordinance is in compliance with the statute. In argument it is not contended that either the statute or the ordinance is deficient in laying down standards pertaining to the Board of Adjustment. The only complaint made is that the board failed to adopt rules and regulations in accordance with the provisions of the ordinance

adopted pursuant to Chapter 19, article 9, R. R. S. 1943. Procedural rules governing the Board of Adjustment are detailed in sections 19-908 and 19-909, R. R. S. 1943, and in the applicable city ordinance. We are unable to observe any deficiency in the rules so promulgated. In Weiner v. State Real Estate Commission, 184 Neb. 752, 171 N. W. 2d 783, it was held that an administrative agency is not required to set out statutory provisions in its rules and regulations. As in that case, it is here apparent that due process of law requirements have been met. It is also noted that the record fails to verify the appellant's statement that the board failed to adopt any rules or regulations.

No error appearing, the judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE SATOR, APPELLANT.
230 N. W. 2d 224

Filed June 12, 1975. No. 39820.

Evidence: Judicial Notice. This court does not take judicial notice of municipal ordinances and a failure to properly present an ordinance that is being attacked precludes our consideration of it here.

Appeal from the District Court for Cass County: BETTY PETTERSON SHARP, Judge. Affirmed.

Dean E. Erickson, for appellant.

David V. Chebatoris of Clements & Svoboda, for appellee.

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

BRODKEY, J.

Defendant was charged and convicted in the county

court of Cass County, Nebraska, of improperly parking a trailer house in violation of ordinance No. 56 of the Village of Murdock, Nebraska, and was fined $25 and costs. He thereafter appealed his conviction to the District Court for Cass County, Nebraska, and in connection with his appeal filed a motion to quash further proceedings, alleging that the municipal ordinance under which he was convicted was illegal and unconstitutional under both the federal and state Constitutions. Defendant's motion to quash was thereafter argued and overruled, and the case set for trial de novo on the record at a subsequent date. Counsel did not appear for trial at the appointed date, whereupon the court affirmed the judgment of the county court of Cass County upon the evidence and the record, and ordered the defendant to pay a fine of $25 and costs. Defendant's motion for a new trial was subsequently overruled, and defendant now appeals to this court. We affirm.

There is only one assignment of error set forth in defendant's brief, which is that the court erred in its findings that the ordinance in question was not in violation of the statutes of the State of Nebraska and of the Constitution of the State of Nebraska and the Constitution of the United States. Unfortunately, however, the ordinance assailed as illegal and unconstitutional in this appeal was never introduced in evidence in either the county court or the District Court, although it appears that the county judge may have had a copy of the ordinance before him during the trial. In any event, it is not a part of the record in this case, and the only place where it may be found is in the brief of the defendant, where it is partially summarized and partially quoted. We do not believe the ordinance is properly before us for consideration, and we decline to pass upon the contentions of the defendant raised in this appeal.

It is the general rule that an appellate court ordinarily does not take judicial notice of a municipal ordinance that does not appear in the record on appeal.

5 Am. Jur. 2d, Appeal and Error, § 741, p. 186. This court has repeatedly so ruled. In State v. Novak, 153 Neb. 596, 45 N. W. 2d 625 (1951), this court stated: "This court does not take judicial notice of municipal ordinances and a failure to properly present an ordinance that is being attacked precludes our consideration of it here. The rule is properly stated in Steiner v. State, 78 Neb. 147, 110 N. W. 723, wherein we said: 'It is true, in Foley v. State, supra, this court held that municipal courts will take judicial notice of the ordinances of the city, and that "on appeal from a judgment of conviction before a police judge for the violation of a city ordinance the district court will upon a trial de novo take notice of whatever facts the former could have noticed judicially before the removal of the cause." But a different rule will prevail with respect to this court, where such matters are not triable de novo. This court cannot undertake to notice the ordinances of all the municipalities within its jurisdiction, nor to search the records for evidence of their passage, amendment or repeal. A party relying upon such matters must make them a part of the bill of exceptions, or in some manner present them as a part of the record.' See, also, Maxwell v. Steen, 93 Neb. 29, 139 N. W. 683." Likewise, in State v. Hohensee, 164 Neb. 476, 82 N. W. 2d 554 (1957), we held that on appeal to the Supreme Court from a judgment of the District Court convicting a defendant of a violation of a city ordinance, the same being a review of the proceedings and not a trial de novo, the existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. To the same effect, see, State v. Warren, 162 Neb. 623, 76 N. W. 2d 728 (1956); Wells v. State, 152 Neb. 668, 42 N. W. 2d 363 (1950); Steiner v. State, 78 Neb. 147, 110 N. W. 723 (1907); Foley v. State, 42 Neb. 233, 60 N. W. 574 (1894).

In view of the above-quoted authorities, and because of the absence of the ordinance in question from the

record in this case, we must presume that the defendant was properly convicted under a valid ordinance, and that the judgment and sentence of the District Court must be affirmed.

AFFIRMED.

VIRGIL MILLER, APPELLANT, V. TOM KINGSLEY, SR., APPELLEE.
TIM ADRIAN ET AL., APPELLANTS, V. VERNON DAHLGREN, APPELLEE.
GAYLE SCHULTZE, APPELLANT, V. DARRELL LAVENE, APPELLEE.
230 N. W. 2d 472

Filed June 12, 1975. Nos. 39821, 39822, 39823.

1. **Damages.** It is a fundamental rule of law in this state that punitive, vindictive, or exemplary damages are not allowed. The measure of recovery in all civil cases is compensation for the injury sustained.
2. **Judgments.** Under the Uniform Enforcement of Foreign Judgments Act, a judgment of another state is entitled to registration if it is entitled to full faith and credit in this state.
3. ———. A judgment of a state court which had jurisdiction has the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced.
4. **Judgments: Conflict of Laws.** A state may not refuse to enforce a judgment of a foreign state on the ground that it would result in a violation of the public policy of the forum state.

Appeals from the District Court for Phelps County: FRED R. IRONS, Judge. Reversed and remanded.

Munro, Parker, Munro & Grossart, for appellants.

William H. Sherwood and John E. Dier, for appellees.

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

BOSLAUGH, J.

These cases were proceedings to register foreign judgments. Although each case involves different parties and the amounts of the judgments are different, they involve similar facts and questions of law. The cases were consolidated for trial in the District Court and were consolidated in this court for briefing, argument, and consideration.

The judgments were obtained in the District Court of Norton County, Kansas, in 1967. Each judgment included an item of $275 in punitive damages. They arose out of the sale of cattle by residents of Kansas to residents of Nebraska. The defendants alleged the cattle were afflicted with coccidiosis when they were shipped into Nebraska, and were delivered in violation of section 54-753.05, R. R. S. 1943. The defendants further alleged the judgments were repugnant to the laws of Nebraska because they included punitive damages in violation of Article I, section 3, of the Constitution of Nebraska. The defendants raised other issues which are not important to the decision in the present appeals.

The parties stipulated that the question relating to punitive damages would be tried first and all other issues reserved. The trial court found the judgments were repugnant to the laws of Nebraska because they included awards of punitive damages and dismissed the petitions and cross-petitions. The plaintiffs have appealed.

It is a fundamental rule of law in this state that punitive, vindictive, or exemplary damages are not allowed. The measure of recovery in all civil cases is compensation for the injury sustained. Abel v. Conover, 170 Neb. 926, 104 N. W. 2d 684.

Under the Uniform Enforcement of Foreign Judgments Act, a judgment of another state is entitled to registration if it is entitled to full faith and credit in this state. §§ 25-1587 to 25-15,104, R. R. S. 1943. The defendants contend the judgments involved in these cases

were not entitled to full faith and credit because they were in conflict with the fundamental law of Nebraska. The question is one of federal law. It involves a construction of the full faith and credit clause of the Constitution of the United States and the act of 1790 implementing that provision.

Section 1 of Article IV of the Constitution of the United States provides: "Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Congress has provided the manner in which judicial proceedings of other states shall be authenticated and has provided that such proceedings shall have the same full faith and credit in every court within the United States as they have by law or usage in the courts of the state from which they are taken. 28 U. S. C. A., § 1738.

The general rule is that a judgment of a state court which had jurisdiction has the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced. A state may not refuse to enforce a judgment of a foreign state on the ground that it would result in a violation of the public policy of the forum state.

In Fauntleroy v. Lum, 210 U. S. 230, 28 S. Ct. 641, 52 L. Ed. 1039, the Supreme Court of the United States held that Mississippi was required to enforce a Missouri judgment based upon a Mississippi transaction upon which no recovery could have been had in Mississippi. The transaction was a gambling contract in cotton futures which was illegal and void under Mississippi law. In holding that the Missouri judgment was valid in Mississippi, Mr. Justice Holmes stated: "The doctrine laid down by Chief Justice Marshall was 'that the judgment of a state court should have the same credit, validity, and effect in every other court in the United States,

which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other court of the United States.' "

In Roche v. McDonald, 275 U. S. 449, 48 S. Ct. 142, 72 L. Ed. 365, the court stated: "It is settled by repeated decisions of this Court that the full faith and credit clause of the Constitution requires that the judgment of a State court which had jurisdiction of the parties and the subject-matter in suit, shall be given in the courts of every other State the same credit, validity and effect which it has in the State where it was rendered, and be equally conclusive upon the merits; and that only such defenses as would be good to a suit thereon in that State can be relied on in the courts of any other State."

In Estin v. Estin, 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561, the court stated: "The situations where a judgment of one State has been denied full faith and credit in another State, because its enforcement would contravene the latter's policy, have been few and far between. * * * The Full Faith and Credit Clause is not to be applied, accordion-like, to accommodate our personal predilections. It substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns. * * * It ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it." (Citations omitted.)

The rule is stated in Restatement as follows: "A valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim." Restatement, Conflict of Laws 2d, § 117, p. 339. See, also, Leflar, American Conflicts Law, § 87, p. 201; Goodrich & Scoles, Conflict of Laws, § 211, p. 398; Annotation, 44 A. L. R. 3d 960.

A distinction is made between the judgments and statutes of a foreign state. Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279; Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 64 S. Ct. 208, 88 L. Ed. 149. The authorities cited by the defendants may be distinguished upon this ground. As stated in Magnolia Petroleum Co. v. Hunt, *supra*: The forum state need not give application to the *statute* of another state where the *statute* is in conflict with the laws or policy of the forum.

Williams v. North Carolina, *supra*, cited by the defendants, was decided upon the ground that North Carolina was not bound by the finding of the Nevada court concerning the jurisdictional fact of domicile. The issue as to whether the Kansas court had jurisdiction in the cases at bar was reserved by the trial court and is not before us at this time.

The judgment in each case is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JESSE E. MILLER, APPELLANT, V. JOHN L. SULLIVAN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.

230 N. W. 2d 226

Filed June 12, 1975. No. 39883.

Appeal and Error: Time: Pleadings. The requirement that on an appeal under section 60-420, R. R. S. 1943, a petition be filed in the District Court within 30 days from filing of the final order of the director is mandatory and jurisdictional.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Appeal dismissed.

John J. Battershell of Cunningham Law Office, for appellant.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

NEWTON, J.

This is an appeal from the revocation of an automobile operator's license for failure to take a test under the Implied Consent Law. A jurisdictional question is raised due to appellant's having failed to file his petition on appeal in the District Court within the time allotted by statute. We dismiss the appeal.

Section 60-420, R. R. S. 1943, provides that the appellant shall file his petition in the District Court within 30 days from the date of filing of the director's final order and shall file a transcript before answer day. The appeal is not lodged in the District Court until the petition is filed, as the transcript, including the bond, may be filed later. The statute allowing 30 days in which to file the petition effectively fixes the time in which an appeal may be taken. As in other instances the taking of an appeal within the time fixed for that purpose is jurisdictional. See, Lynde v. Wurtz, 147 Neb. 454, 23 N. W. 2d 703; Diedrichs v. Empfield, 189 Neb. 120, 201 N. W. 2d 254.

This court being without jurisdiction, this appeal is dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE MILES, APPELLANT.
230 N. W. 2d 227

Filed June 12, 1975. No. 39941.

1. **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 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.
3. **Criminal Law: Statutes: Sentences.** The limitation upon the minimum term specified in section 83-1,105(1), R. S. Supp., 1974, is the maximum sentence provided by law and not the maximum sentence imposed by the court.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Lawrence Miles, pro se.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

SPENCER, J.

This is an appeal from the denial of post conviction relief. Two alleged errors are assigned: (1) The sentencing judge erred in failing to honor a negotiated plea bargain for an 18-months' sentence; and (2) the sentence imposed on the defendant is contrary to section 83-1,105(1), R. S. Supp., 1974. We affirm.

Defendant, who had a previous felony record, pled guilty to forcibly breaking and entering a certain dwelling house. The plea was entered pursuant to a plea bargain whereby the county attorney agreed to recommend a sentence not to exceed 18 months and not to file an habitual criminal charge. Defendant was represented by counsel at all stages of the District Court proceedings. Previous to arraignment defendant executed an affidavit in which he expressed his satisfaction with the services of his counsel; acknowledged the steps taken on his behalf; and specifically stated: "I further understand that such plea bargain agreement would in no way be binding upon the Court, and that the Court could

impose any other or further legal judgment and sentence in this matter."

On arraignment defendant was specifically asked by the court if he understood that any plea bargain made was not in any way binding upon the court. Defendant responded in the affirmative. The county attorney fully performed his part of the plea bargain and recommended that any sentence imposed on the defendant not exceed 18 months. The trial court advised the defendant that he was not bound to follow the plea agreement and asked him if he still desired the court to accept his plea of guilty. The defendant replied in the affirmative. After receiving and reviewing a presentence report, the trial court sentenced defendant to imprisonment in the Nebraska Penal and Correctional Complex for a period of not less than 2 nor more than 4 years. Defendant did not appeal, but now attempts to attack the sentence by a post conviction proceeding.

Defendant, relying on Santobello v. New York (1971), 404 U. S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427, argues the trial court committed error in failing to honor the sentence portion of the plea bargain. What defendant overlooks is that the holding in Santobello refers only to the parties to the agreement, not to the court. Here, the court specifically advised the defendant that it was not bound by the plea bargain and asked the defendant if he still wished to enter his guilty plea. Defendant also had been advised by counsel that the court would not be bound by the recommendation of the county attorney. There is no merit to this assignment.

Defendant has a record of previous felony convictions. He has spent time in five different penal institutions. At the time of the commission of the offense herein, he was on parole from the Kansas Penal Complex. The sentence imposed was very lenient for one with defendant's record. The maximum penalty for the offense is 10 years. The trial court did not abuse its discretion in

imposing a sentence of 2 to 4 years in the Nebraska Penal and Correctional Complex.

Defendant's second assignment of error is that the sentence imposed is in violation of the limitation imposed by section 83-1,105(1), R. S. Supp., 1974, which provides that in imposing an indeterminate sentence on the offender the court may: "Fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term, and the maximum limit shall not be greater than the maximum provided by law; * * *."

Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. State v. Birdwell (1972), 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 (1971), 187 Neb. 334, 190 N. W. 2d 628.

The defendant's contention was previously answered in State v. Suggett (1973), 189 Neb. 714, 204 N. W. 2d 793. There we determined the limitation upon the minimum term specified in section 83-1,105(1), R. S. Supp., 1974, is the maximum sentence provided by law and not the maximum sentence imposed by the court. The statutory maximum for the offense herein is 10 years. The 2-year minimum imposed is well within that limitation.

The judgment of the District Court is affirmed.

AFFIRMED.

M. MONTE MOSER ET AL., APPELLEES, V. LETHA L. JEFFREY ET AL., APPELLANTS, IMPLEADED WITH CLARENCE E. WILLS ET AL., APPELLEES.
231 N. W. 2d 106

Filed June 19, 1975. No. 39597.

1. **Trial: Instructions.** The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal.
2. **Fraud.** In an action at law, the essential elements of fraud are: The making of a false representation, knowing it was false or making it recklessly without any knowledge of its truth and as a positive assertion, with the intention that it be acted on, that it was acted on, and that injury resulted.
3. **Trial.** The verdict of a jury based upon conflicting evidence will not be set aside unless it is clearly wrong.
4. **Trial: Verdicts: Waiver.** The approval by counsel of a form or forms of verdict to be submitted to a jury constitutes a waiver of objections based on the form of verdict, and precludes raising such an objection on appeal.

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

Robert Lloyd Jeffrey and Perry, Perry, Witthoff & Guthery, for appellants.

Joseph J. Cariotto, for appellees Moser.

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

McCOWN, J.

The plaintiff purchasers of a residence property brought this action against the sellers and the sellers' real estate agent for damages for false representations. The jury returned a verdict for the plaintiffs and against the individual real estate agent and the real estate agency for $1,750; and a further verdict against the sellers in the sum of $1,750. The individual real estate agent and the real estate agency have appealed from the judgment against them. The sellers have not appealed, and the judgment against them is final.

On September 15, 1970, Clarence and Irene Wills listed their residence with the Jeffrey Company for sale. On September 19, 1970, the plaintiffs Monte and Judith Moser visited the house in the company of a real estate agent. They looked through the house and, according to plaintiffs' evidence, were advised by Mrs. Wills that the furnace was in good working order and the sellers had never had trouble with it. She also said she did not know what had caused some damage to one board which plaintiffs inquired about. The board was located at one end of the basement where the ceiling was exposed. The rest of the basement was covered by a false ceiling.

On the same day the plaintiffs executed a written offer to purchase the house for $12,500. In the offer plaintiffs requested a termite inspection of the premises. The offer provided that "should termites be found, the termites are to be treated and damages to the property, if any, corrected at seller's expense." Possession of the property was to be delivered on closing on or before October 19, 1970. The offer to purchase was accepted by the Wills on September 20, 1970.

The defendant Jeffrey Company, through the defendant Letha L. Jeffrey, hired the Usher Pest Control Company to conduct a termite inspection, which was done by Monroe Usher, Jr., in mid-October 1970. Mr. Usher testified that he found considerable evidence of termite damage in the area of the basement where the ceiling was exposed, but that he could not tell the extent of the damage because of the false ceiling in most of the basement area. He did note termite tubing however. He testified that the damage would probably not be noticed by anyone unless he had knowledge about termites. He also testified that he did not find any termite activity at the time. Mr. Usher's written report stated: "Our inspection disclosed no evidence of termite activity at the present time. There is extensive termite damage to the floor joist on the east side, to the mudsill in the

northeast corner, and to two window sills in the basement. In addition, termite damage was noticed on the west side of the basement." Mr. Usher's testimony at trial was that he had found damage in 8 to 10 joists and that he had meant to include "joists" in the plural when he typed his own report.

On October 19, 1970, Mrs. Jeffrey discovered that no one had received a termite report and she called Mr. Usher. Usher advised her over the telephone about the extensive termite damage to the house but that they had not found any active termites. He was asked to deliver his report and he brought it to the Jeffrey office and delivered it on the day of the closing.

At this point the evidence is in conflict. The plaintiffs' evidence was that both Mrs. Jeffrey and Mr. Wills told them that there were no active termites and that termite damage was confined to just one board and that the report confirmed those facts. Plaintiffs' evidence also was that after these representations were made the closing took place before the report was received. The defendants' evidence, on the other hand, was that no misrepresentations were made, and the report was received and read by all parties before the closing took place.

Later in October or in early November of 1970, Mr. Moser took down the false ceiling, found extensive damage to the joists, and retained Mr. George Preece to make a further termite inspection. Preece found live termites in the porch, the northeast and the southeast corner of the basement, and evidence of termites in the west end of the basement. He found 10 floor joists badly damaged, the subfloor and floor were damaged, and there was also damage to the garage.

On October 23, 1970, the gas company red tagged the furnace as not in condition for use. There was also evidence that the furnace was not repairable and had to be replaced. A real estate broker and appraiser testified that the value of the house in October of 1970, assuming no termite or furnace damage, was $12,500, but

that the value of the house on that date with the termite damage existing and with a furnace which was not usable was $9,000.

By agreement of the court and counsel for all parties, five separate forms of verdict were submitted to the jury with specific instructions that only one form would be completed and all others returned. The verdict forms were for the plaintiffs and against all defendants; for all defendants and against the plaintiffs; for the plaintiffs and against the Wills but not against the Jeffreys; for the plaintiffs and against the Jeffreys but not against the Wills; and the fifth form, which was for the plaintiffs and in a separate amount as against the Wills and in a separate amount as against the Jeffreys.

The jury returned its verdict on the fifth form against the defendants Letha L. Jeffrey and Jeffrey Company, a corporation, and assessed the amount at $1,750. It further found for the plaintiffs and against the defendants Wills and assessed the amount of that recovery at $1,750. Mrs. Jeffrey and Jeffrey Company filed a motion for new trial, which was overruled, and this appeal by those defendants followed.

The defendants' attack is generally directed at the giving of various instructions, the sufficiency of the evidence, and the form of the verdict returned.

The defendants do not assign as error the failure to give any requested instruction. The assignments of error assert that each of the instructions actually given was erroneous and that the instructions as a whole were vague and confusing.

The record discloses that the court submitted the proposed instructions to counsel for all the parties and that they had approximately one-half hour to examine them. After the court reviewed with counsel the summarized provisions of each individual instruction, each counsel stated to the court that there was no objection to the proposed instructions and that additional time to study them was not necessary. The failure to object to in-

structions after they have been submitted to counsel for review will preclude raising an objection on appeal. Libbey-Owens Ford Glass Co. v. L & M Paper Co., 189 Neb. 792, 205 N. W. 2d 523.

The defendants contend that the evidence is insufficient to establish any liability upon these defendants for statements by Mrs. Wills as to the condition of the furnace. The jury was at least generally instructed to that effect however. Only Mrs. Wills is charged with making representations as to the furnace, and the evidence shows only Mrs. Wills made any such representations. Instruction No. 2 made those facts clear and instruction No. 12 specifically instructed the jury that any false or fraudulent representations made by either of the defendants Wills were binding upon both of the defendants Wills, but that any false representations made by the defendant Letha L. Jeffrey were binding upon all defendants. If the defendants had wanted any more specific instruction, they were at liberty to request one, but they did not do so. Taken as a whole, the instructions given were not confusing and did not authorize the jury to impose liability upon the appealing defendants for the misrepresentations made by Mrs. Wills.

The appealing defendants assert that the evidence is insufficient to establish fraud as against them, and therefore insufficient to support the judgment. If only defendants' evidence is considered the assertion might well be accurate, but the plaintiffs' evidence is directly contradictory. The jury obviously accepted the plaintiffs' version. In an action at law, the essential elements of fraud are: The making of a false representation, knowing it was false or making it recklessly with out any knowledge of its truth and as a positive assertion, with the intention that it be acted on, that it was acted on, and that injury resulted. Buhrman v. International Harvester Co., 181 Neb. 633, 150 N. W. 2d 220. In a case involving false representations in connection with the purchase and sale of a residence, this court

said: "The defendants produced evidence which contradicted that of the plaintiffs. The effect of this evidence was to present a question for the jury. In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the successful party. * * * The verdict by a jury based upon conflicting evidence will not be set aside unless it is clearly wrong." McGerr v. Beals, 180 Neb. 767, 145 N. W. 2d 579. The evidence in this case was sufficient to support the jury verdict.

Finally, these defendants contend that the jury verdict is ambiguous, and that the jury improperly apportioned damages between joint tort-feasors. They argue that the verdict and judgment should be treated as a single judgment against all defendants in the total amount of $1,750. The record refutes the contention. At a conference with counsel in chambers before the case was submitted to the jury, the trial court inquired of each counsel about the five forms of verdict to be submitted, outlined the five forms, and explained the fifth particularly by saying that "from the pleadings you could very well call on the Jeffreys as to termite damage, and the Wills as to the furnace but I think it ought to be split up." In response to the trial court's inquiry all counsel specifically agreed to the submission of the five forms of verdict. The defendants now assert that the form was improper and ambiguous and that they have been prejudiced. The lack of prejudice is apparent. It is apparent that if the appealing defendants were liable, jointly or separately, only for the full amount of termite damage, the judgment against them would have exceeded $1,750 on the record here. Yet they now complain because the jury may have apportioned some of that liability separately against the Wills.

Not only is there a lack of prejudice to the appealing defendants, but if there was any error involved in the forms of verdict submitted and returned, it was based on or contributed to by the agreement of these defend-

ants. We see no reason why the rule precluding objections on appeal to instructions submitted to and approved by counsel at trial should not be extended to a form or forms of verdict submitted to and approved by counsel before submission to the jury. Where no objections to instructions have been made at trial, other courts have approved apportionment of verdicts against joint tort-feasors. See, Browder v. Cook, 59 F. Supp. 675; Baldwin v. Wiggins (Ky. App.), 289 S. W. 2d 729. The approval by counsel of a form or forms of verdict to be submitted to a jury constitutes a waiver of objections based on the form of verdict and precludes raising such an objection on appeal.

The judgment of the District Court is affirmed.

AFFIRMED.

NEWTON, J., participating on briefs.

K & R, INCORPORATED, APPELLANT, V. CRETE STORAGE CORPORATION, A CORPORATION, APPELLEE.
231 N. W. 2d 110

Filed June 19, 1975. No. 39765.

1. **Trial: Verdicts.** A verdict will not be set aside as inadequate unless it is so clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record or that the jury disregarded the evidence or rules of law.
2. **Trial: Evidence.** The jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence.
3. **Interest.** Where a reasonable controversy exists as to plaintiff's right to recover and the amount of such recovery, a claim is generally considered to be unliquidated and prejudgment interest is not allowed.
4. **Damages.** Prospective profits from an established business, prevented or interrupted by the tortious conduct of the defendant, are recoverable when it is proved (1) that it is reasonably certain such profits would have been realized ex-

cept for the tort, and (2) that the lost profits can be ascertained and measured, from evidence introduced, with reasonable certainty.

5. **Damages: Trial: Evidence.** A claimant of substantial damages must, to prevail, furnish appropriate data to enable the trier of fact to find the amount of damages with reasonable certainty and exactness if the evidence of damages or the amount thereof are susceptible of definite proof. They may not be established by conjecture, speculation, or doubtful proof.

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

Bernard J. Ach of Ach & Ach, for appellant.

Peterson, Bowman, Coffman & Larsen, for appellee.

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

BRODKEY, J.

K & R, Incorporated, the plaintiff below, appeals to this court from a verdict of a jury in its favor in the amount of $9,179.40 against Crete Storage Corporation, defendant, representing damages to certain french fried potato products manufactured by plaintiff and stored in defendant's cold storage warehouse. In its first cause of action plaintiff had sued for the sum of $17,362.20 together with interest thereon at 6 percent per annum from June 2, 1965, which damage, it claimed, was the result of the negligence of the defendant in maintaining and repairing its refrigeration equipment, as a result of which ammonia fumes escaped from the refrigeration pipes causing the french fried potatoes stored in defendant's warehouse to become damaged and not to be edible or saleable. In its second cause of action, plaintiff also alleged loss of future business profits and prayed for damages in the amount of $200,000, interest, and costs, which it claims resulted from two of the largest customers of K & R finding new suppliers for their french fried potatoes. The District Judge dismissed plaintiff's second cause of action based upon loss of busi-

ness profits before submitting the case to the jury for damages to the potatoes themselves. Defendant's cross-petition for storage charges was not submitted to the jury, having been withdrawn with consent of the defendant. The jury thereafter returned a verdict in favor of the plaintiff in the sum of $9,179.40. The assessment of prejudgment interest was thereafter denied by the trial court, and motions of both parties for new trial were overruled. Plaintiff has appealed to this court. We affirm.

In this appeal, plaintiff alleges three principal assignments of error which it asserts require this court to reverse and remand the cause to the District Court for a new trial. Summarizing, these are: (1) Inadequacy of the verdict; (2) failure to submit the issue of loss of business profits to the jury; and (3) failure to assess interest on the verdict from June 2, 1965, at the rate of 6 percent per annum, until paid. No issue was raised in this appeal as to the sufficiency of the evidence to establish the negligence and liability of the defendant for the damage to the potatoes.

It appears that George Rullman and his wife were the stockholders, officers, and owners of K & R, Incorporated, of Hastings, Nebraska; and had themselves been operating a cold storage facility in that city until about 1961, when they commenced making french fried potatoes, and were approved by the U.S.D.A. for meat and food processing. The record reveals that on December 4, 1964, K & R shipped to and stored with Crete Storage Corporation 996 cases of french fried potatoes, having a net weight of 29,880 pounds, being designated as Lot No. 1204. On December 7, 1964, plaintiff shipped to defendant and stored in defendant's warehouse, 1,050 cases of french fried potatoes with a net weight of 31,500 pounds, designated as Lot No. 1207. Also, on December 17, 1964, it shipped to the defendant 1,000 cases of such potatoes with a net weight of 30,000 pounds, designated as Lot No. 1217. The french fried potatoes were packed 5

pounds to a bag and 6 bags to the box, making a total weight of 30 pounds per box. It is these three shipments of potatoes, totaling 91,380 pounds, which were in storage in defendant's cold storage warehouse at the time of the ammonia leak, June 2, 1965, and which are the subject of the dispute between the parties in this case.

On July 22, 1965, part of Lots Nos. 1204, 1207, or 1217 of the french fries stored at the Crete storage facility were shipped to Fairmont Foods in Lincoln, and were found to be grey colored, limp, and with an odor of ammonia. Rullman later saw french fries from the same lots at King Food Hosts in Lincoln, Nebraska, and found that they were in a similar condition. Rullman contacted the Crete storage warehouse on July 28th or 29th and was told that there had been an ammonia leak, which was subsequently repaired. It was necessary to withdraw all the french fries from the aforementioned customers, and the concerns involved thereafter made arrangements with other suppliers to obtain their french fried potatoes.

Rullman testified that the market prices in 1965 for sale of french fries varied from 19 cents to 19.9 cents per pound, and that in July of 1965 the market price of the french fries was 19 cents a pound for the grade of potato involved herein. He also testified that the potatoes had no value whatsoever after their exposure to the ammonia fumes. He also testified that the average cost of production of french fried potatoes of Grade A type in 1965 was 11½ cents per pound, and after adding overhead, selling, and administration costs, and storage and handling charges, he arrived at a cost of goods sold per pound of 12½ cents, which resulted in an average profit on June 2, 1965, of 6½ cents per pound. However, there were no records of the company introduced in evidence to substantiate these figures. The actual sales to Fairmont Foods of french fried potatoes between January 1, 1965, and June 1, 1965, was approximately 80,050 pounds, the total dollar sales being $15,274.25.

The actual sales to King Food Hosts from January 1 to June 1, 1965, was approximately 297,920 pounds, the total dollar sales being $56,605.50. Historically the gross sales to both companies had increased between the years 1962 and 1964.

We now consider the assignments of error as set out in plaintiff's brief. Plaintiff first claims that the verdict of the jury for damages to the potatoes in the amount of $9,179.40 was grossly inadequate. It is plaintiff's contention that it should have been awarded damages of $17,362.20 with interest thereon from June 2, 1965, at 6 percent per annum, based upon a total loss of 91,380 pounds of french fries of the fair and reasonable value of 19 cents a pound. Assuming the truth of the underlying facts which formed the basis of its claim, the damages would mathematically compute out to that figure. However, many of the underlying assumptions for plaintiff's larger claim are subject to scrutiny. Even assuming, arguendo, that the market price of french fried potatoes of that quality at the time in question was approximately 19 cents per pound, we seriously doubt the validity of plaintiff's assumption that the remaining potatoes in storage at the warehouse had no value. The evidence is undisputed that the potatoes were later sold as salvage, and that the price recovered was from 4½ cents to 6 cents per pound. In addition, there is conflicting evidence in the record as to whether, in fact, all the remaining potatoes in storage were spoiled. There is credible evidence in the record that many of the potatoes were not spoiled, although a complete inspection of all the remaining boxes in storage was not made. There is also evidence in the record that only about one-third of the boxes of potatoes remaining in storage were of the long type selling at approximately 19 cents per pound, which was the type purchased and preferred by the restaurant trade, and that about two-thirds of those remaining were of the type known as "shorts," which were less desirable and presumably sold for a lower

figure. The jury had all this evidence before it in determining the amount of damages to which plaintiff was entitled on its first cause of action, and we are not inclined to disturb its findings. A verdict will not be set aside as inadequate unless it is so clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law. Cover v. Platte Valley Public Power & Irr. Dist., 173 Neb. 751, 115 N. W. 2d 133 (1962). Even if the evidence on the question of damages had not been contradictory in several material respects, the jury would not have been obliged to believe the testimony of plaintiff's witnesses. We have frequently held that a jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. Batterman v. Richardson, 189 Neb. 303, 202 N. W. 2d 613 (1972); Satterfield v. Watland, 180 Neb. 386, 143 N. W. 2d 124 (1966); Siefford v. Housing Authority, 192 Neb. 643, 223 N. W. 2d 816 (1974). We conclude that the verdict in this case was not improper, and was supported by the evidence.

Further we conclude that the District Court did not err in refusing to award to plaintiff, and to include in plaintiff's judgment, interest at the rate of 6 percent per annum from and after June 2, 1965. It is clear that on that date plaintiff's claim against defendant for damage to the potatoes was an unliquidated claim. The claim was not fixed nor readily determinable, and the conflict of testimony brought out during the course of the litigation clearly indicates this fact, as does also the amount of the verdict. In Mid States Engineering v. Rohde, 182 Neb. 590, 156 N. W. 2d 149 (1968), we stated: " 'The general rule is that, in the absence of agreement to the contrary, liquidated demands bear interest whereas unliquidated demands do not; * * *.' 47 C. J. S., Interest, § 19 a, p. 28. It is true that this court has held upon

occasion that where a reasonable controversy exists as to plaintiff's right to recover and the amount of such recovery, a claim is generally considered to be unliquidated and interest is not allowed. See Lundt v. Parsons Constr. Co., 181 Neb. 609, 150 N. W. 2d 108." See, also, Schmidt v. Knox, 191 Neb. 302, 215 N. W. 2d 77 (1974). In this case the court properly allowed no prejudgment interest.

We turn now to a consideration of plaintiff's principal assignment of error that the trial court should have submitted to the jury the issue of plaintiff's alleged loss of future business profits. Plaintiff asserts that it was entitled to recover such profits because of the fact that Fairmont Foods and King Food Hosts ceased purchasing french fried potatoes from it shortly after the incident in question, or, to be more exact, some time during July 1965. There is, however, a conflict in the evidence as to whether the cessation of business was due to the spoilage of the potatoes during the incidents involved. There is evidence in the record that plaintiff stopped making french fried potatoes early in the year 1966, for reasons which do not appear therein; and, therefore, plaintiff's claim in this regard must, of necessity, be limited to the period of approximately 6 months following July 1965.

The general rule is that prospective profits from an established business, prevented or interrupted by the tortious conduct of the defendant, are recoverable when it is proved (1) that it is reasonably certain such profits would have been realized except for the tort, and (2) that the lost profits can be ascertained and measured, from evidence introduced, with reasonable certainty. 22 Am. Jur. 2d, Damages, § 177, p. 252. Such lost profits must not be speculative, remote, or imaginary, but must be established with reasonable certainty by the evidence. 22 Am. Jur. 2d, Damages, § 178, p. 253; NJI No. 4.50. In Kaufman v. Tripple, 180 Neb. 593, 144 N. W. 2d 201 (1966), this court stated: "The law generally is un-

favorable to the recovery of losses of profits in tort actions. But a recovery of profits does not rest on the fact that they are profits but because they are ordinarily speculative, contingent, or uncertain." In numerous cases this court has held that damages in the nature of anticipated profits on conjectured, expected, or hoped for sales cannot be recovered. Such damages are too speculative, remote, and consequential; they lack the element of certainty necessary to authorize a recovery therefor. Silurian Mineral Springs Co. v. Kuhn & Co., 65 Neb. 646, 91 N. W. 508 (1902); Punteney-Mitchell Manufacturing Co. v. T. G. Northwall Co., 70 Neb. 688, 97 N. W. 1040 (1904).

Mr. Rullman was himself a certified public accountant and testified orally as to the cost accounting system used by K & R in computing the cost of production of the french fried potatoes manufactured by it, and its profit per pound on the sale of the potatoes to its customers. He testified that the same type of system was maintained and used from the time it commenced processing potatoes until it ceased operations. There is evidence in the record that the company stopped making french fried potatoes early in 1966. He also testified as to the volume of sales made by K & R to its two principal customers, Fairmont Foods and King Food Hosts. However his testimony on these matters appears to have been completely oral and no business or cost accounting records were offered or received in evidence at the trial. There is also evidence that the company itself was losing money from its inception and had only begun to show a small profit when the incident involved in this case occurred. He also testified that his income tax return for the year 1965 did not show a profit but explained that away on the basis that the company had a tax loss carryover from the prior years which wiped out the small profit he made in that year. In any event, K & R ceased manufacturing french fried potatoes about 7

months after the occurrence involved in this case, which, by agreement of the parties, was on June 2, 1965.

Plaintiff endeavors to compute its loss of business profits separately as to Fairmont Foods and King Food Hosts, by the expedient of taking its gross sales for the 5-month period from January 1 to June 1, 1965, and dividing that figure by five in order to obtain average monthly sales. That figure, in turn, it divides by 19 cents per pound, which it asserts was the average selling price during that period, in order to obtain the number of pounds sold monthly, and then it multiplies the resulting figure by 6½ cents per pound, which it claims was its average profit per pound according to its cost accounting records, which, however, were not introduced in evidence. The monthly profit thus obtained is then multiplied by 12 in order to obtain the amount of the lost profits on an annual basis.

However, even assuming that the two customers in question would have continued to purchase the same quantities of french fried potatoes from the plaintiff that they had in the prior 6 months, and that the cause of their changing suppliers was, in fact, the bad experience on the occasions in question with plaintiff's potatoes, the fact still remains that the figures presented by plaintiff to substantiate its claim of lost profits are indeed speculative and conjectural. There is evidence in the record that both the market price of the potatoes and the cost of production fluctuated from time to time, and even Rullman testified that he could not state positively what the profits would have been on the volume of sales to which he had testified. He *assumed* that it would be at least as much as it had been. There is also no evidence in the record that plaintiff had the capacity to produce more frozen french fried potatoes than it was currently selling in the market place. Moreover, the use by plaintiff of the figure of 6½ cents per pound as an average profit on sales is open to question, particularly in view of the fact that he introduced no

business records to substantiate the figures to which he testified. The question is not, as we see it, whether his testimony relative to such profits is properly in the record, there being no objections thereto voiced during the trial, but rather whether or not because of the absence of such records plaintiff has proved his loss of profits with "reasonable certainty."

In discussing the effect of the absence of books and records of a company to prove loss of profits as damages, the Supreme Court of Colorado in Lee v. Durango Music, 144 Colo. 270, 355 P. 2d 1083 (1960), quoted from the case of Morrow v. Missouri Pacific Ry. Co., 140 Mo. App. 200, 123 S. W. 1034 (1909), as follows: " 'Such books would contain record entries of the business, an itemized account of the amount of the gross receipts, and the amount of expenditures and the capital invested. Yet in this case no such books were produced in evidence, but the evidence of profits rests wholly upon a statement of a lump sum by one of the plaintiffs in the case.' " In its opinion in the Morrow case, the court further stated: "These books, as usually kept, would contain entries such as no memory could actually preserve, and would show the very essential facts upon which the plaintiffs could recover, if at all, for the loss of profits in their business. And yet no books were produced, and no explanation was given showing that they were lost or not within the possession of the plaintiffs, but reliance was had, as a substitute, upon the memory of one of the interested parties. * * * Besides this, there is an entire failure of the evidence to show in any way what were the total returns of the plaintiffs' business, the amount of the operating expenses, and the depreciation of capital, if any, during the previous fixed period of time. Without such a showing, under the authorities cited, there were no actual facts or reliable data given in evidence that would enable the jury to form a reasonable estimate of the amount of plaintiffs' profits." In Rambo v. Galley, 188 Neb. 692, 199 N. W. 2d 14 (1972), this court made a

similar observation stating: "We assume it to be plaintiff's contention that she would have had a much greater increase in gross income and a profit in 1969, except for the fact that defendants started a competing agency. There is no way, from the evidence, to tell what this increase might have been. *Plaintiff did not put her records in evidence.*" (Emphasis supplied.) Likewise, in Bitler v. Terri Lee, Inc., 163 Neb. 833, 81 N. W. 2d 318 (1957), the court stated: "His testimony, insofar as it was intended to establish costs of production, margin of gross profit, and percentage of gross profit, is unsupported by any record, data, or corroboration. * * * The determination of the cost of production of manufactured goods, the gross margin, and the percentage of gross profit of the organization concerned would generally and logically be expected to be done from the books in which were recorded the facts of its day-to-day transactions and activities and according to usual and ordinary accounting practices. * * * The law requires the best evidence available. A claimant of substantial damages must, to prevail, furnish appropriate data to enable the trier of fact to find the amount of damages with reasonable certainty and exactness if the evidence of damages or the amount thereof are susceptible of definite proof. They may not be established by conjecture, speculation, or doubtful proof. * * * The record of the financial operations of appellant was available in its books." Also, in Gilmartin v. Stevens Inv. Co., 43 Wash. 2d 289, 261 P. 2d 73 (1953), the Supreme Court of Washington specifically ruled that where a plaintiff, in attempting to prove loss of profits, fails to produce available records relevant to such question, plaintiff does not fulfill his obligation of proving damages with "reasonable certainty."

We affirm the judgment of the trial court.

AFFIRMED.

SYLVIA SCHADEMANN, APPELLEE AND CROSS-APPELLANT, V. JOHN J. CASEY ET AL., APPELLANTS AND CROSS APPELLEES, IMPLEADED WITH ELWOOD DAHL, JR., ET AL., APPELLEES AND CROSS-APPELLEES.

231 N. W. 2d 116

Filed June 19, 1975. No. 39770.

1. **Workmen's Compensation: Judges.** Absent either statutory disqualification, bias, or other cause shown, it is not prejudicial for the one judge of the Workmen's Compensation Court to thereafter serve as one of the judges of that court on rehearing.
2. **Discovery: Records.** A transcript of court proceedings prepared by an official court reporter is not a part of an attorney's work product; it is subject to discovery on payment of a proportionate share of its cost.
3. **Workmen's Compensation.** 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. In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard.
4. **Workmen's Compensation: Contracts: Employer and Employee.** Where incident to the employment contract, whether express, implied, or by custom, it is understood by the employer and employee that the employer will transport the employee to or from the place where the work is to be done, and the employer does so provide that transportation in a vehicle under the employer's control, an injury during that journey arises out of and in the course of employment.
5. **Workmen's Compensation: Words and Phrases.** The word "willfully" as used in section 48-145.01, R. R. S. 1943, is that failure by act or omission to act, done knowingly and intentionally.

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

H. E. Hurt, Jr., and James Gallant, for appellants.

McGroarty Welch, Langdon & McGill and Moodie & Moodie, for appellee Schademann.

Neil W. Schilke of Sidner, Svoboda, Schilke & Wiseman, for appellees Dahl et al.

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

COLWELL, District Judge.

Plaintiff Sylvia Schademann filed a petition in the Nebraska Workmen's Compensation Court for benefits claimed by reason of the death of her husband, Elra Schademann, on January 25, 1973, in a truck-train crossing accident at Scribner, Nebraska, while employed by defendants John J. Casey and Janith M. Casey, doing business as Casey Construction, West Point, Nebraska. An award was made for the plaintiff by a single judge of the Workmen's Compensation Court against defendants John J. Casey and Janith M. Casey, doing business as Casey Construction, and Dahl & Sons, Inc. Defendants waived rehearing and noticed appeal to the District Court. Plaintiff made application for a rehearing before the full Workmen's Compensation Court sitting en banc urging that the award should also be against defendants Elwood Dahl, Jr., and JoAnn Dahl, pursuant to section 48-145.01, R. R. S. 1943. Upon hearing en banc the award was affirmed; no attorney's fee was allowed plaintiff, to which plaintiff claims further error. All parties appealed to the District Court, where the award was affirmed and plaintiff was allowed $500 attorney's fee for services in that court. Defendants appeal and plaintiff cross-appeals. We affirm.

Defendants urge that this matter be heard de novo in this court. We conclude from a full consideration of the record that the findings of fact made by the Workmen's Compensation Court and as affirmed by the District Court are fully supported by the record and de novo review is not required. See Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285. For the purpose of this opinion we set out the substance of

the record supporting the findings of the Workmen's Compensation Court.

Defendants John J. Casey and Janith M. Casey were in the general contracting and building business at West Point, Nebraska, operating under the name of Casey Construction, doing business in West Point and surrounding territory, with offices in their home. On November 13, 1972, a written contract was executed between defendant John J. Casey and defendant Dahl & Sons, Inc., Scribner, Nebraska, to build a triplex apartment in Scribner. The contract made no provision requiring Casey to obtain workmen's compensation insurance for his employees, and there was no other agreement for the same. Defendants Casey had no policy of workmen's compensation coverage for their employees. Dahl & Sons, Inc., was incorporated on October 24, 1972; defendants Elwood Dahl, Jr., and JoAnn Dahl were the officers and principal stockholders; and the triplex apartment being constructed was the principal asset of the corporation. Defendants Elwood Dahl, Jr., and JoAnn Dahl, individually, owned and operated Dahl's Cafe, Scribner, Nebraska; and they had a policy of workmen's compensation insurance in force covering cafe employees issued by Hawkeye Security Insurance Company.

In November 1972, Casey Construction began the triplex construction. John J. Casey worked on the project and supervised other company employees, one of whom was Elra Schademann, who farmed near West Point and worked part time as a carpenter for Caseys on an hourly rate basis in and around West Point. On jobs away from West Point, Schademann usually rode to the jobsites with his employers. On the triplex job, Schademann worked a few days in November 1972, and on January 23, 24, and 25, 1973. On January 24th Janith M. Casey transported him to the jobsite. There was no express agreement between employer and employee for transportation to jobsites. On the triplex job at Scribner it was the custom of Schademann to leave his farm

home at about 7:40 a. m., and drive in his car to West Point where he met John J. Casey either at the Strehle's Cafe, or at Casey's home; Schademann would leave his car in West Point and ride to the Scribner jobsite with Casey; they generally arrived at the Scribner jobsite at about 8 a.m.; and at the close of the work day about 5 p.m. Schademann would ride back to West Point with Casey. On January 25, 1973, Schademann met John J. Casey at the cafe in West Point shortly before 8 a.m., and then drove to Casey's home where Casey picked him up and they rode together to Scribner in Casey's van, registered in the name of John J. Casey, arriving at about 8 a.m. Shortly before 5 p.m. Casey directed Schademann in some last minute work and told Schademann that he would be delayed in returning to West Point for 30 to 45 minutes because Casey had some other carpenter work to do at another jobsite. Schademann expressed an interest to then return to his home. Casey furnished Schademann with a 1967 van to drive back to West Point. Schademann drove the van toward West Point and within a few blocks from the jobsite collided with a railroad train at the crossing at about 5 p.m. resulting in his death. At the time of his death Schademann was earning an average of $110 a week. He left surviving him the plaintiff, his widow, aged 51, and three minor children.

Defendants contend that they were denied an impartial hearing before the Workmen's Compensation Court sitting en banc for the reason that the single judge, who presided at the original hearing, was also one of the three judges sitting en banc at the rehearing. Defendants first made this objection in their petition on appeal to the District Court. There is no showing of either bias or prejudice.

The Nebraska Workmen's Compensation Court, by law, is composed of four members. Prior to a 1965 amendment it was composed of three members. Section 48-156, R. R. S. 1943, provides in part: "A majority of the

judges of the Nebraska Workmen's Compensation Court shall constitute a quorum * * * to transact business * * * and for rehearing of any disputed claim for compensation." Section 48-179, R. R. S. 1943, provides in part: "Either party at interest who refuses to accept the findings, order, award, or *judgment of the court* on the original hearing may * * * file with the Nebraska Workmen's Compensation Court an application for a *rehearing* before the *court sitting en banc,* * * *. The court * * * thereafter shall proceed to hear said cause *de novo.*" (Emphasis supplied.)

The hearing before the single judge and the rehearing before the full court sitting en banc are hearings before the Workmen's Compensation Court. The hearing en banc is a full hearing, and issues are submitted anew on the evidence then presented. It is not in any sense an appellate procedure. See City of Lincoln v. Nebraska Workmen's Compensation Court, 133 Neb. 225, 274 N. W. 576 (1937). Absent either statutory disqualification, bias, or other cause shown, it is not prejudicial for the one judge of the Workmen's Compensation Court to thereafter serve as one of the judges of that court on rehearing. §§ 48-177 and 48-179, R. R. S. 1943. The record here fails to show either error or prejudice.

At the original single judge hearing, defendants provided themselves with the services of an official court reporter who prepared a transcript of proceedings, retaining a copy, and giving the original to H. E. Hurt, Jr., defendants' attorney. Plaintiff made application for and was granted discovery upon tender and payment of her proportionate share of the cost. Defendants claim as error that the copy of the transcript was a part of their attorney's work product.

In Walla v. Chicago, B. & Q. R.R. Co., 19 F.R.D. 352 (Neb., 1956), a similar situation arose. Chief Judge Delehant granted discovery, finding the court reporter was not an employee of the party securing his services. Pro-

duction of the transcript by the reporter was ordered upon payment of a proportionate share of the cost.

An annotation in 35 A. L. R. 3d, at p. 460, on this subject states: "A transcript of a * * * hearing made by a certified shorthand reporter at the express request of the attorney for the plaintiffs * * * was held not the 'work product' of the plaintiffs' attorney, in Dougherty v. Gellenthin (1968) 99 NJ Super 283, 239 A 2d 280. * * * The court pointed out that the plaintiffs had not compelled the witnesses to appear at the hearing and that the testimony given had not been a product of investigation or resourcefulness by the plaintiffs' attorney. The court also reasoned that since the hearing had been a solemn judicial public proceeding, 'to permit either party to reserve unto himself that which transpired below and thereby effectively foreclose his adversary from the same would be manifestly unjust.' By refusing discovery, the court said, the plaintiffs seek to make private that which was public in its inception."

A transcript of court proceedings prepared by an official court reporter is not a part of an attorney's work product; it is subject to discovery on payment of a proportionate share of its cost.

Defendants urge that the death of Elra Schademann did not arise out of and in the course of his employment as provided in sections 48-101 and 48-151 (6), R. R. S. 1943, and the rule that generally, if an employee is injured while going to or from his work or home, the injury is not one arising out of and in the course of employment, citing McDonald v. Richardson County, 135 Neb. 150, 280 N. W. 456. Plaintiff does not claim that travel was a substantial part of Schademann's job, but rather the transportation in the employers' vehicle is an exception to the general rule. The precise factual question presented here is of first impression.

This court has said: "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 for-

mula by which the question may be resolved. * * * In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independant hazard." We further said: "The term 'arising out of the employment' in the Workmen's Compensation Act covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment." Seger v. Keating Implement Co., 157 Neb. 560, 60 N. W. 2d 598.

The weight of authority in cases where the employer furnishes transportation to the employee is stated in 1 Larson, Workmen's Compensation Law: "§ 17.10 General rule covering trips in employer's conveyance. If the trip to and from work is made in a truck, bus, car, or other vehicle under the control of the employer, an injury during that trip is incurred in the course of employment. The justification for this holding is that the employer has himself expanded the range of the employment and the attendant risks. * * * The reason for the rule in this section depends upon the extension of risks under the employer's control. * * * Since the element of control of the risk in the employer-operated-vehicle case is an independent ground of liability, the employer remains liable for the journey though he charges the employee an amount for the trip sufficient to cover its cost. * * * § 17.30 Non-contractual or casual provision of transportation. The provision of transportation by the employer may come about as a result of custom

and usage, as well as by express contract, as when employees, working at some distance from their homes, engage in the known and habitual practice of riding on the employer's trucks."

A case in support of this majority view is Konopka v. Jackson County Road Commission, 270 Mich. 174, 258 N. W. 429, 97 A. L. R. 552 (1935): "The law seems rather definitely settled that in cases where the contract of employment expressly includes conveyance of the employee to or from his place of work, an accident arising out of such transportation and resulting in an injury to the employee is compensable. It is so held because such an accident arises both out of and in the course of the employment. 1 Schneider's Workmen's Compensation Law (2d Ed.), § 265. We think both on reason and on respectable authority the holding should be the same where, as in this case, incident to the employment contract it is contemplated and understood by both the employer and the employee that the former will transport the latter to or from the place where the work is done. And especially should such be the rule when under a uniform course of conduct the employer does so convey the employee. We do not think the legal aspect is affected by the fact that the employee may at his option adopt other means of conveyance. The arrangement for conveyance of the employee by the employer, when made, is obviously for their mutual advantage; and from the inception of the journey the employee in a very large sense is under the control of the employer. Surely the safety or the peril of the journey is within the control of the employer. The transportation is such an essential incident of the employment as to be a part of it."

We conclude that where incident to the employment contract, whether express, implied, or by custom, it is understood by the employer and employee that the employer will transport the employee to or from the place where the work is to be done, and the employer does so provide that transportation in a vehicle under the em-

ployer's control, an injury during that journey arises out of and in the course of employment.

There was conflict in the record as to the arrangement existing between the employer and the employee Schademann, relating to the transportation between West Point and the jobsite. It was the testimony of John J. Casey that there was no invitation to ride, that he gave his employees an opportunity to ride, and that he loaned the van to Schademann for the return trip to West Point. A fellow employee testified that usually at the beginning of the trip from West Point to the jobsite Casey would say which of the employer's vehicles they would take to the jobsite, and the employees then got into that vehicle and rode with Casey to the jobsite. There was evidence by way of admission that Casey instructed Schademann to drive the van on the return trip to West Point at the time of the fatal accident. The trial court could find from the record that Schademann was furnished transportation to and from the jobsite on a regular informal prearranged basis; the jobsite was several miles distance from Schademann's home, and he had no transportation available for the return trip to West Point; that Schademann understood with his employers that they would furnish transportation to and from the jobsite in a vehicle under their control; that the return trip on January 25, 1973, by Schademann was incident to his employment in a vehicle under the control of defendants Casey; and that the death of Schademann arose out of and in the course of his employment.

Plaintiff urges on cross-appeal that the court sitting en banc erred in not allowing her an attorney's fee. The hearing before the court en banc was requested by plaintiff, the parties defendant having waived rehearing and appealed directly to the District Court. Although Wiekhorst v. Rural Electric Co., Inc., 186 Neb. 445, 183 N. W. 2d 747, held that the word "may" used in section 48-125, R. R. S. 1943, is generally interpreted as "should," we

find here no abuse of discretion by the Workmen's Compensation Court. The District Court properly allowed an attorney's fee.

Plaintiff also urges that defendants Elwood Dahl, Jr., and JoAnn Dahl should be liable for the payment of an award made because of the application of section 48-145.01, R. R. S. 1943, which provides in part: "Any employer required to secure the payment of compensation under this act who *willfully fails* to secure the payment of such compensation shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment. In any case where the employer is a corporation any officer or employee of the corporation who had authority to secure payment of compensation on behalf of the corporation and *willfully failed* to do so shall be individually liable to a similar fine and imprisonment and such officer or employee shall be personally liable jointly and severally with such corporation for any compensation which may accrue under Chapter 48, article 1, in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure the payment of compensation as required by section 48-145." (Emphasis supplied.)

At the time this legislation was pending before the Nebraska Legislature, Workmen's Compensation Judge Benjamin Novicoff testified before a legislative committee that: "Section 18 provides a penalty for failure to secure insurance or to qualify as a self-insurer, and I think it is important to accent the word 'willful' failure. An error in judgment would not result in penalty but if the employer willfully fails to get insurance, then there would be a penalty."

We interpret the word "willfully" as used in section 48-145.01, R. R. S. 1943, as that failure by act or omission to act, done knowingly and intentionally. The

plaintiff failed to sustain her burden of proof on that issue.

The judgment of the District Court affirming the award of the Workmen's Compensation Court sitting en banc was correct and should be affirmed. Plaintiff is allowed $750 attorney's fees in this court.

AFFIRMED.

J. MYRON OLSON, APPELLANT AND CROSS-APPELLEE, V. LOUIS PEDERSEN ET AL., APPELLEES AND CROSS-APPELLANTS.
231 N. W. 2d 310

Filed June 19, 1975. No. 39859.

1. **Landlord and Tenant.** Nonperformance of a covenant by one party to a lease, unless the performance is an express condition, does not excuse the other party from performing further than the law of property governing evictions provides.
2. ———. In the absence of a statute to the contrary, a tenancy cannot be terminated for the breach of a covenant, condition, or collateral agreement by the lessee unless there is an express and distinct provision in the lease for a forfeiture or right of reentry on the occurrence of the breach.
3. **Landlord and Tenant: Forfeitures: Contracts.** Forfeitures of estates under leases are not favored in law and the right to forfeit must be clearly stipulated. If a forfeiture has not been stipulated for, a covenant or condition which is merely implied, or an express one not clearly within the forfeiture clause, will not sustain a claim of forfeiture for breach.
4. **Rescission: Forfeitures.** Ordinarily forfeiture for breach of a condition subsequent may not be declared in the absence of a demand for performance.
5. **Rescission: Damages: Contracts.** An indivisible contract cannot be rescinded in part and a part remain executed. If rescinded at all, it must be the entire contract, and the parties thereto placed in the situation they were at the time it was made as nearly as the circumstances will permit. The remedies of rescission and damages are inconsistent; the former proceeding upon disaffirmance, and the latter upon affirmance of the contract. Rescission extinguishes the contract and neither party can thereafter base any right of recovery on any part of it.

6. **Rescission.** Where rescission is granted both parties must, as nearly as possible, be restored to the status quo.
7. **Rescission: Damages.** Under some circumstances a party may be required to mitigate his damages by resorting to appropriate and reasonable legal remedies to obtain possession of personal property wrongfully detained from him, and if he does not do so, damages will be denied.
8. **Rescission: Damages: Trial.** There must be a causal relationship between the damages asserted and the breach relied upon. Proof which leaves this issue in the realm of speculation and conjecture is insufficient to support a judgment.
9. **Landlord and Tenant: Mines and Minerals.** Where ore is mined under a lease, the title to it vests as personal property in the lessee as soon as it is mined and removed from its original place, subject, however, to the royalty rights of the lessor.

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

Gleysteen, Harper, Kunze, Eidemoe and Heidman, for appellant.

Smith, Smith & Boyd, for appellees.

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

CLINTON, J.

This multifaceted action arises out of a gravel mining lease between the defendant landowners, Pedersens, as lessors, and the plaintiff, J. Myron Olson, as lessee.

The nature of the case and the issues involved make it desirable to first set forth some background facts. In 1967 the parties made their first lease agreement. It provided for payment of a 20 cents per yard royalty with a minimum payment of $500 per year and contained provisions relating to the disposal of the overburden. Approximately 35,000 cubic yards of gravel were mined and sold under that lease. In the first part of April 1971, Pedersens, who had kept records of the gravel sold, brought suit against Olson for allegedly unpaid

royalty. This suit was dismissed by the Pedersens without payment of any sums by Olson and the parties resolved their differences by entering into a new and more elaborate lease on April 29, 1971. The present action grows out of that lease. At the time the new lease was entered into, in addition to the gravel which had been sold, there had been mined and stockpiled on the premises approximately 11,000 cubic yards of gravel. There was at that time, also, a substantial amount of overburden piled upon what was formerly level ground referred to in the record as the first orchard level.

The lease of April 29, 1971, was for a 5-year term. It provided for payment to the Pedersens of "twenty cents ($.20) for each cubic yard of limestone, sand, rock or gravel removed from said premises to be marketed or for lessee's own use, including approximately 10,000 cubic yards already mined and stockpiled on said premises." The lease provided that the royalty was to be paid within 10 days after the end of each 30-day period. It also provided: "In no event shall the payments herein specified be less than five hundred dollars ($500.00) in any 12 month period beginning with the execution of this lease." The provision with reference to disposal of overburden was as follows: "LESSEE AGREES to level all dirt, waste material and refuse from said operation to a height not to exceed the first level west of the orchard. The dirt now piled on the first level west and south of the orchard shall be pushed westward into a hole, into the area now occupied by the stockpile or in any area agreed upon around the farm buildings designated by lessors for their use and benefit. In no event shall any material of any type be pushed any further east of its present location except into the hole now existing or the stockpile area, nor shall the same be pushed over or upon any existing structure or fence. It is understood that the original first level was 50 feet wide on the average before gravel operations commenced, and lessee has no obligation to remove or level any dirt which is

more than 50 feet west of first level. All material shall be pushed in a westerly direction if practical. The parties shall agree on a new site for any future stockpiles of gravel. The present pile of dirt now on the first level west of the orchard shall be removed or leveled as herein provided within two years from date of execution of this lease. Lessee agrees to construct adequate dikes around the excavating site to prevent erosion and excess water drainage onto surrounding areas, especially toward lessor's house and other farm buildings."

No mining was done during the first year of this lease. Before the end of the first year Olson made a check for the minimum $500 yearly royalty payable to the Pedersens and to John Hancock Insurance Company, holder of a mortgage on the Pedersen land, to whom the royalties had been assigned, and sent this check to Pedersens' attorney. This check was never negotiated. Not only was no mining done under the lease, but none of the stockpile was sold. Timely tenders of the minimum annual royalty for 1973 and 1974 were made and refused.

On July 26, 1972, Pedersens sent Olson a "Notice to Terminate Lease," which recited as grounds for termination, the following:

"(1) Nonpayment of rent by Lessee;

(2) Failure by Lessee to construct one cattle and hog crossing which was sufficient to restrict cattle and hogs from crossing the same.

(3) Failure by Lessee to level all dirt, waste material and refuse from said gravel operation to a height not to exceed the first level west of the orchard.

(4) Failure of Lessee to construct adequate dikes around the excavating site to prevent erosion and excess water drainage on surrounding areas.

(5) Failure by Lessee to stock pile gravel on premises leased.

(6) Stock piling gravel on premises not agreed to by Lessors,"

and then demanded delivery and possession of the premises within 15 days of the receipt of the notice.

About 30 days after the receipt of the notice, Olson commenced this action and alleged three causes. The first was for a declaratory judgment, praying that the rights of the parties be determined. This cause was much later amended to allege that the Pedersens' actions were such a material breach of the lease as to excuse further performance by Olson. The second cause was for an injunction to prevent termination of the lease and to restrain Pedersens from interfering with Olson's use and enjoyment of the leasehold estate. The third cause claimed damages allegedly resulting to Olson by publicity arising out of the earlier litigation and also asked for damages from Pedersens for their having prevented Olson from disposing of the stockpiled gravel. The third cause was also later amended to allege that Pedersens had breached the lease by, among other things, serving the notice to terminate. It also asked damages for the loss of use of certain equipment on the premises used in the mining operation, namely a D9 dozer, a link-belt crane, a conveyor, and two trucks, which items Pedersens allegedly prevented Olson from removing.

Pedersens answered, admitting certain allegations and denying others, alleged nonpayment of rent due April 29, 1972, and asked damages for failure to level the dirt and waste and for failure to build the dike, and also prayed for certain consequential damages.

The trial court found that both parties had breached the lease and that it was terminated; and that Olson breached the lease by failing to build the dike and permitting waste and erosion. It awarded Olson $10,000 damages for loss of use of his equipment, and it allowed Pedersens $10,000 damages from Olson for the latter's failure to level, fill, and build dikes. It awarded Pedersens $1,000 for rent payments, and Olson $344.10 for gravel sold by Pedersens from the stockpile and not paid

for by them. It ordered that the stockpile of gravel be sold within 18 months and authorized injunctive relief to bring this about. Its order terminated the lease as of April 29, 1974, the third anniversary date thereof.

Olson appeals. Pedersens cross-appeal. Olson here, by proper assignment, urges: (1) The court erred in ruling that the lease had been terminated. In the alternative Olson asserts that the purported termination by Pedersens excused further performance on his part. (2) The award of $10,000 damages to Pedersens was erroneous and not supported by the evidence and the only breaches of the lease by Olson, if any, were excused by reason of Pedersens' refusal to perform. (3) The court erred in refusing to award Olson damages for gravel sales frustrated by Pedersens. By proper assignment on cross-appeal, Pedersens urge: (1) The court erred in finding that Pedersens breached the lease by refusing Olson access to the premises. (2) The evidence is insufficient to support the award of the judgment of $10,000 in damages for wrongful detention by Pedersens of Olson's equipment. We affirm in part, reverse in part, and remand with directions.

The proper answer to the riddles presented by this litigation may, we perceive, be best reached by answering the following questions: (1) Did Olson's failure to construct the dike justify the action of the Pedersens in attempting to terminate the lease? (2) If such action was not legally justified, and we find it was not, what effect did this have upon Olson's future obligations to perform his promises under the lease? (3) Were the various money judgments justified under the applicable rules of law and/or supported by the evidence? (4) Was the action of the trial court in directing the stockpile of gravel be sold within 18 months legally justified?

The following principles of law are applicable to the solution of the first question. Nonperformance of a covenant by one party to a lease, unless the performance is an express condition, does not excuse the other party

from performing further than the law of property governing evictions provides. Restatement, Contracts, § 290, p. 429; Hague v. Sterns, 175 Neb. 1, 120 N. W. 2d 287. In Nebraska the rule is that in the absence of a statute to the contrary a tenancy cannot be terminated for the breach of a covenant, condition, or collateral agreement by the lessee unless there is an express and distinct provision in the lease for a forfeiture or right of reentry on the occurrence of the breach. Forfeitures of estates under leases are not favored in law and the right to forfeit must be clearly stipulated. If a forfeiture has not been stipulated for, a covenant or condition which is merely implied, or an express one not clearly within the forfeiture clause, will not sustain a claim of forfeiture for breach. Hague v. Sterns, *supra*; Chesnut v. Master Laboratories, 148 Neb. 378, 27 N. W. 2d 541; 51C C. J. S., Landlord & Tenant, § 102 et seq., p. 330; 58 C. J. S., Mines and Minerals, § 173b, p. 369; Home Creek Smokeless Coal Co., Inc. v. Combs, 204 Va. 561, 132 S. E. 2d 399. In Wadman v. Boudreau, 270 Mass. 198, 170 N. E. 44, the Massachusetts court declined to declare forfeiture of a sand and gravel lease where overburden had been badly "sidecast" even though there was a forfeiture clause in the lease. The operation of the rules cited in the above Nebraska cases may be otherwise in the case of a mineral lease where the only consideration for the lease is the implied covenant to develop and operate. In such a case forfeiture may be declared. George v. Jones, 168 Neb. 149, 95 N. W. 2d 609, 76 A. L. R. 2d 710. The foundation for the foregoing rule appears to be grounded upon the general principle of contract law that, where a breach is so material and substantial as to defeat the objects of the parties in making the contract, forfeiture or rescission may be declared. 17A C. J. S., Contracts, § 422(1), p. 516. In the absence of a forfeiture clause, breach of a covenant is ordinarily not ground for forfeiture of a lease because an action for damages is an adequate

remedy. This principle would appear to be but an application of the rule applicable to contracts generally in cases where rescission is sought. Klapka v. Shrauger, 135 Neb. 354, 281 N. W. 612. Ordinarily forfeiture for breach of a condition subsequent may not be declared in the absence of a demand for performance. 51C C. J. S., Landlord & Tenant, § 114(2), p. 362.

Let us now in the light of the foregoing principles examine the evidence and the notice of termination. As implied by our statement of the questions, we need consider only one of the alleged breaches listed in the termination notice. This is because grounds (1) and (2), as the District Court properly held, find no support in the evidence. Ground (3), with reference to leveling and filling, is not applicable because, by the terms of the lease, Olson had a period of 2 years within which to carry out those obligations. The notice of termination was served before that time elapsed. Grounds (5) and (6) have no applicability because there were no provisions in the lease imposing such obligations. This leaves for consideration only the alleged failure to construct the dikes.

The time within which the dikes were to be constructed was not clearly specified. No demand was ever made for performance of that obligation previous to the serving of the notice to terminate. Olson argues that he understood he had 2 years within which to construct the dikes just as he had that amount of time to level and fill. The evidence would tend to support this interpretation of the contract because it would appear that the material from the pile of overburden would be utilized to construct the dikes and that this material would have, at least in part, to be moved to make way for the dike construction. But whether that construction of the contract is adopted or not, the application of the previously cited principles of law to the evidence make it clear that grounds for forfeiture and termination of the lease did not exist when the notice was served.

The exception to those general principles resting upon an implied obligation to continue to develop is eliminated because the lease provides for payment of a minimum annual royalty which was in fact paid or tendered.

Olson, in effect, argues that service of the notice to terminate by Pedersens was a total anticipatory breach of the lease, that now the passage of time has totally frustrated the purposes of the lease, and he should therefore be relieved of all obligations thereunder, including that of leveling, filling, and building dikes. In other words, he would now acquiesce in the wrongful termination rather than rely upon his prayer for declaratory and injunctive relief. He still seeks damages, however, for lost sales of gravel. At this point, we are confronted with a legal inconsistency. On the one hand Olson would acquiesce in Pedersens' termination and on the other seeks damages for Pedersens' breach. This he cannot do. "An indivisible contract cannot be rescinded in part and a part remain executed. If rescinded at all, it must be the entire contract, and the parties thereto placed in the situation they were at the time it was made as nearly as the circumstances will permit. . . . The remedies of rescission and damages are inconsistent; the former proceeding upon disaffirmance, and the latter upon affirmance of the contract. . . . Rescission extinguishes the contract and neither party can thereafter base any right of recovery on any part of it." James v. Hogan, 154 Neb. 306, 47 N. W. 2d 847. Where rescission is granted both parties must, as nearly as possible, be restored to the status quo. 17A C. J. S., Contracts, §§ 438, 439, p. 545. See, also, 17A C. J. S., Contracts, § 440, p. 551. Whether or not a breach has been so material as to require the injured party (in this case, Olson) to be relieved of all his obligations under the contract depends upon the circumstances. A. L. I., Restatement, Contracts 2d, Tentative Draft No. 8, March 20, 1973, C. 10, § 266, p. 67.

Under the circumstances of the case before us, the

parties cannot be restored to the status quo. This is primarily because the present lease was in effect a settlement of difficulties which the parties encountered in their dealings in the preceding lease and if we simply said that the present agreement is rescinded this would leave the express but imprecisely stated obligation of Olson to fill and level under the former lease wholly unfulfilled. See 17A C. J. S., Contracts, § 440, p. 551.

For the above reasons we find that the unjustified effort of the Pedersens to terminate the lease does not relieve Olson of his obligation to level, fill, and construct a dike or dikes in accordance with the contractual provisions.

This action being one for declaratory relief, we must now construe the contract to determine Olson's obligation under the provisions just mentioned. The contract provides: "The dirt now piled on the first level west and south of the orchard shall be pushed westward into a hole, into the area now occupied by the stockpile or in any area agreed upon around the farm buildings designated by lessors for their use and benefit. In no event shall any material of any type be pushed any further east of its present location except into the hole now existing or the stockpile area, nor shall the same be pushed over or upon any existing structure or fence. It is understood that the original first level was 50 feet wide on the average before gravel operations commenced, and lessee has no obligation to remove or level any dirt which is more than 50 feet west of first level. All material shall be pushed in a westerly direction if practical." The trial court awarded damages against Olson in the sum of $10,000 for breach of the foregoing provision as well as the provision to "construct adequate dikes." The evidence does not support a judgment for that amount. The witness who testified for Pedersens based his estimate of cost of leveling, filling, and construction, not upon the basis of Olson's obligations under the contract, but upon the cost of leveling, diking, and

terracing the entire excavation site. Under the express provisions of the contract, "lessee has no obligation to remove or level any dirt which is more than 50 feet west of first level." Since the judgment for $10,000 is unsupported by the evidence, it must be vacated. Olson testified that the cost of leveling, filling, and diking in accordance with the contract would be $3,996.20. This evidence, although supplied by Olson, was the only competent evidence on the point.

We find that upon remand of this case, Olson shall, within 30 days from the issuance of the mandate herein, perform the work required as interpreted in this opinion, and if he shall fail to do so, judgment shall be rendered against him in the amount of $3,996.20.

We now turn to a consideration of the judgment against Pedersens in the amount of $10,000 for the alleged wrongful detention by them of the machinery of Olson earlier described. As a matter of law such judgment is not supported by the evidence. The evidence indicates that Olson made no effort to retrieve his equipment from the pit site except as follows. In July 1971, Olson sought to remove a bulldozer. He was required by Pedersens to have his attorney contact Pedersens' lawyer and then he was able to obtain that item. In July 1972 he desired to retrieve a bulldozer and later two or three dump trucks. On each occasion Olson was told, apparently by Mrs. Pedersen, that he would have to see their lawyer first. Apparently Mrs. Pedersen interpreted a provision of the contract to prohibit removal by Olson even of mobile equipment (the contract refers to machinery and buildings constructed and maintained on the premises) until "all of the covenants and agreements as herein provided have been fulfilled." Olson did nothing further, but let the machinery sit. When later removed it was essentially worthless. Damages were based upon a claim for rental value and not upon the value of the equipment. We find that Olson should have mitigated his damages by having taken timely legal

action to obtain the equipment. Having not done so, the judgment for $10,000 against the Pedersens must be set aside.

The general principle underlying the duty to mitigate damages has been stated as follows: "Legal rules and doctrines are designed not only to prevent and repair individual loss and injustice, but to protect and conserve the economic welfare and prosperity of the whole community. Consequently, it is important that the rules for awarding damages should be such as to discourage even persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts, or from actively increasing such loss where prudence would require that such activity cease. The machinery by which the law seeks to encourage the avoidance of loss is by denying to the wronged party a recovery for such losses as he could reasonably have avoided, and by allowing him to recover any loss, injury, or expense incurred in reasonable efforts to minimize his injury." McCormick, Damages, C. 5, § 33, p. 127.

In Lawson v. Brokmann, 116 Kan. 102, 226 P. 252, the Kansas Supreme Court approved an instruction requiring the owner of a haybaler wrongfully attached to mitigate his damages. The appellant was claiming lost profits allegedly caused by the lost opportunity of use. The court noted that this appellant could have rented another baler or could have utilized a form of replevin, essentially consisting of a posting of a bond. The court concluded that the law requires such reasonable measures. W. B. Moses & Sons v. Lockwood, 295 F. 936, is in accord. This was another wrongful attachment damage suit. The court stated: "When the plaintiff's car was taken from him, he could have procured its return immediately by giving an undertaking under section 455 of the Code, with security approved by the court. It was his duty to do this and thus to reduce the defendant's liability. If he had done it, the only loss which

would have come to him would be that occasioned by the expense of procuring the undertaking and necessarily incurred for a car between the date of the levy and the return of his own car, assuming that he used due diligence throughout." See, also, Levy v. J. A. Olsen Co., Inc., 237 Miss. 452, 115 S. 2d 296; Lynch v. Call, 261 F. 2d 130. In Schneider v. Daily, 148 Neb. 413, 27 N. W. 2d 550, we find a Nebraska case illustrative of an application of the rule pertaining to the duty to mitigate damages allegedly arising from a failure to return property improperly attached. This court there held that if a mere oral release of the property had not been sufficient, and apparently this was the plaintiff's contention, the plaintiff's damages could only be the cost of transporting the equipment from the place of attachment to his farm. This court said: "The plaintiff will not be permitted to stand by on such a technical excuse and bring action for a large amount of damages when they could have been avoided by the simple expedient of taking his machine at the place where it was attached. He will be required to mitigate his damage the same as any other litigant." We hold that under some circumstances a party may be required to mitigate his damages by resorting to appropriate and reasonable legal remedies to obtain possession of personal property wrongfully detained from him, and if he does not do so, damages will be denied.

The court awarded judgment to Pedersens against Olson in the sum of $1,000 as compensation for mineral royalty for the first 2 years of the lease. Since the lease remained in force, Pedersens are entitled to that annual royalty for those years and that part of the judgment is affirmed. No interest, however, shall be allowed as proper and timely tender was made. The judgment in the sum of $344.10 against Pedersens for gravel sold and the proceeds of which were unaccounted for is affirmed.

At this point we call attention to the fact that the record indicates the parties, through their counsel, have

stipulated that tenders of minimum royalties for the balance of the term of the lease are waived during pendency of the litigation. If Olson wishes the lease to continue those royalties would have to be paid.

Olson asserts that the trial court erred in not awarding damages to him for gravel sales allegedly frustrated because of Pedersens' refusal of access to the premises. Olson testified that after the lease of April 29, 1971, was signed he attempted to sell gravel to Dakota County but was unable to do so. The highway superindendent for Dakota County testified that the county did not purchase gravel because of the dispute between the Pedersens and Olson and that the county did not want to pay twice. The county purchases stopped "when Pedersens received the two checks for the $2,000." The conclusion to be drawn from the record is that these events occurred prior to the signing of the lease of April 29, 1971. The further conclusion would be that the county did not purchase because of the dispute which preceded the settlement between the parties made by the new lease. It follows, therefore, that the gravel sales were not lost because of the Pedersens' attempt to terminate the lease, but because of the earlier dispute. There must be a causal relationship between the damages asserted and the breach relied upon. Proof which leaves this issue in the realm of speculation and conjecture is insufficient to support a judgment. Western Land Roller Co. v. Schumacher, 151 Neb. 166, 36 N. W. 2d 777.

Was the trial court correct in ordering that the gravel stockpile be sold within 18 months? We find that it was. Under the circumstances of this case, it is equitable to apply the rule applicable to ore mined under a lease. Where ore is mined under a lease, the title to it vests as personal property in the lessee as soon as it is mined and removed from its original place, subject, however, to the royalty rights of the lessor. 58 C. J. S., Mines and Minerals, § 177, p. 379. A question arises

as to whether Olson is entitled to credit for the minimum annual royalties paid or to be paid upon the 20 cents per cubic yard royalty which will be owed when the stockpiled gravel is sold. We conclude that under the proper interpretation of the lease he is not. Such a credit would be applicable, we conclude, only where and to the extent that some gravel is sold during the year for which the minimum annual rental or some part thereof is payable.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. NATHANIEL L. HALL, APPELLANT.
231 N. W. 2d 123

Filed June 26, 1975. No. 39496.

1. **Post Conviction: Res Judicata.** The trial court is not required to entertain successive motions under the Post Conviction Act for similar relief from the same prisoner.
2. **Post Conviction: Pleadings: Motions, Rules, and Orders.** After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the District Court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief.

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

Nathaniel L. Hall, pro se.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

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

NEWTON, J.

This is a post conviction proceeding. Defendant was convicted of homicide. He had plead guilty, received a life sentence, and did not appeal. Subsequently he brought a post conviction proceeding. See our opinion in State v. Hall, 188 Neb. 130, 195 N. W. 2d 201.

In the present proceeding defendant argues his plea was induced by statements of his counsel that if tried and convicted he might receive a death penalty but his life could be saved by a negotiated plea. The advice of counsel was previously questioned in the former proceeding wherein it was held: "When counsel has advised a defendant to plead guilty, a defendant who has heeded such advice may not subsequently attack the voluntariness of a guilty plea so long as the counsel's advice was within the range of competence demanded of attorneys in criminal cases." State v. Hall, *supra*.

"The trial court is not required to entertain successive motions under the Post Conviction Act for similar relief from the same prisoner." State v. Huffman, 190 Neb. 319, 207 N. W. 2d 696.

"After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the district court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief." State v. Reichel, 187 Neb. 464, 191 N. W. 2d 826.

The judgment of the District Court is affirmed.

AFFIRMED.

BRODKEY, J., not participating.

DENNIS VOICHAHOSKE, APPELLANT, V. CITY OF GRAND ISLAND, HALL COUNTY, NEBRASKA, APPELLEE.
231 N. W. 2d 124

Filed June 26, 1975. No. 39799.

1. **Employer and Employee: Municipal Corporations: Public Officers and Employees.** The theory that public employment which may be denied altogether may be subjected to any conditions regardless of how unreasonable has been uniformly rejected.
2. **Employer and Employee: Constitutional Law.** Where a classification impinges upon fundamental freedoms protected by the Constitution, such classification must, under the Equal Protection Clause, be not merely rationally related to a valid public purpose, but necessary to the achievement of a compelling state interest.
3. **Marriage: Constitutional Law.** The right to marry is a fundamental right afforded protection by the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.
4. **Marriage: Employer and Employee: Constitutional Law: Rules: Municipal Corporations: Public Officers and Employees.** A city personnel rule which conditions continued employment by the city upon nonmarriage to a fellow city employee establishes a system of classification which affects the exercise of the fundamental right to marry.
5. **Employer and Employee: Municipal Corporations: Public Officers and Employees: Rules: Trial.** The state or a subdivision thereof, having formulated a law or rule which establishes a system of classification which affects the exercise of a fundamental right, has the burden of proving that such law or rule is necessary to promote a compelling governmental interest.

Appeal from the District Court for Hall County: LLOYD W. KELLY, JR., Judge. Reversed and remanded.

Wagoner & Wagoner, for appellant.

Earl D. Ahlschwede, for appellee.

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

BRODKEY, J.

This is an appeal from an order of the District Court for Hall County, Nebraska, sustaining a motion for sum-

mary judgment filed by defendant, City of Grand Island, to plaintiff's first cause of action in his second amended petition to recover money damages for wrongful discharge from employment. Plaintiff's second and third causes of action contain essentially the same allegations of facts as set out in the first cause of action, but involve and allege other types of damages allegedly suffered by plaintiff as a result of the wrongful discharge from employment.

The facts of the case are that plaintiff was employed as a mechanic in the department of public works of the City of Grand Island since October 9, 1967, and that on December 30, 1971, he married Miss Janice Randolph, who had been employed by the police department of that city since December 7, 1966. Shortly thereafter, the city manager of the City of Grand Island consulted with plaintiff and his wife and requested that one or the other of the parties resign because of their violation of a certain personnel rule of the City of Grand Island. Neither of said parties chose to do so; and, therefore, on January 5, 1972, the city manager wrote to plaintiff advising him that he had been dismissed from public employment by the City of Grand Island for conduct prejudicial to the public interest, under Item J, page 22A, of the Personnel Rules, City of Grand Island, which had been adopted on or about December 13, 1971. The rule above referred to states: "2. Acts or conduct prejudicial to the public interest include: * * *J. Changing status, by marriage or otherwise, which would result in more than one person in a household being on the payroll of the City of Grand Island."

Plaintiff thereafter requested reinstatement, and was refused. He then commenced this action. In his petition, plaintiff alleges, among other things: "That Item J, Page 22A, Personnel Rules, of the City of Grand Island, insofar as the same pertains to change of status by reason of marriage, is violative of the Plaintiff's rights guaranteed by the Constitutions of the United

States and the State of Nebraska, in one or more of the following particulars: 1. That it violates the Constitutionally protected right to equal protection and that it discriminatorily prohibits employment of a class of persons, to-wit: Spouses of city employees. 2. That it violates the right of privacy guaranteed by the 9th Amendment to the Constitution of the United States, in that it interferes with the marriage relationship, a constitutionally protected penumbra within the purview of the 9th Amendment, and in which the Defendant City of Grand Island has no overriding interest."

Defendant city filed its answer in the foregoing action, alleging among other things "that plaintiff was advised of defendant's personnel policy and rule concerning more than one person in a household being on the payroll of the City, before his marriage to Janice Randolph, and therefore, had knowledge of the policy and rule; that Janice Randolph was advised of the same personnel policy and rule prior to her marriage to plaintiff, and therefore, she had knowledge of the policy and rule; that plaintiff assumed the risk of separation from employment by the defendant City because of his own action and therefore brought the result upon himself through his own action." As previously stated, the defendant thereafter filed a motion for summary judgment, and a hearing was held thereon on June 27, 1974. On August 14, 1974, the District Court entered its order sustaining the motion, rendered judgment for the defendant, and dismissed plaintiff's first cause of action. The court in its order specifically found "that there is no genuine issue as to any material fact in the plaintiff's first cause of action of his second amended petition, and that the defendant is entitled to a judgment as a matter of law." It is from that order that the plaintiff has appealed to this court. For reasons hereinafter stated, we reverse and remand the cause to the District Court for further proceedings.

We must determine in this case not only whether

a personnel rule prohibiting more than one person in a household being on a city payroll is constitutionally valid; but also whether, in the instant case, that determination may be made in a ruling on a motion for a summary judgment, where additional evidence and facts may be necessary to finally determine the constitutionality or unconstitutionality of such a rule. We also point out at the outset that this case does not involve any claim of discrimination on the basis of sex, as the rule in question, by its terms, is applicable to both men and women. It merely prohibits more than one person "in a household" being on a city payroll. Therefore the citations of cases involving "sex discrimination" are not pertinent.

There is no dispute, and the parties are in agreement, that there is no constitutional right to public employment. Nebraska Department of Roads Employees Assn. v. Department of Roads, 189 Neb. 754, 205 N. W. 2d 110 (1973); Gossman v. State Employees Retirement System, 177 Neb. 326, 129 N. W. 2d 97 (1964); State ex rel. Fischer v. City of Lincoln, 137 Neb. 97, 288 N. W. 499 (1939); Armstrong v. Howell, 371 F. Supp. 48 (Neb., 1974). The difference of opinion between the parties concerns itself with the right to terminate such employment, and under what conditions it may be terminated.

This court has previously indicated that a public employee may be summarily dismissed. Nebraska Department of Roads Employees Assn. v. Department of Roads, *supra*. In Gossman v. State Employees Retirement System, *supra*, this court stated: "It is clear that State employment is not a vested right, but it is extended at the will of the State, and the State may reasonably make a mandatory retirement system as a condition of such employment, and if this be so, it follows that the State has a right to impose such conditions as are economically and practically sound. And, in responding to such imposed conditions, the employees have the alternative of accepting such conditions and complying with the con-

ditions that are found in the Act or finding work elsewhere." See, also, Armstrong v. Howell, *supra*. However, it is also well established that there is a limitation on the types and kinds of conditions which may be imposed upon public employees. The theory that public employment which may be denied altogether may be subjected to *any* conditions regardless of how unreasonable has been uniformly rejected. Keyishian v. Board of Regents, 385 U. S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); Pickering v. Board of Education, 391 U. S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). It is clear that one may not be dismissed from public employment in a manner which is violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In Armstrong v. Howell, *supra*, the court pointed out recognized limitations on the right to discharge a government employee, stating: "Many government employees are under civil service and some under tenure. Absent these security provisions a public employee has no right to continued public employment, except insofar as he may not be dismissed or failed to be rehired for impermissible constitutional reasons, such as race, religion *or the assertion of rights guaranteed by law or under the constitution.*" (Emphasis supplied.) To the same effect see Perry v. Sindermann, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); Board of Regents v. Roth, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); Freeman v. Gould Special School Dist., 405 F. 2d 1153 (8th Cir., 1969); Town of Milton v. Civil Service Commission, 312 N. E. 2d 188 (Mass., 1974); Keyishian v. Board of Regents, *supra*; Pickering v. Board of Education, *supra*. Plaintiff contends that his dismissal based on marriage alone is a violation of a fundamental constitutional right, and hence was done for an impermissible constitutional reason.

It seems clear that the personnel rule involved in this case establishes a system of classification which must be examined to determine its validity under the Equal

Protection Clause of the United States Constitution. In 1939, the Supreme Court of Massachusetts had occasion to consider a proposed legislative bill similar to the city rule under consideration in this case. The proposed act provided: "A husband and wife shall not at the same time be employed in the service of the commonwealth." That court held the bill differed from certain other bills of similar nature considered by the Massachusetts Senate and House of Representatives in that it was equally applicable to both married men and women; but pointed out: "It does discriminate, however, between a particular class of married persons and all other persons married or unmarried, * * *." In re Opinion of the Justices, 303 Mass. 631, 22 N. E. 2d 49, 123 A. L. R. 199 (1939). The rule is well established that where a classification impinges upon fundamental freedoms protected by the Constitution, such classification must, under the Equal Protection Clause, be not merely rationally related to a valid public purpose, but necessary to the achievement of a compelling state interest. Shapiro v. Thompson, 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969); Dunn v. Blumstein, 405 U. S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972); Eisenstadt v. Baird, 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972).

The United States Supreme Court has made it abundantly clear that the right to marry underlies the purposes of the Constitution, although not mentioned therein, and is a fundamental right afforded protection by the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 2d 1042 (1923); Skinner v. Oklahoma, 316 U. S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); Loving v. Virginia, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); Boddie v. Connecticut, 401 U. S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971); Cleveland Board of Education v. LaFleur, 414 U. S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974); O'Neill v. Dent, 364 F. Supp. 565 (E.D. N.Y., 1973). It is clear that the personnel rule

involved herein establishes a system of classification of employees which is based upon and affects the exercise of a fundamental right, i.e., the right to marry. Therefore, under the rules previously stated, the personnel rule in question can only be sustained if it promotes a compelling governmental interest.

In the case of O'Neill v. Dent, *supra,* the court struck down a regulation of the Merchant Marine Academy prohibiting cadets at that institution to be married. In that case, the court reiterated the well-established rule that marriage is a fundamental right, and took evidence as to whether the regulations of the academy were necessary to promote a compelling governmental interest. The court also held that the Merchant Marine Academy had the burden to prove that the regulations were necessary for that purpose. After hearing the evidence, the court concluded that there was no compelling governmental necessity for Merchant Marine Academy regulations prohibiting cadet marriages, and that the interference with the cadet's fundamental right to marry violated the cadet's right to due process. That case, of course, is not binding upon this court as a precedent which we are obliged to follow, but the logic and reasoning of parts of the opinion in that case are persuasive. See, also, Bell v. Lone Oak Independent School Dist., 507 S. W. 2d 636 (Tex. Civ. App., 1974).

As previously stated, this case was disposed of by the trial court on a motion for summary judgment filed by the defendant. That motion was sustained. The rule is that a summary judgment may be granted only where there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law. § 25-1332, R. R. S. 1943. As stated above, it is clear that the personnel rule with which we are concerned can only be sustained if it is established there is a compelling governmental interest for so doing, clearly a higher standard than that ordinarily required to sustain the validity of a classification established by law. Since

there is an issue as to whether or not there is a "compelling governmental interest" under the facts of this case, sufficient to sustain the validity of the personnel rule in question, this becomes a question of fact, and requires evidence for its resolution. Therefore, it would appear that the summary judgment herein is not justified and must be reversed. However, the defendant should have an opportunity to present evidence in support of its contentions that there is a compelling governmental interest involved, as was done in O'Neill v. Dent, *supra*. Some of the elements which may be considered by the court in making this determination are set out in Johnson v. State of Minnesota Civil Service Department, 280 Minn. 61, 157 N. W. 2d 747 (1968), where the court stated: "The numerous cases which have considered the problem indicate that to meet the requirements of reasonableness it must be shown not only that the restriction is not arbitrary or discriminatory but also that it serves a manifest public interest by protecting against a clear, substantial, and direct threat to the efficiency, integrity, morale, and discipline of state employees and the merit system under which they are recruited, their performance evaluated, and their tenure assured. * * * The burden rests upon the State to show a compelling public need to protect substantial public interest. See, Thornhill v. State of Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093."

In view of what we have stated above, we reverse the judgment and remand the cause for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

CARL BRALICK, APPELLANT, V. DOROTHY E. BRALICK, APPELLEE.

231 N. W. 2d 129

Filed June 26, 1975. No. 39810.

1. **Divorce: Alimony.** The rules for determining alimony or division of property in a divorce action provide no mathematical formula by which such awards can be precisely determined. They are always to be determined by the facts in each case and courts will consider all pertinent facts in reaching an award that is just and equitable.
2. **Divorce: Parent and Child: Infants.** In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered, and the amount rests in the sound discretion of the court.

Appeal from the District Court for Custer County: EARL C. JOHNSON, Judge. Affirmed as modified.

David T. Schroeder for Padley & Dudden, for appellant.

Simon Galter, Carlos E. Schaper, and Howard W. Spencer, for appellee.

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

NEWTON, J.

This is an appeal in a divorce proceeding. Appellant assigns error in regard to the awarding of custody of three of the children and the amount of alimony, child support, and attorneys' fees awarded. We modify the judgment of the District Court.

Eight children were born to appellant and appellee. Five were minors at the time of dissolution of the marriage, to wit: Carl, 16 years of age; Andrew, 15; Elizabeth, 13; Jean, 11; and Arthur, 10. Custody of Carl and Andrew was awarded to appellant and custody of the three younger children was retained by the court with physical custody and control placed in appellee.

No purpose will be served by setting out the comparatively lengthy evidence regarding child custody. The record does not disclose, and the trial court did not find, that either parent was unfit to have custody of the minor children. The court did however take the precaution of placing restrictions on the custody of the three younger children granted to appellee. Although the necessity for such precaution is not clear, it can scarcely be soundly criticized. The interests of minor children should be safeguarded even to the extent of taking precautions which may prove to be unnecessary. It is apparent that the trial court very carefully inquired into and considered all factors bearing on the custody of the children. The record sustains the solution arrived at and there was not an abuse of discretion. The judicial discretion of the trial court with respect to fixing the custody of minor children will not ordinarily be disturbed on appeal unless there is a clear abuse of judicial discretion. See Fisher v. Fisher, 185 Neb. 469, 176 N. W. 2d 667.

The evidence sustains the trial court's finding that property awarded to appellant had a reasonable value of $44,657 and that property awarded to appellee had only a nominal value. Appellant has an income of approximately $14,000 per year. The award to appellee of $15,000 permanent alimony is not unreasonable but its payment in 10 semiannual installments, together with the child support, places a severe burden upon appellant. His income amounts to approximately $1,160 per month. On payment of the alimony award at the rate of $750 semiannually and at $300 monthly child support, reduced from $375, his income for himself and the support of the two boys will be reduced to about $735 per month. The alimony payments would amount to $125 per month, the child support payments, $300, and the appellee's earnings approximately $400 per month, a total of $825 per month. It would not be advantageous to either party to place the payments for alimony and child sup-

port beyond the reach or capability of the appellant and we therefore fix the child support payments at $100 per child per month and the alimony payments at $750 semiannually. "The rules for determining alimony or division of property in a divorce action provide no mathematical formula by which such awards can be precisely determined. They are always to be determined by the facts in each case and courts will consider all pertinent facts in reaching an award that is just and equitable. * * *

"In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered, and the amount rests in the sound discretion of the court." Bliven v. Bliven, 190 Neb. 492, 209 N. W. 2d 168.

The court allowed appellee the sum of $2,500 for attorneys' fees and the guardian ad litem, $1,424.80. The trial occupied 2 days and the record does not disclose the rendering of any unusual, extraordinary, or time-consuming services by the attorneys involved. It would appear that the District Court allowances were on the generous side and sufficient to cover also the services of appellee's attorney in this court.

The judgment of the District Court is affirmed as modified.

AFFIRMED AS MODIFIED.

JOHN BERIGAN, APPELLEE, V. ALICE E. BERIGAN, APPELLANT.
231 N. W. 2d 131

Filed June 26, 1975. No. 39836.

1. **Divorce: Appeal and Error: Waiver: Parent and Child: Infants.** An appellant who voluntarily accepts payment of a part of a judgment in his or her favor loses the right to prosecute an appeal. This rule has no application in cases involving the dissolution of a marriage only insofar as it affects the interests and welfare of minor children.

2. **Divorce: Alimony.** The proper procedure where an appeal is contemplated is to apply to the trial court for temporary allowances.
3. ———: ———. If the trial court has fully adjusted the property rights of the parties, the court may make the temporary allowances during the pendency of the appeal applicable on the alimony awarded in the decree.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed as modified.

Fraizer & Fraizer, for appellant.

Baylor, Evnen, Baylor, Curtiss & Grimit, for appellee.

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

SPENCER, J.

Alice E. Berigan, respondent, appeals from the alimony and child support portions of a dissolution of marriage decree. We affirm as modified.

The parties, who were married in 1961, have four children. At the time of the trial in December 1973, their ages were: Elizabeth, 11; Carol, 10; William, 8; and Gregory, 2. Petitioner was 43 years of age and respondent 42. Both are graduates of the University of Nebraska and both have taught school. Petitioner is now teaching at Nebraska Wesleyan University and respondent is employed at Doane College.

Respondent was awarded the custody of the four children. In addition to an approximately $5,000 equity in a home at Crete, Nebraska, respondent was awarded the furniture and furnishings therein, a 1966 station wagon, $50 per month alimony for 10 years, and $80 per month for each child as child support. Petitioner was awarded 800 acres of ranch land, which was premarital property and is subject to an encumbrance of approximately $29,000. In addition he was awarded an equity in a 1973 automobile, a fishing boat, a radio tower, musical instruments, and a music library.

Respondent is contesting the adequacy of the alimony allowance and the amount of the child support. Unfortunately for respondent, the record discloses that she has accepted at least 18 payments of alimony pending this appeal, and although we might have increased the alimony allowance if the matter were properly before us, on the record herein we cannot do so.

In Larabee v. Larabee (1935), 128 Neb. 560, 259 N. W. 520, this court established the rule that an appellant who voluntarily accepts payment of a part of a judgment in his or her favor loses the right to prosecute an appeal. The rule that the acceptance of benefits precludes an appeal by the one benefited is one of general application, although there are varying exceptions. See 29 A. L. R. 3d 1184. While we modified Larabee v. Larabee, *supra*, in Reynek v. Reynek (1975), 193 Neb. 404, 227 N. W. 2d 578, we did so only insofar as it affected the interests of minor children. We reaffirm the rule enunciated in Larabee except as it may affect the interests and welfare of minor children. The proper procedure where an appeal is contemplated is to apply to the trial court for temporary allowances pending appeal. If the trial court has fully adjusted the property rights of the parties, the court may make the temporary allowances during the pendency of the appeal applicable on the alimony awarded in the decree. See Badberg v. Badberg (1975), 193 Neb. 844, 229 N. W. 2d 552.

On the record herein, considering the ages of the children, we do not question the adequacy of $80 per month for the support of each child at the present time. This award is subject to future modification if necessity requires. We do feel, however, that the petitioner should additionally be required to pay all medical and dental expenses necessarily incurred for said children, and modify the decree in that respect.

The judgment is affirmed as modified herein. Costs are taxed to the petitioner, including the allowance of

$500 as attorney's fee for services of respondent's attorney in this court.

AFFIRMED AS MODIFIED.

CLINTON, J., concurs in the result.

H. L. BLACKLEDGE, APPELLANT, V. FRANCIS L. RICHARDS ET AL., APPELLEES.
231 N. W. 2d 319

Filed June 26, 1975. No. 39852.

1. **Municipal Corporations: Improvements.** The Downtown Improvement and Parking District Act of 1969, sections 19-3401 to 19-3420, R. R. S. 1943, prescribes the method by which cities of the first and second class may raise additional revenue for certain stated purposes relating to the improvement of public facilities within the district.
2. **Constitutional Law: Statutes: Parties.** It is a well-established rule that no one can complain a statute is unconstitutional unless he is injuriously affected thereby, and that the courts will not set aside a law as violative of the Constitution for the reason there is a possibility that one's interest may be injuriously affected in the future.
3. **Constitutional Law: Statutes.** This court will not strike down legislation as violative of the title provision of Article III, section 14, of the Nebraska Constitution, if the title calls attention to the subject matter of the bill, and the portion of the bill challenged is germane to the purpose announced in the title.
4. **Constitutional Law: Pleadings.** This court will not consider a constitutional question in the absence of a specification of the portion of the Constitution appellant desires vindicated.
5. **Constitutional Law: Statutes.** Where an act does not purport to be amendatory, but it is enacted as original and independent legislation and is complete in itself, it is not within the constitutional requirement as to amendments, although it may, by implication, modify or repeal prior acts or parts thereof.
6. ———: ———. A grant of prescribed administrative powers is not an unlawful delegation of legislative authority.
7. **Constitutional Law: Statutes: Municipal Corporations.** The fact that a statutory grant of legislative authority to a mu-

nicipal corporation is made in general terms is not basis for constitutional challenge.

8. **Taxation: Municipal Corporations.** An occupation and license tax levied by a municipality under the Downtown Improvement and Parking District Act of 1969 for the purpose of raising revenue may be based upon a square footage formula.

9. ———: ———. A classification of businesses made pursuant to the levying of an occupation and license tax will not be set aside unless it is arbitrary, capricious, and unreasonable.

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

H. L. Blackledge, pro se.

Dewayne Wolf and Ward W. Minor, for appellee.

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

CLINTON, J.

This action was brought by appellant to have portions of Laws 1969, L.B. 918, p. 511, the Downtown Improvement and Parking District Act of 1969, now sections 19-3401 to 19-3420, R. R. S. 1943, declared unconstitutional; to determine the consitutionality of ordinance No. 2154 of the City of Kearney, Nebraska; to enjoin the collection of taxes levied under the above ordinance; and to obtain a refund of the taxes paid pursuant to the above ordinance. We affirm the dismissal of appellant's petition.

The plaintiff-appellant, a lawyer, is a citizen, resident, and taxpayer of Kearney, whose office is located within the boundaries of the Kearney Downtown Improvement and Parking District. The defendants-appellees are comprised of Kearney's mayor, city council, downtown improvement board, and certain other city officers.

By enacting the Downtown Improvement and Parking District Act of 1969, the Legislature set out the method by which cities of the first and second class may raise additional revenue for certain stated purposes relating to the improvement of the district area. Gen-

erally, the act provides for the appointing of a downtown improvement board; the duties of the board members; guidelines in determining the boundaries of any district established; procedure for enacting an ordinance utilizing the power conferred by the grant; the authorization of cities to approve general business license and occupation tax on businesses and users of space within an improvement district; the purposes for which the revenue may be used; and procedure for disestablishment of a district.

Pursuant to this legislation, the mayor and city council of Kearney appointed the members of the Kearney downtown improvement board on December 23, 1969. Following a resolution of intention and publication of the proposed district boundaries and rate of tax, a hearing was held, subsequent to which ordinance No. 2154 was adopted on June 24, 1970. Commencing August 1, 1970, the city clerk of Kearney mailed statements of the license and occupation tax imposed by the ordinance to businesses included in the district. Appellant has not paid the tax assessed against him for the years 1970, 1971, 1972, and 1973, and filed this action when notified that a complaint for nonpayment was imminently to be filed against him.

The appellant's petition in the District Court contained numerous allegations concerning the constitutionality of the statute and ordinance. The trial judge dismissed the petition after taking evidence. We consider only those contentions properly preserved, assigned, and argued in appellant's brief.

Appellant propounds the theory that sections 19-3401 et seq., R. R. S. 1943, must be struck down as violative of that portion of Article III, section 14, of the Nebraska Constitution, which provides in part: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." This position is argued in the brief with regard to parts of sections 19-3406, 19-3404, and 19-3419, R. R. S. 1943. The material portion

of the title appended by the Legislature to L.B. 918 (sections 19-3401 et seq., R. R. S. 1943) reads: ". . . to adopt the Downtown Improvement and Parking District Act of 1969."

Appellant would have us hold that the part of section 19-3406, R. R. S. 1943, which restricts the right of utility franchise holders to undertake capital improvements within the improvement districts without prior city approval contravenes Article III, section 14, of the Nebraska Constitution. We determine that appellant may not question the inclusion of this part of section 19-3406 within the ambit of the statute's broad title. He does not have the requisite standing to litigate this issue. There is no evidence that this portion of section 19-3406 is presently impeding whatever right a utility franchise holder has to make a capital improvement within the district. Appellant is not a franchise holder, and his status as a consumer of utility output does not grant him the capacity to litigate questions of constitutional law which relate to a statute's effect on the business of another. State v. Brown, 191 Neb. 61, 213 N. W. 2d 712; Ritums v. Howell, 190 Neb. 503, 209 N. W. 2d 160; Peterson v. Anderson, 100 Neb. 149, 158 N. W. 1055. For this same reason, we also affirm the dismissal of appellant's argument that this portion of section 19-3406 is an unconstitutional infringement upon the validity of an existing contract.

This same standing infirmity prevents us from considering appellant's complaint that section 19-3419, R. R. S. 1943, relating to the disestablishment of an improvement district violates the title provision of Article III, section 14, of the Nebraska Constitution. There is no indication in the record that there is any possibility that the district will be dissolved in the foreseeable future. "It is a well-established rule that no one can complain that a statute is unconstitutional unless he is injuriously affected thereby, and that the courts will not set aside a law as violative of the Constitution for the reason that

there is a possibility that one's interest may be injuriously affected in the future." Peterson v. Anderson, *supra*. Thus we do not consider appellant to presently be a proper plaintiff to raise a constitutional question relating to the disestablishment of an improvement district.

A portion of section 19-3406, R. R. S. 1943, provides: ". . . the mayor and council may grant the downtown improvement board authority . . . to make a detailed study and recommendation to the mayor and council for the establishment of an overall plan for improvements of the downtown district . . . and to commit the city for the cost of such planning from the funds raised by sections 19-3401 to 19-3420." Appellant clearly is urging a new construction of Article III, section 14, of the Nebraska Constitution, in arguing that this portion of the statute unconstitutionally strays beyond the ambit of the title noted previously. The purpose of Article III, section 14, of the Nebraska Constitution, is to prevent surreptitious legislation. This court will not strike down an act of the Legislature under this provision of the Constitution if it can be said that the title calls attention to the subject matter of the bill. The portion of section 19-3406 quoted above is germane to the purpose announced in the title to the act. This is sufficient for purposes of Nebraska's Constitution. Yellow Cab Co. v. Nebraska State Railway Commission, 175 Neb. 150, 120 N. W. 2d 922; Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W. 451, 291 N. W. 100.

Appellant, without citation of authority, asks us to declare the above-quoted portion of section 19-3406, R. R. S. 1943, an unconstitutional delegation of authority. There is no discussion of this allegation. There is no indication as to which portion of the Constitution is purportedly violated. Assuming this is a sufficient assignment and discussion to merit review by this court, nevertheless we will not consider a constitutional question in the absence of a specification of the portion of the Con-

stitution appellant desires vindicated. See, Rule 8 a 2(3), Revised Rules of the Supreme Court, 1974; Radil v. State, 182 Neb. 291, 154 N. W. 2d 466.

Section 19-3404, R. R. S. 1943, provides in part that: "Any warrant issued by the city against funds derived or received hereunder shall first be approved by the chairman or secretary of the board." Appellant contends that this part of the statute is an attempted amendment of section 16-718, R. R. S. 1943, which sets out the general warrant procedure for cities of the first class, and, as such, must be declared in violation of the requirement of Article III, section 14, of the Nebraska Constitution, that a law is unamended "unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed." Appellant cites us to the case of State ex rel. Beal v. Bauman, 126 Neb. 566, 254 N. W. 256. Admittedly, the general rule is therein stated that a purely amendatory act is fatally flawed if it does not meet the above constitutional requirement. However, it is equally well settled in Nebraska that: "Where an act does not purport to be amendatory, but is enacted as original and independent legislation, and is complete in itself, it is not within the constitutional requirement as to amendments, though it may, by implication, modify or repeal prior acts or parts thereof." Live Stock Nat. Bank v. Jackson, 137 Neb. 161, 288 N. W. 515, quoting 1 Lewis' Sutherland, Statutory Construction (2d Ed.), § 239, p. 446. As indicated in Bodenstedt v. Rickers, 189 Neb. 407, 203 N. W. 2d 110, a determination of whether an act is "amendatory" or "independent" must be based upon the considerations behind this particular provision of our Constitution. The mischief to be avoided is "an impermissible confusion in the enactment of amendatory statutes." Bodenstedt v. Rickers, *supra*. With this in mind, we find this portion of section 19-3404 to be independent and not amendatory of section 16-718. It is intelligible without reference to other legislation. There is no pos-

sibility of confusion in so interpreting this statute as it quite clearly operates only in the novel area relating to warrants against improvement district funds, leaving section 16-718 to operate to the full limit of its former scope.

There is no merit to appellant's next contention, which is that section 19-3404, R. R. S. 1943, does not come within the subject matter noted in the title to L.B. 918. This section recites the purpose of the act and provides for council authority over the administration of improvement district plans and operations. Certainly this is subject matter related to the title noted previously. Appellant also urges that parts of section 19-3404 are so vague as to be a nullity. Specifically, he points to the phrases "Whoever administers the program" and "The board or person who administers the program" as defying interpretation. A reading of the entire section dispels any uncertainty of meaning. Section 19-3404 authorizes the city to use revenue raised by the tax contemplated by the act to "secure personnel . . . to administer policies . . . and carry out the purposes of sections 19-3401 to 19-3420." "Whoever administers," as used in section 19-3404, refers to personnel hired by the council pursuant to section 19-3404. "The board or person who administers" refers to the downtown improvement board defined in section 19-3406, R. R. S. 1943, and to the same personnel noted above. There is nothing vague about this section of the statute.

Section 19-3404, R. R. S. 1943, provides in part that: "The board or person who administers the program shall prepare budgets, programs of action and plans and when the same have been approved by the council, the board or person shall have authority, under council supervision, to execute and carry out such programs and plans." Appellant contends that this is an unconstitutional delegation of authority violative of Article II, section 1, and Article III, section 1, of the Nebraska Constitution, which respectively provide for the separa-

tion of powers and define the legislative authority. We do not agree. There is no contention made that the grant of authority to the city council is invalid. As is patent from the reading of section 19-3404, the function of the board or administrator is only to recommend plans and execute council policy. Under the statutory scheme, ultimate control of policy, planning, and spending is vested in the council. A grant of administrative authority is not an unconstitutional delegation of legislative power. Lennox v. Housing Authority of City of Omaha, *supra.*

Appellant challenges sections 19-3401 to 19-3420, R. R. S. 1943, on the ground that Kearney was not in need of additional funds for improvements, section 19-3404 indicating that this legislation was passed because of a legislatively perceived need for cities of the first class to obtain additional revenue. The fact that Kearney may be an exception to a general statement of necessity included in this legislation does not warrant a determination by this court that the legislation is invalid.

Section 19-3402, R. R. S. 1943, provides: "Sections 19-3401 to 19-3420 provide a separate and additional method, authority and procedure for the matters to which it relates and does not affect any other law relating to the same or similar subject. When proceeding under sections 19-3401 to 19-3420 its provisions only need be followed." Appellant asserts in his brief that: "This is another conspicuous example of legislative arrogance by its obvious attempts to declare that the act is above and beyond the purview of any judge or court." This "argument" is without merit. Not only is the significance of appellant's conclusion unexplained, but it is also unwarranted. The statutory language above noted is not unfamiliar and amounts to no more than a declaration that the act is to be interpreted as a unit and is cumulative to existing grants of authority to cities of the first class.

With regard to Kearney's ordinance No. 2154, imple-

menting L.B. 918's grant of authority, appellant asserts numerous defects. A discussion of these allegations now follows.

Appellant first contends that section 7(g) of ordinance No. 2154, providing that revenue from the improvement district may be used to "Assist in the payment of *general obligation bonds issued for the construction of such parking facilities*" (emphasis supplied), is unconstitutional. He does not specify which portion of the Constitution is violated, and, as previously noted, this precludes our consideration of his contention. Radil v. State, *supra*.

It may be that this provision is constitutionally questionable. However, there is nothing in the record to indicate that any such general obligation bonds exist or that the city proposes or threatens imminently to pay any such obligations with the proceeds of the special district tax. The factual situation in Peterson v. Anderson, *supra,* is in principle indistinguishable from that existing here and the rule of law from that case which we earlier quoted is applicable. The determination of the question will have to be made if and when a justiciable issue arises.

Section 7(d) of Kearney's ordinance provides that the district's revenue may be used in "Planning and promoting the improvement of streets, lighting and traffic control for the District." Appellant argues that this use is not within any of the enumerated purposes of section 19-3404, R. R. S. 1943, or, if the city council has authority to interpret the general purposes of section 19-3404, then there has been an unconstitutional delegation of authority to the council. Section 19-3404 provides in pertinent part that funds raised under the statutory scheme may be used in: "(2) Improvement and decoration of any public place in the district area; . . . (6) Any other project or undertaking for the betterment of the public facilities in the district area, whether the project be capital or noncapital in nature."

As street improvement, lighting, and traffic control for the district are obviously improvements of public places or projects reasonably related to the betterment of public facilities in the district, the sole question presented by appellant is whether this statutory authorization of district spending for these general purposes amounts to an unconstitutional delegation of authority. As such, he appears to have confused the competence of the Legislature to generally devolve upon a municipality the power to make public improvements, and the rule that a grant of power to a municipality is to be strictly construed. See Besack v. City of Beatrice, 154 Neb. 142, 47 N. W. 2d 356. Apparently the appellant's argument is that in so delegating authority to make improvements, the Legislature must specify exactly the sort of improvement to be made. This is not the law. It is one thing to question whether authority to act has been given a municipality. It is another thing to question whether a city may be the recipient of a general delegation of power. In this case the general authorization granted by the statute clearly encompasses the objectives described in section 7(d) of the ordinance. In Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N. W. 2d 76, this court reviewed action taken by a city under an authorization to improve streets, avenues, or alleys "in any manner it may deem proper." The grant of power in this case is at least as specific as that, and is no more objectionable when exercised in a "good faith, reasonable" manner, and not in an arbitrary fashion. Hillerege v. City of Scottsbluff, *supra.*

Section 19-3420, R. R. S. 1943, allows the city council to declare nonpayment of an improvement district tax to be a violation of the enacting ordinance, and "subject the violator to fine or other punishment as provided by ordinance." Appellant contests the constitutionality of section 12 of ordinance No. 2154, providing that if an agent conducts a business for a nonresident or a corpo-

ration, "such agent shall be subject to arrest and punishment under the provisions hereof, if his principal shall not have complied with the provisions hereof." We shall not address this issue, for there is no indication in the record that appellant or anyone else is threatened with prosecution under this provision of the ordinance. He may not assert the constitutional rights of another in this action. See, Ritums v. Howell, *supra;* Peterson v. Anderson, *supra.*

Section 19-3408(5), R. R. S. 1943, provides in part that the notice of intent to establish a downtown improvement and parking district "shall recite that the license and occupation tax shall be fair and equitable and uniform as to class and shall be based primarily on the square footage of the owner's and user's place of business or professional office space and such basis as may be stated in the notice." Section 19-3413, R. R. S. 1943, states: "For purposes of the additional tax to be imposed . . . the city council may make a reasonable classification of businesses or users of space." Section 6 of ordinance No. 2154 contains the following classifications and tax rates: "a) 3¢ per square foot floor space upon retail and financial businesses within the district facing Central Avenue, b) 2¢ per square foot floor space upon retail and financial businesses within the district not facing Central Avenue, c) 1¢ per square foot floor space upon other businesses within the district . . . ." Appellant would have us hold that gearing the tax to area of occupancy and not weighing other considerations such as the amount of income derived by a business offends the requirement of Article VIII, section 6, of the Nebraska Constitution, that "such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." Appellant does not challenge the classification of businesses made in the ordinance, and we do not consider them.

The tax in this case is a business occupation and license tax levied for the purpose of raising revenue and

not for the purpose of regulating activity. In such a case, this court has recognized the validity of a flat rate occupation tax. Norris v. City of Lincoln, 93 Neb. 658, 142 N. W. 114; Village of Dodge v. Guidinger, 87 Neb. 349, 127 N. W. 122. In City of Grand Island v. Postal Telegraph Cable Co., 92 Neb. 253, 138 N. W. 169, this court stated: "The tax was uniform, in that it operated alike on all persons or corporations engaged in that business, and we are not aware of any case which holds that when the business transacted by one person or corporation of a class has proved largely remunerative, and the business of another of the same class was less remunerative, or was in fact conducted at a loss, a court of justice can for that reason declare an occupation tax ordinance void." In that case, the appellant's contention that the constitutional requirement of uniformity was offended was not sustained.

These cases recognize that a flat rate tax may be voided only if manifestly unreasonable and confiscatory. As the square footage formula used by the city operated uniformly upon all members of the same class, as did the flat rate taxes noted above, it is not unconstitutional.

The final contention of appellant, and the point toward which the bulk of the evidence taken in the District Court was directed, concerns the boundaries of Kearney's improvement district.

Section 19-3407, R. R. S. 1943, provides that: "A downtown improvement and parking district may be established as provided in sections 19-3401 to 19-3420, and it should be, if possible, coextensive with the established business area in the downtown portion of the city." The record establishes that there are business areas of Kearney not included within the improvement district. Appellant insists that the district boundaries must therefore be disapproved as either conflicting with section 19-3407, or as reflecting an arbitrary and capricious exercise of the city's boundary-making power.

The boundaries of the district as adopted by section

4 of ordinance No. 2154 are as follows: ". . . commencing at Railroad Street 130 feet West of Second Avenue, thence east along Railroad Street to a point 130 feet east of Avenue B, thence north along a line 130 feet east of Avenue B to 25th Street, thence West along 25th Street to a point 130 feet west of Second Avenue, thence south along a line 130 feet west of Second Avenue to the place of beginning." The evidence shows, as appellant contends, that there are businesses to the north of 25th Street and to the south of Railroad Street which were not included in the district. There are 16 businesses north of 25th Street and at least that many south of Railroad Street which were excluded. Twenty-fifth Street, which is also U.S. Highway No. 30, is 130 feet wide, not including a concrete median dividing the highway. Railroad Street is 60 feet wide, bordered on the south by two railroad tracks and the railroad right-of-way. Aside from a freight depot, railroad warehouses, and a lumber company, the businesses which appellant notes as existing south of the improvement district are all a substantial distance from it, separated from the district by the right-of-way, the tracks, and Railroad Street itself. A reading of the record indicates that the businesses north of 25th Street and south of Railroad Street were excluded from the district because the downtown improvement board and the city council were convinced that there was no significant parking problem in these areas and no significant pedestrain traffic from the district area to the south or north.

Under this set of facts, we are not convinced that the boundaries of the district do not conform to the statutory directive that they be "if possible, coextensive with the established business area in the downtown portion of the city." § 19-3407, R. R. S. 1943. The language of the statute calls for a judgment as to the extent of the established downtown business area, and a further determination of the possibility of extending the district to the limits of that area. This judgment and determi-

nation is embodied in ordinance No. 2154.

As the ordinance does not conflict with the statute, we must only determine whether the classification of businesses made by the city council is valid. As is evident from the above recital of fact, there is no basis for us to decide that the boundaries were set in an arbitrary or capricious fashion. Speier's Laundry Co. v. City of Wilber, 131 Neb. 606, 269 N. W. 119; City of Ord v. Biemond, 175 Neb. 333, 122 N. W. 2d 6. The judgment of the District Court dismissing the petition of appellant is therefore affirmed.

AFFIRMED.

LEROY A. PERKINS, APPELLEE, V. MILDRED I. PERKINS, APPELLANT.
231 N. W. 2d 133

Filed June 26, 1975. No. 39861.

1. **Parent and Child: Infants.** The termination of parental rights to children is an issue separate and apart from the award of custody usually made in a proceeding for dissolution of a marriage.
2. **Parent and Child: Infants: Notice: Hearings.** Parents are entitled to notice and hearing with regard to termination of parental rights.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed as modified.

Padley & Dudden, for appellant.

No appearance for appellee.

Joseph A. Shaughnessy, guardian ad litem.

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

BOSLAUGH, J.

This is an action for dissolution of a marriage. The

trial court dissolved the marriage, divided the property of the parties, terminated the parental rights of the parties to their children, and committed the children to the State Department of Public Welfare for the purposes of adoption. The respondent wife has appealed and contends the court erred in terminating her parental rights and not awarding custody of the children to her.

The parties were married on October 4, 1961. They have three children, Leroy, age 11; Charlotte, age 10; and Robert, age 7. The parties separated when the petitioner husband discovered the respondent had been entertaining a male friend in the home when he was at work. The respondent has been living with this man since the separation, and has had an illegitimate child. The evidence further shows both neglect and mistreatment of the children by the respondent when they were in her custody.

The petitioner has been living with an 18-year-old girl who is now pregnant with his child. He failed to support the children when they were in the custody of the respondent and he did not require them to attend school when they were in his custody.

A guardian ad litem for the children was appointed at the request of the county attorney who alleged the children had not been attending school.

The finding by the trial court that both parents were unfit to have custody of the children is fully supported by the record. It is unnecessary to further summarize the evidence in that regard.

The finding that the parental rights of the parties should be terminated was not responsive to any issue in the pleadings. The termination of parental rights was not an issue properly before the court for determination at that time. It is an issue separate and apart from the award of custody usually made in a proceeding for dissolution of a marriage which is subject to modification from time to time. § 42-364, R. R. S. 1943.

Parents are entitled to notice and hearing with re-

gard to termination of parental rights. See, § 43-209, R. R. S. 1943; Morimoto v. Nebraska Children's Home Society, 176 Neb. 403, 126 N. W. 2d 184. The finding made in this case, where there had been no allegation or claim by anyone that parental rights should be terminated, was erroneous.

The judgment of the District Court is modified by deleting that portion of the judgment terminating the parental rights of the parties. The judgment as modified is affirmed. The costs in this court are taxed to the appellant. The guardian ad litem is allowed $500 for his services in this court.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT A. EWERT, APPELLANT.
230 N. W. 2d 609

Filed June 26, 1975. No. 39868.

1. **Criminal Law: Statutes.** In this state all public offenses are statutory. No act is criminal unless the Legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of written law.
2. **Criminal Law: Indictments and Informations: Time: Judgments.** Where in a criminal prosecution the face of the record clearly discloses that the information upon which the defendant has been found guilty does not state a charge which on the date of the alleged offense was a crime under the statutes of this state, and no appeal has been taken, the trial court should, upon proper motion, vacate the judgment of conviction.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded with directions.

J. William Gallup, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

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

CLINTON, J.

This is an appeal from an order denying the motion of the defendant, filed in the original action, to vacate a conviction for violation of subsection (1) (f) of section 28-4,127, R. S. Supp., 1974. The ground for the motion is that the judgment of conviction is a nullity because the defendant was charged with having violated the statute on February 19, 1971, and that statute, which is a part of the Controlled Substances Act, did not become law until May 26, 1971. The record shows that the specific charge was that on February 19, 1971, the defendant "did then and there keep or maintain a dwelling house, building, vehicle, or place which was resorted to by persons using controlled substances or which was used for the keeping of controlled substances." The record further shows that the defendant pled guilty to the charge and was fined in the sum of $300. No appeal was taken. On August 23, 1974, the defendant filed the motion in question. On October 23, 1974, the District Court denied the motion "for want of jurisdiction." We reverse and remand the cause with directions to grant the motion.

In this state all public offenses are statutory. No act is criminal unless the Legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of written law. State v. Hauck, 190 Neb. 534, 209 N. W. 2d 580; Lange v. Royal Highlanders, 75 Neb. 188, 106 N. W. 224; Lane v. State, 120 Neb. 302, 232 N. W. 96. It is conceded that previous to May 26, 1971, there was no statute defining the crime and prohibiting the act of which the defendant was convicted. The State on this appeal asserts that the defendant was entitled to no relief because the right of appeal is barred for the reason that at the time of his conviction the defendant paid his fine. It relies upon State v. Fulton,

187 Neb. 787, 194 N. W. 2d 187; and Abbott v. State, 160 Neb. 275, 69 N. W. 2d 878. It is true, of course, that ordinarily the voluntary payment of a fine defeats any appeal therefrom. However, the above authorities have no application to the present facts where the information states no crime at all and where the defendant appeals from the denial of his motion to set aside the judgment of conviction.

It is apparent on the face of the record that the judgment of conviction is void. We have, heretofore, in civil actions said that void judgments may be set aside on motion at any time. Ehlers v. Grove, 147 Neb. 704, 24 N. W. 2d 866 (judgment absolutely void because no jurisdiction over the person of the defendant); Semrad v. Semrad, 170 Neb. 911, 104 N. W. 2d 338 (partition of real estate where the owner not made party). Counsel has cited no cases and we have found none in which this court has been called upon to apply the rule in a criminal case such as this, where proceedings under the post conviction act are unavailable because the defendant is not incarcerated. Other courts have, however, in criminal proceedings found the rule applicable and we perceive no reason why the principle should not apply. In Ehlers v. Grove, *supra,* we said the power of the court to set aside void judgments is an inherent power of the court.

In State v. O'Keith, 136 Kan. 283, 15 P. 2d 443, the Kansas court held that a void judgment of conviction could be set aside at any time. In that case the court applied the principle in a situation where the statute gave exclusive jurisdiction in the prosecution of persons under the age of 16 years to the juvenile court, but the District Court had nonetheless entered a judgment of conviction upon a defendant of the age of 13 years. In that case the facts upon which the lack of jurisdiction depended did not show upon the face of the record. The Kansas Supreme Court directed that the judgment be set aside and called attention to the common law rule

of inherent power to set aside void judgments and noted that it had been incorporated into the statutes of that state.

In Lucas v. United States, 158 F. 2d 865, the court held that a motion to vacate a judgment of conviction raises only the question whether the judgment and sentence are void on the face of the record and cannot be used to review proceedings of the trial as upon appeal or writ of error. In that case it affirmed the order of the District Court refusing to vacate the sentence holding that the alleged defect required looking behind the language of the indictment and this could not be done. In People v. Blalock, 170 Cal. App. 2d 307, 338 P. 2d 578; and People v. Flohr, 30 Cal. App. 2d 576, 86 P. 2d 862, the California Court of Appeals held that where a judgment is void on its face, it may be attacked either by appeal from the judgment, or by motion to vacate the judgment, but pointed out that both remedies are not available in the same case.

We hold that where, as here, it is clearly disclosed on the face of the record that the information to which the defendant entered the plea of guilty does not state a charge which on the date of the alleged offense was a crime under the statutes of this state, and where no appeal has been taken, the trial court should, upon proper motion, set aside the judgment of conviction.

The judgment is reversed and the cause is remanded to the District Court with direction to vacate and set aside the judgment of conviction.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. STEVEN J. HOGAN, APPELLANT.

231 N. W. 2d 135

Filed June 26, 1975. No. 39871.

1. **Searches and Seizures: Probable Cause.** A customs officer has the unique power to stop a person at an international entry point and to conduct a border search of persons or mail without having a search warrant or probable cause to believe a crime has been committed. Reasonable suspicion of possible illegal activity is sufficient.
2. ———: ———. A border search is not presumptively illegal even though it is conducted without a warrant.
3. **Searches and Seizures: Probable Cause: Evidence.** A defendant who seeks to suppress evidence under a legally issued search warrant has the burden of establishing that the search was improper and that the evidence secured thereby should be suppressed.
4. **Searches and Seizures: Probable Cause: Affidavits: Evidence.** Where an affidavit for a validly issued search warrant discloses that the underlying information upon which probable cause rests was obtained from the United States Bureau of Customs as the result of a warrantless "border search," the burden is on the defendant to establish that the border search was improper and that the evidence secured thereby should be suppressed.
5. **Trial: Evidence: Waiver.** The failure to object promptly to an offer of evidence waives the objection.
6. **Trial: Evidence.** A written extrajudicial utterance may be admissible in evidence without regard to the truth of the assertion made for its nontestimonial value as a circumstance, provided it is legally relevant. The hearsay rule does not apply to such use.
7. **Trial: Evidence: Criminal Law.** Errors in rulings on the admissibility of evidence which do not injuriously affect the substantial rights of an accused are not grounds for reversal.
8. ———: ———: ———. A trial court is bound to submit to the jury only such degrees of the crime as find support in the evidence. While a court has no power to dismiss a part of an offense or direct a verdict of acquittal on one or more degrees of a crime, an attempt to do so will be treated as withdrawing the issue from consideration by the jury.

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

Healey, Healey, Brown, Wieland & Burchard, for appellant.

Paul L. Douglas, Attorney General, and Jerold V. Fennell, for appellee.

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

MCCOWN, J.

The defendant, Steven J. Hogan, was found guilty by a jury on one count of possession of cocaine and one count of possession of marijuana. The District Court sentenced him to 90 days in the county jail on the first count and 5 days on the second count, and this appeal followed.

In late February 1974, in a "usual examination" of foreign mail by the Bureau of Customs at the Port of New York, a letter was opened. The letter had been mailed in Bogota, Colombia, and the sender's name and address were shown as Leonard Russell, Hotel Dann, Bogota, Colombia. The letter was addressed to Steven Hogan, 551 East 26th Street, Kearney, Nebraska. Examination and test disclosed 3 grams of cocaine concealed in the lettter. The letter was then sent to a postal inspector in Nebraska under controlled delivery. The inspector, with the assistance of the Nebraska State Patrol, arranged for the letter to be delivered to the defendant by a regular postman. An investigator for the state patrol then executed an affidavit for a search warrant. The affidavit recited that the affiant had been informed by the postal inspector that official information had been received from the Bureau of Customs that the envelope addressed to the defendant had been inspected and that the envelope contained cocaine. It also recited that the envelope would be delivered at the defendant's address at approximately 1:30 p.m. on March 7, 1974,

and requested the issuance of a no-knock search warrant. On the basis of the affidavit the county judge of Buffalo County duly issued a no-knock search warrant shortly before noon on March 7. The defendant has raised no issue as to the sufficiency of the affidavit or of the search warrant obtained.

Officers maintained surveillance of the defendant's residence thereafter. The letter was duly delivered and at about 3 p.m., the defendant picked up the letter and took it into the house. After waiting approximately 5 minutes, officers broke the door and entered the house. The defendant was standing in a doorway down the hall with a holstered gun in his hand. He put the gun down when he was advised they were police officers and was cooperative with the officers thereafter. The letter was found on the kitchen table unopened. The defendant was asked to open it but declined, although he consented to the postal inspector opening it. It was opened, and contained a little over .1 gram of cocaine. The letter also gave instructions as to cutting the contents, and said that the writer would settle up with the defendant when he got back. Some marijuana and other materials, including some other letters, were also seized in the search. Defendant denied knowing any Leonard Russell and denied having knowledge of the presence of cocaine in the letter addressed to him.

Prior to trial, at the hearing on the motion to suppress, neither side offered any oral testimony. The defendant offered three exhibits, the letter addressed to him containing the cocaine; a chain-of-custody letter used by customs officers in tracing contraband to the place of delivery; and the affidavit and search warrant involved here. The defense also introduced a portion of the testimony of the postal inspector at the preliminary hearing. That testimony had been that there was nothing unusual about the appearance or weight of the critical letter. The State offered no evidence at the hearing

on the motion to suppress. The motion was overruled and the trial proceeded thereafter.

At the conclusion of the prosecution's case, the trial court overruled defendant's motion to dismiss but changed count II, involving marijuana, to a charge of simple possession rather than possession with intent to deliver.

The defendant's testimony was that he had no knowledge of the cocaine, and defendant's evidence tended to place responsibility on his absent roommate, one Lynn Jensen. The defendant's mother stated that Lynn Jensen was in Colombia, South America, at the time of the defendant's arrest. The defendant admitted that he had received two letters from Colombia prior to the critical letter. One was addressed to him and one to Lynn Jensen, and that he had opened and read both letters. He denied any agreement to receive contraband or any knowledge that contraband or cocaine was to be sent to him. He did admit that some of the marijuana found was his.

The jury found the defendant guilty on both counts. He was sentenced to 90 days in the county jail on count I and 5 days on count II.

The defendant's major contention on appeal is that the motion to suppress was erroneously overruled. The defendant tacitly concedes that the affidavit for the search warrant here was more than sufficient to justify the issuance of the warrant. He only attacks the search warrant indirectly on the ground that the affidavit and the evidence show that the information from the Bureau of Customs, which was the foundation information for the issuance of the search warrant, was obtained by means of a customs border search which was conducted without a warrant. The defendant then takes the position that the search and seizure here was consequently a search and seizure without a warrant which requires the prosecution to prove all the facts necessary to establish that the border search was legally authorized and reasonable

instead of requiring the defendant to prove that the search and seizure in Nebraska and at the border were legally unauthorized and unreasonable. The argument is that in the absence of testimony that the customs inspector had a reasonable suspicion or articulable reason for opening the letter addressed to the defendant, the search being without a warrant must be presumed to be illegal and unreasonable and that it poisons the tree and destroys the fruits of any search or seizure thereafter. The argument is ingenious but unsupportable.

It is well settled that a customs officer has the unique power to stop a person at an international entry point and to conduct a "border search" of persons or mail without having a search warrant, or even having probable cause to believe a crime has been committed. Reasonable suspicion of possible illegal activity is sufficient. See, 19 U. S. C., § 482; 39 C. F. R., § 61.1; United States v. Doe, 472 F. 2d 982, cert. den. 411 U. S. 969, 93 S. Ct. 2160, 36 L. Ed. 2d 691; United States v. Beckley, 335 F. 2d 86. Standards applicable to mail moving entirely within the United States are not applicable to mail coming from outside the country, and for customs purposes, mail sorting rooms at a port of entry can be treated as a border crossing. See, United States v. Sohnen, 298 F. Supp. 51 (1969); United States v. Various Articles of Obscene Merchandise, 363 F. Supp. 165 (1973). Border searches are distinctly different from other types of searches. Nevertheless, the defendant seeks to equate such a border search with all other warrantless searches in order to argue that it comes under the general rule that a warrantless search is presumptively illegal. A border search is not presumptively illegal, even though it is conducted without a warrant. If any presumption is to be imposed with respect to a border search, it would be that such a search is presumptively legal. In any event, the rule has been clearly and definitely established that a defendant who seeks to suppress evidence obtained under a legally issued search warrant has the

burden of establishing that the search was improper, and that the evidence secured thereby should be suppressed. United States v. Wright, 468 F. 2d 1184; United States v. McDonnell, 315 F. Supp. 152 (Neb., 1970); Chin Kay v. United States, 311 F. 2d 317.

Where an affidavit for a validly issued search warrant discloses that the underlying information upon which probable cause rests was obtained from the United States Bureau of Customs as the result of a warrantless "border search," the burden is on the defendant to establish that the border search was improper, and that the evidence secured thereby should be suppressed. The defendant's only evidence here however was the testimony of the Nebraska postal inspector at the preliminary hearing that there was nothing unusual about the appearance or weight of the letter. The same inspector at trial, however, testified that it was unusual in that it had a certain amount of thickness compared to normal letters, and that you could tell the difference. Even if we ignore presumptions, there is sufficient evidence that the customs inspector had ground for reasonable suspicion of possible illegal activity. The motion to suppress was properly overruled.

The defendant contends that four letters designated as exhibits 3, 6, 7, and 8 were hearsay and therefore incompetent and inadmissible. Exhibit 3, the letter containing the cocaine, was not objected to at trial and it is unnecessary to consider the issue of its admissibility. The failure to object promptly to an offer of evidence waives the objection. State v. Huerta, 191 Neb. 280, 214 N. W. 2d 613.

Exhibit 6 was a letter from Leonard Jensen in Bogota, Colombia, addressed to the defendant, and exhibit 7 was a letter written by the same individual who wrote exhibit 3 and addressed to Miss Lynn Jensen at the defendant's address and was also mailed from Bogota, Colombia. The defendant conceded that he had opened and read both exhibits 6 and 7 prior to receiving exhibit

3. These letters were not offered to prove the truth of their contents but rather to show the defendant's knowledge of the identity of one Leonard Russell and of his presence in Bogota, Colombia; and also defendant's knowledge of the terminology of drug use. A written extrajudicial utterance may be admissible in evidence to prove the truth of the assertion made if one of the many exceptions to the hearsay rule is satisfied, or it may be admissible in evidence without regard to the truth of the assertion made for its nontestimonial value as a circumstance, provided it is legally relevant. The hearsay rule does not apply to the latter use. See, 6 Wigmore (3d Ed.), §§ 1788 to 1792, pp. 234 to 240; Phenix v. State, 488 S. W. 2d 759 (Tex Cr. App.). Exhibits 6 and 7 here were properly admitted.

Exhibit 8 is an envelope containing defendant's checking account statement from his bank for the period of January 14, 1974, to February 11, 1974. This exhibit was received with no foundation and there is simply no testimony in the record to support its relevancy. While the trial court should have excluded exhibit 8, there is nothing unusual about it or the information in it, except that it was irrelevant. While exhibit 8 was improperly received, its admission could not have been prejudicial to the defendant. Errors in rulings on the admissibility of evidence, which do not injuriously affect the substantial rights of an accused, are not grounds for reversal. State v. Stroh, 181 Neb. 24, 146 N. W. 2d 756.

The defendant also contends that the admission of defendant's handgun into evidence was erroneous because it was irrelevant and was an attempt to arouse the prejudice of the jury against the defendant. No relevancy for the admission of the handgun appears. The testimony with respect to its possession and use by the defendant in his own house was innocuous. Its admission cannot be said to be prejudicially erroneous. It is quite clear that while this handgun should not have been admitted into evidence, its admission did not in-

juriously affect any substantial rights of the accused and does not constitute any valid ground for reversal. State v. Stroh, *supra*.

The final contention of the defendant is that the trial court could not amend count II to charge a distinctly different crime than that originally charged. In this case the court amended count II from a charge of possession of marijuana with intent to deliver, to a charge of simple possession of marijuana. The action, for all practical purposes, withdrew from the jury the issue of whether or not the possession was with intent to deliver. While a court has no power to dismiss a part of an offense or direct a verdict of acquittal on one or more degrees of a crime, an attempt to do so will be treated as withdrawing the issue from consideration by the jury. A trial court is bound to submit to the jury only such degrees of the crime as find support in the evidence. See State v. Hutter, 145 Neb. 798, 18 N. W. 2d 203. Here the evidence did not support the charge of possession of marijuana with intent to deliver and the court was fully justified in withdrawing the issue of intent to deliver from the jury. The offenses involved were based upon the possession of marijuana at a given time and place and the change in the charge could not have created any confusion as to the nature and cause of the accusation nor created any difficulty in defending against it. The action was clearly to the defendant's benefit and his contention of error is unsupportable.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALLEN MILLER, APPELLANT.
231 N. W. 2d 140

Filed June 26, 1975. No. 39884.

1. **Criminal Law: Trial: Evidence.** In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court on appeal to resolve conflicts in the evidence, pass on credibility of witnesses, or weigh the evidence.
2. **Trial: Evidence.** Error in the admission of evidence is not ground for reversal if no substantial miscarriage of justice occurred.

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

Jeffrey L. Orr, for appellant.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

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

NEWTON, J.

The defendant was convicted on a charge of delivering or dispensing a controlled substance, namely, amphetamines. We affirm the judgment of the District Court.

Defendant challenges the sufficiency of the evidence to sustain the judgment and asserts error in the admission of evidence.

The evidence discloses that the defendant and Diane Matuschka, accompanying defendant in his automobile, drove up adjacent to an automobile occupied by Rick Houchin and Robert Atkinson. Houchin inquired of the occupants of defendant's automobile if they had any amphetamines. Diane went over to the Houchin automobile and asked if they wanted amphetamines. Atkinson said he did. Diane returned to the defendant's automobile and asked defendant if she should sell any speed to Houchin. She was informed "it was up to her" and

"If she did, it was her own neck." Diane returned and made a sale to Atkinson. This evidence is conceded. Diane testified that the amphetamines were not hers but came from the defendant's automobile and that she gave the defendant the money received from the sale. This testimony was denied by defendant.

The trial court gave the standard cautionary instruction in regard to the testimony of an accomplice. The evidence discloses a sale of amphetamines by the defendant's companion and if her evidence is believed, the amphetamines were in the defendant's possession and the sale made with his consent. He also received the proceeds. A jury question was presented. "In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on credibility of witnesses, or weigh the evidence." State v. Simons, 187 Neb. 761, 193 N. W. 2d 756.

The trial court admitted evidence of statements made between Houchin, Atkinson, and Diane Matuschka. These statements were not made in the presence of the defendant but dealt solely with the consummation of the sale and did not refer to the defendant in any respect. Since the defendant concedes that the sale was made, it is difficult to see how the evidence could have been prejudicial. "Error in the admission of evidence is not grounds for reversal if no substantial miscarriage of justice occurred." State v. Russ, 191 Neb. 300, 214 N. W. 2d 924.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY D. GOODRICH, APPELLANT.

231 N. W. 2d 142

Filed June 26, 1975. No. 39889.

1. **Courts: Records.** Ordinarily the duly authenticated record of a county court imports absolute verity.
2. **Guilty Pleas.** In determining the validity of guilty pleas the standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. Specific articulation of the Boykin rights is not the sine qua non of a valid guilty plea.
3. **Guilty Pleas: Trial.** The court should allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.

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

Ronald D. Mousel, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

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

SPENCER, J.

The defendant prosecutes this appeal from the denial of his motion to withdraw a plea of guilty entered in the county court of Red Willow County pursuant to a plea bargain. We affirm.

Defendant was originally charged in three separate counts as follows: Count I. Unlawfully concealing stolen property with intent to defraud the owner, to wit, two gas tanks; count II, unlawfully concealing stolen property with intent to defraud the owner, to wit, a tarpaulin; and count III knowingly and unlawfully possessing marijuana weighing 1 pound or less. Defendant, who was represented by counsel at all stages of the county court proceeding, entered into a plea bargain

whereby the State agreed to dismiss counts II and III of the complaint and the defendant would plead guilty to count I.

The journal entry of the county court, so far as material herein, reads: "Being fully advised on the premises the Court hereby accepts the plea-bargain arrangement whereupon the Defendant, being fully advised of his Constitutional Rights and represented by counsel, entered a plea of guilty to Count I of the Complaint."

After the filing of a presentence report wherein the probation officer stated: "We Would Not recommend Probation," defendant was sentenced to 7 days in the county jail and ordered to pay the costs of the prosecution. Defendant appeared pro se before the county court 16 days later, requested the appointment of a new attorney and that he be allowed to withdraw his guilty plea. The county court denied leave to withdraw the guilty plea. Defendant appealed to the District Court where new counsel was appointed for him. The District Court denied defendant's request to withdraw his plea, and affirmed the county court conviction.

Due either to a malfunction in the recording equipment in the county court or to an erasure of the tape, the verbatim transcription of defendant's arraignment in the county court was not available in the District Court. The journal entry, the sentencing proceedings, and the presentence report were available. Defendant contends that because there is no transcription of the arraignment, the record is silent and does not affirmatively show that he was fully advised of his constitutional rights with respect to the plea of guilty. He therefore argues his request to withdraw that plea must be granted. The flaw in the defendant's argument is that the record is not silent. While it is true the verbatim record of the court's examination and explanation is not available, a journal entry does exist and is set out above. The entry specifically recites defendant was fully advised of his constitutional rights and in the ab-

sence of proof to the contrary that is sufficient to support a finding in that respect. In State v. Morford (1974), 192 Neb. 412, 222 N. W. 2d 117, we said: "Ordinarily the duly authenticated record of a county court imports absolute verity." In that case no transcript of the county court arraignment proceedings was available, and the facts regarding the question there presented were taken from the county court journal entry.

Defendant contends the District Court committed reversible error because the record does not disclose that the defendant voluntarily and understandingly entered his plea of guilty. Defendant's contention is that Boykin v. Alabama (1969), 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274, requires a complete transcription of the plea proceedings, setting out seriatum the information required to prove affirmatively an intelligent and voluntary plea. The Ninth Circuit Court of Appeals, in Wilkins v. Erickson (1974), 505 F. 2d 761, held: "The rigid interpretation of Boykin urged by Wilkins has not been adopted by the Supreme Court in subsequent decisions on voluntariness of guilty pleas. In Brady v. United States, 397 U. S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970), the Court citing Boykin, upheld a guilty plea as voluntary and intelligent even though defendant had not been specifically advised of the three rights discussed in Boykin. The Brady Court clarified Boykin by stating, '(t)he new element added in Boykin was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily.' 397 U. S. at 747-748 fn. 4, 90 S. Ct. at 1468. In North Carolina v. Alford, 400 U. S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162 (1970), the Court stated that in determining the validity of guilty pleas the 'standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' Specific articulation of the Boykin rights is not the sine qua non of a valid guilty plea."

The Supreme Court of Illinois, in an opinion by Justice Schaefer, who served as chairman of the ABA committee which prepared the Standards Relating to Pleas of Guilty, dealt with the nonavailability of a verbatim transcript of the arraignment proceedings in People v. Hopping (Ill., 1975), 326 N. E. 2d 395. The Illinois court held: "What has been considered appropiate for preservation of a complete record on the basis of which to appraise attacks made on judgments of conviction in cases in which lengthy periods of imprisonment may be involved has not been transformed into a constitutional requirement by the adoption of the rules relating to a verbatim transcript with respect to waivers of counsel and admonitions to defendant in connection with entry of pleas of guilty."

The United States Supreme Court in Mayer v. City of Chicago (1971), 404 U. S. 189, 92 S. Ct. 410, 30 L. Ed. 2d 372, pointed out: "A 'record of sufficient completeness' does not translate automatically into a complete verbatim transcript. We said in Griffin (v. Illinois, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891) that a State 'may find other means (than providing stenographic transcripts for) affording adequate and effective appellate review to indigent defendants.' 351 U. S. at 20 (76 S. Ct. at 519, 100 L. Ed. at 899)." In Draper v. Washington (1963), 372 U. S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899, the Supreme Court more fully described the various substitutes for a complete verbatim transcript. We hold the journal entry sufficient for such purpose in this misdemeanor action.

Once it has been affirmatively established from the record that a guilty plea has been voluntarily and intelligently entered, the burden shifts to the defendant to prove the contrary. McGhee v. Wolff (8th Cir., 1972), 455 F. 2d 987, cert. den. 409 U. S. 1022. Defendant has made no offer of proof to indicate that his plea was not voluntarily and intelligently entered.

It is apparent defendant's dissatisfaction with the

7-day county jail sentence triggered the attempt to set aside the plea. No claim is made that the defendant was misled or deceived as to the nature of the bargain. The bargain was made the morning the case was scheduled for trial and several witnesses were present pursuant to subpoenas. The sentencing proceedings are a part of the record presented in the District Court. It is obvious that jail time was imposed because of defendant's record.

The ABA Standard Relating to Pleas of Guilty, 2.1(a), provides: "The court should allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice." There is no manifest injustice appearing on the record herein. The order of the court denying defendant the right to withdraw his guilty plea is affirmed.

AFFIRMED.

BRODKEY, J., concurs in the result only.

CLINTON, J., concurring in the result.

I concur in the result on the ground stated in the last paragraph of the opinion. Under Standard 2.1, A.B.A. Standards Relating to Pleas of Guilty, the burden of proof is upon the defendant to establish the manifest injustice. See Commentary, § 2.1(a)(ii). The mere introduction of the journal entry did not carry that burden, but in fact made a contrary prima facie case.

IN RE ESTATE OF GERTIE MCDONALD, DECEASED. CHESTER A. MCDONALD, APPELLANT, V. MICHAEL J. SHAUGHNESSY, ADMINISTRATOR OF THE ESTATE OF GERTIE MCDONALD, DECEASED, ET AL., APPELLEES.

231 N. W. 2d 332

Filed July 3, 1975. No. 39760.

Wills: Estates. Where a will, in express terms, creates a life

estate in the donee, and annexes thereto a power of appointment or disposal, with remainder over to certain named beneficiaries, the first taker takes but a life estate.

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

John S. Mingus of Mingus & Mingus, for appellant.

Michael J. Shaughnessy of Shaughnessy, Shaughnessy & Shaughnessy, Kenneth H. Dryden, and Luebs, Tracy, Dowding & Beltzer, for appellees.

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

WHITE, C. J.

The question in this case arises out of the construction of the will of Edward McDonald, the husband of the decedent, Gertie McDonald. Installment proceeds from the sale on contract of real property devised in the will of Edward McDonald was included in Gertie McDonald's estate by the county court when it was probated. The appellant, one of the decedent's sons, appealed to the District Court requesting that the contract proceeds be removed from Gertie McDonald's estate and the inheritance taxes and the administrator's commissions be reduced accordingly. The District Court dismissed the appellant's petition. On appeal to this court, we reverse and remand with directions.

The sole issue presented by this controvery is whether a contract of sale for certain real estate and the proceeds flowing from that contract should be includable in the estate of Gertie McDonald.

Edward McDonald died testate in 1958. In his will, he provided that his wife, Gertie McDonald, would receive a life estate in *all* his property, *with a power to dispose of the corpus of the estate for her support and maintenance.* Paragraph three of the will provided that on her death the remainder would then pass to his

children. The pertinent clauses of the will read as follows: "Second, after the payment of such funeral expenses and debts, I give, devise and bequeath to my beloved wife, Gertie McDonald, the use, income and profits of all my property, both real and personal, and wherever situated, during her life time, but provide that all of said property is to be turned over to her without restriction and she shall have the right to sell and convey the same without permission of any court, as though she was the absolute owner, and re-invest the proceeds, and use so much of the income and principal thereof as may be necessary to provide her with a living and the usual comforts had by persons in her station of life.

"Third, after the death of my said wife, I give, devise and bequeath all the rest, residue and remainder of my property to my three beloved children, Inez Sorahan, Kenneth McDonald and Chester McDonald, in equal shares."

After Edward's death and probate of his estate, Gertie subsequently sold the real estate that was part of the life estate, by installment contract. At her death, the balance due under the contract was $46,667.50. The county court construed the Edward McDonald will and determined that these proceeds were includable in Gertie's estate.

As we see it, Edward's will simply and specifically provided that Gertie would receive a life estate in all his property, including the real estate involved herein, with the power to dispose of the property as she deemed necessary to provide for her maintenance and her customary comforts and necessities of life. The third paragraph indisputedly indicates the intent that after the use of the estate during her lifetime, the unused portion would, upon Gertie's death, pass to his children in equal shares. The power to sell in order to satisfy her needs for maintenance and support could not be converted into a power to create an independent title in the proceeds of the sale in herself and emasculate and destroy the

clear intent to vest the remainder equally in the children. This conclusion would appear independent of an examination of the authority in the matter.

In Abbott v. Wagner, 108 Neb. 359, 188 N. W. 113, this court held as follows: "Where a will, in express terms, creates a life estate in the donee, and annexes thereto a power of appointment or disposal, with remainder over to certain named beneficiaries, the first taker takes but a life estate. This is the rule established and adhered to by a very large majority of the courts which have been called upon to pass upon the question. It is the rule to which this court is committed. In Loosing v. Loosing, 85 Neb. 66, the matter is dealt with * * * as follows: * * * 'If an estate is devised to a person generally or indefinitely with a power of disposition, it carries the fee; but, if the testator gives the first taker an estate for life only with a power to dispose of the remainder to definitely described individuals, the express limitation for life will control the operation of the power and *prevent it from enlarging the life estate to a fee.*' " (Emphasis supplied.) In Jones v. Shrigley, 150 Neb. 137, 33 N. W. 2d 510, we held that a grant of power to the holder of a life estate to sell and dispose of the remainder was not enough to enlarge a life estate into a fee simple. See, also, Attebery v. Prentice, 158 Neb. 795, 65 N. W. 2d 138.

No question is presented in this case as to whether the sale by Gertie was consistent with the purpose and intent of paragraph two of Edward's will. Nor is there any contention in this case that the conveyance by Gertie did not vest a clear fee simple title to the real estate in the purchaser. What is clear, under the analysis of the language of Edward's will, and the appropriate authorities, is that he intended to convey the power to sell and convert the property into money for the maintenance and support of his widow life tenant. The intent that the remainder of the proceeds of the sale would remain in his estate and descend to the remaindermen is in-

disputable from paragraph three of the will. It is elementary that the provisions of a will should be construed together and that the intent should be gathered from the four corners of the whole will.

We are aware that underlying the dispute in this case is the contention and dispute as to the distribution of the tax burden under the state and federal laws. We do not discuss this question. Sufficient it is to say that the conclusions reached herein are harmonious with the applicable inheritance tax statute, section 77-2008.03, R. R. S. 1943, and the applicable provisions as to powers of appointment in the Internal Revenue Code. § 2041 (b) (1), I. R. C.

We therefore hold that the District Court was in error in finding that the proceeds of the sale were a part of Gertie McDonald's estate, and in accordance with this interpretation of the will and the decision herein, the cause is remanded to the District Court with directions to enter a decree finding that the proceeds are a part of the estate of Edward McDonald; and the assessment of the inheritance tax consequently is reduced accordingly.

The judgment of the District Court is reversed and the cause remanded with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

CAROLYN BLIVEN, APPELLANT, V. JAMES BLIVEN, APPELLEE.
231 N. W. 2d 145

Filed July 3, 1975. No. 39798.

Divorce: Parent and Child: Judgments. 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.

Appeal from the District Court for Dakota County: JOSEPH E. MARSH, Judge. Affirmed.

Norris G. Leamer of Leamer & Galvin, for appellant.

Raymond B. Johansen of Johansen, Clemens & Johansen, for appellee.

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

NEWTON, J.

In this proceeding appellant seeks an increase in an award for child support. The case was appealed heretofore and determined July 6, 1973. See Bliven v. Bliven, 190 Neb. 492, 209 N. W. 2d 168. The trial court found that there had not been a change in circumstances justifying a modification of the original decree and denied appellant's application. We affirm the judgment of the District Court.

The record discloses that appellant is a school teacher and has received annual increases in salary. Appellee remains a farmer operating on leased land. The case was tried in 1972 and appellee underestimated his income for that year which proved to be $7,936.90. His 1973 income was $8,351.41 and he estimates that, due to the drought, his 1974 income will be minimal. Appellant's 1973 income was $7,859. Her pay was increased $700 for the 1974-75 school year. The original award for child support was $75 per month for each of two children. In addition appellant received alimony of $10,000, $6,000 of which was payable in 10 annual installments.

"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." Gray v. Gray, 192 Neb. 392, 220 N. W. 2d 542.

It does not appear that any material change in cir-

cumstances has occurred and the judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MYRON E. KARSTEN, APPELLANT.
231 N. W. 2d 335

Filed July 3, 1975. No. 39840.

1. **Criminal Law: Statutes.** In this state all public offenses are statutory; no act is criminal unless the Legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law.
2. **Criminal Law: States: Extraterritoriality.** Ordinarily, no penalty can be incurred under the law of this state except for transactions occurring within this state, and our state law has no extraterritorial effect.
3. **Criminal Law: Statutes: Extraterritoriality: Conspiracy.** The Nebraska conspiracy statute does not apply to a conspiracy to commit a felony in another jurisdiction.

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

Max A. Wilson and Griffiths & Gildersleeve, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

BOSLAUGH, J.

The defendant appeals from a conviction for conspiracy. The amended information alleged the defendant, Myron E. Karsten, and Charles E. Sliger had conspired with Thomas H. Spencer to commit an assault with intent to inflict great bodily injury upon James Michael Donelan, III.

The record shows the defendant and Sliger were residents of Scottsbluff, Nebraska. Spencer was an employee of Sliger. Donelan was a resident of Sterling, Colorado.

The defendant and Donelan had been good friends. In 1973, marital trouble developed between the defendant and his wife, Thelma. When the defendant learned that Donelan was dating Thelma, the defendant asked Donelan not to see her, but Donelan refused. The defendant and Sliger then developed a plan to have someone assault Donelan in Sterling, Colorado, and hired Spencer for that purpose.

On December 22, 1973, Spencer agreed to "beat up" Donelan for $1,000. On the following day Spencer contacted the sheriff of Banner County, Nebraska. An arrangement was made for Spencer to pretend to perform the agreement to assault Donelan while cooperating with various law enforcement agencies in Nebraska and Colorado.

Sliger paid Spencer $450 in advance that had been supplied by the defendant. On December 27, 1973, Sliger took Spencer to Sterling, Colorado, and furnished Spencer with a key to Donelan's residence. At Sterling, Colorado, the sheriff there gave Spencer a billfold purporting to belong to Donelan. Spencer returned to Nebraska and told Sliger that he had broken both of Donelan's arms and one leg and wanted his money. Sliger then paid Spencer $500 that had been supplied by the defendant and which represented the balance due Spencer under the agreement.

No assault upon Donelan ever took place and Spencer testified that he at no time intended to perform his agreement to beat up Donelan.

There were many conflicts in the evidence but the jury could find that the defendant and Sliger had conspired to hire Spencer to assault Donelan in Colorado. The principal assignment of error is that the evidence failed to show a crime had been committed in Nebraska.

It is a fundamental rule that in this state all public

offenses are statutory; no act is criminal unless the Legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law. State v. Hauck, 190 Neb. 534, 209 N. W. 2d 580; State v. Buttner, 180 Neb. 529, 143 N. W. 2d 907; State v. Tatreau, 176 Neb. 381, 126 N. W. 2d 157; State v. Coomes, 170 Neb. 298, 102 N. W. 2d 454. A person may not be convicted of a crime unless his conduct, however reprehensible, is made penal by the plain import of the written law.

It is also a fundamental rule that criminal and penal laws are essentially local in character. Ordinarily, no penalty can be incurred under the law of this state except for transactions occurring within this state, and our state law has no extraterritorial effect. State v. Hyslop, 131 Neb. 681, 269 N. W. 512. A conspiracy in this state to do something in another state which is lawful in that state is not a crime in this state. A conspiracy in Nebraska to gamble in Nevada is a convenient illustration of that principle.

The Nebraska conspiracy statute applies only to a conspiracy to commit a felony or to defraud the state. § 28-301, R. R. S. 1943. The information alleged a conspiracy to commit an assault with intent to inflict great bodily injury. Such an assault would be a felony in Nebraska, and the jury was instructed in regard to the Nebraska law. § 28-413, R. S. Supp., 1974. However, the Nebraska assault statute has no force in Colorado where the assault which was the subject of the conspiracy in this case was to have taken place. It was error for the District Court to submit the case to the jury upon the theory that Nebraska law was applicable to an act which was to be performed in Colorado.

In People v. Buffum, 40 Cal. 2d 709, 256 P. 2d 317, the defendants had conspired in California to commit abortions in Mexico. The California Supreme Court held that the California statute which prohibited abor-

tions did not apply to abortions performed in Mexico; and the California conspiracy statute did not apply to a conspiracy to perform abortions in Mexico. The court said: "A conspiracy may be established by showing that there was an agreement between two or more persons to commit a crime and that an act was done in California to effect the object of the agreement. (Pen. Code, §§ 182, 184; see People v. Daener, 96 Cal. App. 2d 827, 831 [216 P. 2d 511]; People v. Benenato, 77 Cal. App. 2d 350, 358 [175 P. 2d 296]; People v. Huling, 71 Cal. App. 144, 146 [234 P. 924].) The object of defendants' agreement, as alleged in the indictment, was 'to violate section 274, Penal Code of the State of California.' No other unlawful purpose was stated, and defendants, of course, cannot be punished for conspiracy unless the doing of the things agreed upon would amount to a violation of section 274. The statute makes no reference to the place of performance of an abortion, and we must assume that the Legislature did not intend to regulate conduct taking place outside the borders of the state. (See People v. Chapman, 55 Cal. App. 192, 197 [203 P. 126]; Foley Bros. v. Filardo, 336 U. S. 281, 284-286 [69 S. Ct. 575, 93 L. Ed. 680]; American Banana Co. v. United Fruit Co., 213 U. S. 347, 356-357 [29 S. Ct. 511, 53 L. Ed. 826].) Similarly, section 182 of the Penal Code, standing alone, should not be read as applying to a conspiracy to commit a crime in another jurisdiction."

The problem that is presented by this case is one that can be solved by legislation. The Model Penal Code, drafted by the American Law Institute, contains a provision designed to remedy this situation. Section 1.03 relating to territorial applicability provides in part: "(1) Except as otherwise provided in this Section, a person may be convicted under the law of this State of an offense committed by his own conduct or the conduct of another for which he is legally accountable if: * * *

"(d) conduct occurring within the State establishes

complicity in the commission of, or an attempt, solicitation or conspiracy to commit, an offense in another jurisdiction which also is an offense under the law of this State; * * *." Model Penal Code, Proposed Official Draft, Art. 1, § 1.03. Similar provisions have been enacted in many states. However, in the absence of such legislation, the Nebraska conspiracy statute does not apply to a conspiracy to commit a felony in another jurisdiction.

It is unnecessary to consider the other assignments of error. The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. LLOYD A. CARDIN, APPELLANT.
231 N. W. 2d 328

Filed July 3, 1975. No. 39845.

1. **Criminal Law: Trial: Evidence.** To sustain a conviction the evidence must show beyond a reasonable doubt not only that the crime was committed, but also that the defendant committed it.
2. **Names: Idem Sonans.** Under the doctrine of idem sonans a mistake in the spelling of a name is immaterial if both modes of spelling have the same sound and appearance.
3. ———: ———. The doctrine of idem sonans is applicable to both civil and criminal proceedings.
4. **Presentence Reports: Criminal Law: Sentences.** Under section 29-2261, R. S. Supp., 1974, the use of a presentence report is only required for sentencing if the offense is a felony.

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

Michael N. Schirber, for appellant.

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

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

BRODKEY, J.

Defendant, Lloyd A. Cardin, and two codefendants, his father, Lloyd R. Cardin, and one John A. Bojanski, were all charged in the county court of Cass County, Nebraska, with committing the misdemeanor offense of assault and battery in violation of section 28-411, R. S. Supp., 1974. The judge of that court found the codefendants not guilty, but found defendant, Lloyd A. Cardin, guilty as charged, and sentenced him to a 20-day jail term in the Cass County jail. Defendant thereafter appealed to the District Court for Cass County, Nebraska, which affirmed his county court conviction, but modified the sentence of the county court to a term of 20 days in the Cass County jail, to be served on weekends from 7 a.m., Saturday morning, until 7 a.m., Monday morning, and further provided that the commitment should be served on days when there were no school functions. Defendant appeals to this court from that judgment and sentence.

The defendant assigns as error the failure of the District Court to reverse the conviction in the county court as a matter of law, claiming that the State failed to produce any evidence identifying the defendant as the person who committed the crime charged; and also that the sentence imposed was excessive, and was imposed without a presentence investigation. We affirm.

Defendant is correct in his assertion that to sustain a conviction, the evidence must show beyond a reasonable doubt not only that the crime was committed, but also that the defendant committed it. State v. Sedlacek, 178 Neb. 322, 133 N. W. 2d 380 (1965). Defendant claims that there is a lack of evidence in the record tying this defendant to the crime in question, and that there were no witnesses who testified that they saw the defendant hit the victim, Larry Donovan. However, before exam-

ining this contention, we wish to dispose of another matter raised by defendant.

Defendant points out and makes much of the fact that the complaint filed against the three defendants in this case spells his first name, and that of his father, as "Lloyd," whereas throughout the entire bill of exceptions containing the testimony given in the trial of the case in county court, their names are spelled "Loyd." We think this objection is without merit, and frivolous. While we are confident that the difference in the spelling of the first names was undoubtedly merely an error in the transcription of the testimony, we are certain that the variance in spelling was not in any way prejudicial to the defendant. The error, if any, would clearly be covered under the doctrine of idem sonans. Under that doctrine, a mistake in the spelling of a name is immaterial if both modes of spelling have the same sound and appearance. Strasser v. Ress, 165 Neb. 858, 87 N. W. 2d 619 (1958). We have also held that doctrine is applicable to both civil and criminal proceedings. State v. Paulson, 176 Neb. 126, 125 N. W. 2d 194 (1963). In Strasser v. Ress, *supra,* this court held that where the name "Harald G. Strassen" appeared in an abstract of record of a justice of the peace court showing a conviction for speeding, the true name being "Harold G. Strasser," true name of the licensee and the name appearing in the abstract were so similar in pronunciation and appearance that they must be regarded as idem sonans. Also in Bunge v. State, 87 Neb. 557, 127 N. W. 899 (1910), the court held that "Adolph" and "Adolf" are idem sonans when used in both forms as the Christian name of the complaining witness in an information for robbery, and in the transcript of the proceedings of the examining magistrate. See, also, Carrall v. State, 53 Neb. 431, 73 N. W. 939 (1898), where this court held that the names "Mrs. Fred Steinburg" and "Mrs. Fred Steenburg," the first endorsed on an information as the

name of a witness, and the second appearing in testimony as her name, are idem sonans.

The record is replete with evidence identifying the defendant as the one who inflicted the brutal beating upon the victim in this case. This is obvious from the testimony of witnesses for both the State and the defendant. The first witness for the State was the victim, Larry Donovan. He was asked: "Q. Do you recall who the first individual was that struck you? A. Ya, Loyd Cardin Jr." He also testified that prior to the altercation "little Loyd was standing next to me," and he explained that by "little Loyd" he meant Loyd Cardin, Jr. He testified that Loyd Cardin, Jr., hit him in the mouth and knocked him down three times. He was asked: "Q. Okay, Did you have any talk or discussion with any of the defendants before the first time you got hit? A. Yes sir I did. Q. Who were you talking to? A. Loyd Cardin Jr. Q. Okay, Is that the only one of the defendants you talked to? A. Yes, sir." Subsequent in the testimony, the following appears: "Q. You turned your head and then the next thing you know you are on the ground. A. Ya. Q. Did — This is the first time you got hit. Did you see who hit you? A. Ya. Loyd Jr. Q. Well, now Larry, you turned your head and got hit; I am not trying to trick you or anything. You were looking towards John, did you actually see somebody hit you there? A. Ya. I seen Loyd. I had my head turned like this and Loyd was standing over there. I could see him."

Of particular interest, with regard to the identification of all the defendants in this case, is the testimony given by one of the participants, David Mark Thompson. His testimony in this regard was as follows: "Q. Excuse me. Now you say the (sic) jumped out. Could you explain that? A. Well they got out of the car. Q. How many got out, do you know? A. Three (3). Q. And do you know what three (3) those were? A. Ya. Three . . . . Q. The three (3) defendants setting here

today? A. (Could not hear answer) Q. Okay, After they got out of the car then what? A. John wanted to beat me up or something. Q. You stated John and, meaning John Bojanski? A. Ya. Q. And Vickie were arguing about what? A. Arguing about he wanted to beat me up or something, I don't know, they all three (3) started coming at us. Q. They all three (3)? ? ? ? A. Ya. Q. *Who are they all three* (3)? *A. The defendants.*" (Emphasis supplied.)

The third witness for the State was Vickie Lynn Wentz. She was asked the following questions and gave the following answers: "Q. Okay, As Mr. Bojanski; as you stated; he took off after Dave, do you know where Cardin Sr. and Cardin Jr. were standing at that time? The general location. A. Well, then I walked back over there by Larry and Loyd Jr. was standing, oh, I'm not sure I think he was standing on the left hand side of me. Then he looked at Larry and Larry said that he didn't want to fight but Loyd hit him and knocked him on the ground. Q. How did he hit him; I mean what did he hit him with? A. His fist. Q. Do you know where he hit him? A. In the mouth, right here." It was at approximately this point that counsel made the following statement into the record, apparently without objection: "At this time I would (sic) to make a statement for the record. We have been calling the Cardins, Loyd Cardin Sr. and Loyd Cardin Jr. Now in reference to this I do not know if they are; that is their title but when I refer to Loyd Card (sic) Sr. I am referring to the father and Loyd Cardin Jr. is to the son. You understand that Vickie? A. Yes." Subsequent in her examination, she was asked the following questions: "Q. Okay, After John got away from you, what did you do? A. Well I just turned around and I looked at Larry and that's when Loyd Jr. just hit Larry. Q. Okay. So you saw Loyd Jr. hit Larry? A. Yes sir. Q. He hit him with his fist, right? A. Yes. Q. Okay. After he hit him did

he knock Mr. Donovan down on the ground? A. Yes. Sir. Q. Did you . . . . you said you saw him hit him more than this one time? A. He was on top of Larry and Larry was screaming."

Without detailing all the evidence that was adduced from the State's witnesses, it is to be noted that after the State had rested the defendant made no motion for a directed verdict on the ground of insufficiency of the evidence, or any motions whatsoever. The first witness for the defendant was John Bojanski, one of the defendants, and he testified among other things to the following, without objection from counsel: "Q. So as far as you are concerned you don't know how Larry came by his condition you saw him in after you came back from pursuing David. A. I was told afterwards how; but I didn't see it. Q. Told afterwards—by who? A. By Mr. Cardin. Q. And what was that? A. He said that his son hit him a couple times."

However, the most significiant testimony of all came from the defendant, Lloyd R. Cardin, father of the defendant, Lloyd A. Cardin, his 16-year-old son. He describes the altercation, at which he was personally present, as follows: "Q. Well, A, Mr. Cardin could you describe in your own words what happened at this—in relation—let's narrow this down a little bit. In relation to Larry Donovan and your son Loyd Cardin Jr. A. Yes sir. My son and Larry got into it. My son hit him and knocked him down. Q. Okay. You said your son hit him and knocked him down. You saw this with your own eyes? A. Yes. Q. Okay, Was there any argument or any words spoken between them before? ? ? ? ? A. They was talking, what they was saying I don't know. Q. How close were you to your son and Larry? A. Oh, 10 feet. Q. Ten feet, so you didn't hear what was going on between them? A. They was talking—No sir, I don't know. Q. Okay, Then you say your son —tell us what happened. A. Well he hit Larry and knocked him down. Q. Okay, He hit him and knocked

him down. Did Larry get up? A. No sir. Q. Larry did not get up? A. No sir. Q. Well if Larry didn't get up, was that the end of the fight? A. No sir. Loyd went down on him and I told him to get off him. Q. All right, after Larry fell down, your son jumped on top of him and they were wrestling or something like that? A. They was fighting, yes."

The last witness for the defendants was John Minor, who, among other things, testified as follows: "Q. Okay, so you don't really know what happened first? A. No I don't. Q. Okay, but very close in time, within a few seconds the girls ran and Loyd Jr. hit Larry? A. Yes sir. Q. Okay, and after Loyd hit Larry could you, directing your attention to Loyd and Larry, ... what then did you see between Loyd and Larry? A. Well I seen Loyd hit Larry and Larry went down and I could not see them no more."

In view of all the foregoing testimony taken from the record in this case, it borders on the ridiculous to claim there is no evidence from which the court, as the trier of fact, could conclude that this particular defendant was guilty of an assault upon Larry Donovan. The decision of the District Court upon that point is amply supported by the record and must be affirmed.

Turning now to defendant's claim that both the District Court and the county court abused their discretion in sentencing him to a term of 20 days in the county jail, we find that contention is likewise without merit. The assault in this case, as disclosed by the evidence in this record, was an unusually brutal one, and the victim suffered serious and painful injuries therefrom, including a broken nose and cuts requiring multiple stitches. At the conclusion of the trial, the county judge made the following comments: "As to the defendant, Loyd A. Cardin; of course, all of the evidence including the evidence of the defendants is to the point that he was the one who committed an assault and a battery and it was certainly vicious. It was unprovoked. This boy

could well have been seriously injured. Unfortunately (sic) he wasn't. If there is repetition of these type of events it well may be that the next time somebody will be killed or seriously injured. Certainly I would hope that the defendants themselves would assess it in this light and that there be no repetition of these."

A sentence imposed within statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record. State v. Gochenour, 193 Neb. 855, 230 N. W. 2d 90 (1975). Under section 28-411, R. S. Supp., 1974, the penalty for one convicted of assault and battery is a fine in any sum not exceeding $500 or by imprisonment in the jail of the county not exceeding 6 months. There is no question that the sentence given defendant was well within the statutory limits. It appears that both courts were most lenient and considerate in the imposition of this particular sentence; and, in fact, endeavored to "tailor-make" the sentence to fit the convenience of the defendant in every way possible, without sacrificing the deterrent effect they desired to attain. While it is true that the court sentenced the defendant without the benefit of a presentence investigation, we point out that the offense in question was not a felony, but a misdemeanor, and that under section 29-2261, R. S. Supp., 1974, the use of a presentence investigation before sentencing an offender is required only as to those convicted of felonies. The failure of the court to obtain a presentence report in this case did not constitute prejudicial error. The reasons given by the court for the sentence, as above stated, appear to be reasonable, and were based upon facts and circumstances within the knowledge of the judge. There was no abuse of discretion in this regard.

Finding no reversible error, we, therefore, affirm the judgment and sentence of the District Court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PETER J. VANELLA, JR., APPELLANT.
231 N. W. 2d 358

Filed July 3, 1975. No. 39858.

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

Joseph D. Martin, for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

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

CLINTON, J.

The defendant, Peter J. Vanella, Jr., pled guilty in the District Court for Hall County, Nebraska, to a charge of burglary committed on August 2, 1974. On October 30, 1974, he was sentenced to a term of 2 to 3 years in the Nebraska Penal and Correctional Complex with credit being given for time spent in the county jail. On this appeal he claims the sentence is excessive. We affirm.

At the time of the offense defendant was 18 years of age. He had not been previously convicted of a felony. He had, however, in 1969 and 1970, been arrested on charges of petit larceny and joy riding, and had been apprehended for running away from home. He was committed to the Youth Development Center in Kearney from which he escaped on August 26, 1973. He was recommitted and apparently spent a total of 3 years in that institution before his release on December 20, 1973. His subsequent work record was indicative of unreliability. He is apparently above average in intelligence. He has an unfortunate family history.

The burglary to which he pled guilty was one of two in which he participated with a companion on the same night. The companion received an identical sentence.

We have carefully examined the presentence investigation report. It and defendant's history tend to show an attitude on the part of the defendant which places doubt upon the effectiveness of past efforts at correction. The sentencing judge apparently concluded that a stiff sentence was required if there was any possibility of defendant changing his outlook. We cannot, on the record, conclude that the judge was wrong or that the sentence demonstrates an abuse of discretion.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MERLIN SCOTT ABBOTT, APPELLANT.
231 N. W. 2d 359

Filed July 3, 1975. No. 39857.

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

James A. Kelly of Kelly & Kelly, for appellant.

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

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

CLINTON, J.

The defendant, Merlin Scott Abbott, pled guilty in the District Court for Hall County, Nebraska, to a charge of burglary committed on August 2, 1974. On October 22, 1974, he was sentenced to a term of 2 to 3 years in the Nebraska Penal and Correctional Complex. On this appeal he claims the sentence is excessive. We affirm.

At the time of the offense defendant was 17 years of age. Although he had not previously been convicted of a felony, he was, in an earlier juvenile proceeding,

found to have been the perpetrator of two burglaries and as a consequence was committed to the Boys' Training School at Kearney. He was subsequently released on parole, and violated his parole, but was not recommitted.

He appears to be of average intelligence. His work record is indicative of a lack of responsibility.

The burglary involved in the present case is the same as in State v. Vanella, *ante* p. 239, 231 N. W. 2d 358, and the defendant was a participant in the other burglary there mentioned. We have carefully examined the presentence investigation report. As in the case of Vanella, past correctional efforts in this instance have not been productive.

The comments we have made in State v. Vanella, *supra,* are applicable here.

AFFIRMED.

JUDITH ANN MCNAMARA CONNOLLY, APPELLANT, V. WILLIAM M. CONNOLLY, APPELLEE.
231 N. W. 2d 337

Filed July 3, 1975. No. 39869.

1. **Divorce: Alimony: Judgments.** A judgment of a trial court fixing the amount of alimony, or making a distribution of property, will not be disturbed on appeal unless good cause is shown.
2. **Divorce: Alimony: Parent and Child.** In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered. In determining those circumstances, the financial position of the husband as well as the estimated costs of support of the children must be taken into account.

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

Cullan & Cullan and William D. Staley, for appellant.

Luebs, Tracy, Dowding, Beltzer & Leininger, for appellee.

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

NEWTON, J.

This is an appeal from a decree of divorce. Petitioner Judith Ann Connolly assigns error in regard to the property division, alimony, and child support. We affirm the judgment of the District Court.

The parties were married August 29, 1959. They have four children who are now 15, 13, 11, and 10 years of age. Petitioner had been dissatisfied with the marriage almost from its inception and had contemplated divorce from time to time. At the time of the marriage respondent William M. Connolly was a student in Creighton Law School. During two of his college years Judith supported the family through her employment as a secretary except for William's earnings during summer recesses. After William's graduation financial contributions made by Judith were very minimal. Total assets of the parties amounted to $79,971.59 on the basis of petitioner's valuation of the real estate. On the same basis she received property valued at $24,410, $200 per month alimony for 60 months or $12,000, and the use of the home for 6 years. Respondent received property valued at approximately $58,803.71, was required to pay outstanding indebtedness of approximately $23,000, to maintain exterior house repairs, insurance, and taxes but can recover back the taxes and 9/20 of the insurance premiums if and when the house is sold. He was directed to pay the $200 per month alimony and $500 per month for child support plus taking care of drug, dental, or medical bills the children may incur. The net estate awarded respondent, after payment of debts, amounts to $35,803.71. Property and alimony awarded to petitioner, exclusive of the 6-year use of the residence, amounts to $36,410. It is apparent that the property and

alimony awarded petitioner amount to about the same as the property received by respondent and comprises fair and equal treatment of petitioner.

Respondent's income for 1971, 1972, and 1973 averaged approximately $55,000 per year before payment of income taxes. He no longer occupies the position of county attorney with a salary of $11,000 per year and all secretarial and office expenses paid. He is now a member of a law firm and draws $1,000 per month from the partnership fund with a division of partnership earnings over salaries and expenses on an annual basis. What his annual income will be in the future is not clear although respondent estimated his 1974 income at $25,000.

Petitioner is 34 years of age and a skilled secretary. She wishes to attend college and obtain a degree in sociology. She feels that she can do this and still give adequate attention to the four children but questions the sufficiency of the amount awarded for child support. In view of income taxes, the indebtedness respondent is required to pay necessitating monthly payments of $754.20 per month, payment of house insurance and taxes, his own living expenses, the children's dental and medical bills, and $500 per month child support, it is not clear at this time that he is in a position to contribute a larger sum for child support. Under all the circumstances existing at the time of trial and entry of decree, we are unable to note any abuse of discretion on the part of the trial court but, on the contrary, conclude that the decree is reasonable in all respects.

"A judgment of a trial court fixing the amount of alimony, or making a distribution of property, will not be disturbed on appeal unless good cause is shown." Reisig v. Reisig, 191 Neb. 612, 216 N. W. 2d 731.

"In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered. In determining those circumstances, the financial position of the husband as well as the estimated costs of

support of the children must be taken into account." Schwaninger v. Schwaninger, 192 Neb. 681, 223 N. W. 2d 829.

The judgment of the District Court is affirmed. Costs, including an attorney's fee of $500 allowed petitioner's attorney for services in this court, are taxed to respondent.

AFFIRMED.

JACQUELYN FLANNERY, APPELLANT, V. SAMPLE HART MOTOR COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.
231 N. W. 2d 339

Filed July 3, 1975. No. 39880.

1. **Motor Vehicles: Ordinances: Parking: Extraterritoriality.** An ordinance proscribing leaving a motor vehicle on any street unattended without locking the ignition and removing the key is not applicable where the vehicle is left on private property.
2. **Motor Vehicles: Parking: Negligence: Extraterritoriality.** In the absence of an applicable statute or ordinance, a motorist or bailee having control of a motor vehicle who leaves the vehicle unattended on private property without locking the ignition and removing the key is not liable to a third person when the vehicle is taken by a thief or other unauthorized person who drives it negligently and causes personal injury and property damage to such third person.
3. **Motor Vehicles: Parking: Negligence.** In the absence of applicable statutes or ordinances, the failure of a person having charge of a motor vehicle to remove the ignition key does not constitute a negligent omission or the breach of a duty owed to a third person in the position of the plaintiff here.

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

Thomas R. Wolff, for appellant.

Erickson, Sederstrom, Johnson & Fortune, for appellees.

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

MCCOWN, J.

The plaintiff, Jacquelyn Flannery, brought this action for personal injuries sustained in an automobile accident which was caused by the negligence of the unidentified driver of an automobile stolen from the repair lot of the defendant, Sample Hart Motor Company. At the conclusion of the testimony, the District Court sustained defendant's motion for directed verdict, and plaintiff has appealed.

In the early part of February 1971, a Ford automobile owned by Carl Anderson was involved in an accident. The right front wheel was bent in under the car at a 20 to 30 degree angle and there was substantial other damage. The car was not in condition to be driven. It was towed to Anderson's home. On February 16, 1971, Anderson employed Neff Towing Service, Inc., to pick up the car and tow it in for repairs. On February 17, 1971, Neff Towing Service, Inc., towed the car to the Sample Hart garage and placed the car on the open repair lot. The driver for Neff Towing Service, Inc., unhooked the car from the tow truck, removed the key, and locked the car. It was then 5:30 p.m., after business hours. The driver made out the tow ticket and placed the ticket and the key in an envelope and deposited the envelope in a drop box provided for that purpose in the side door of the Sample Hart building. At some time between 5:30 p.m. February 17th and 2 p.m. February 20, 1971, the automobile was stolen.

On February 20, 1971, at approximately 2 p.m., the plaintiff was a passenger in a car being driven by her husband on Florence Boulevard in Omaha, Nebraska. A car occupied by two unidentified negro males, approximately 14 or 15 years of age, struck plaintiff's car in attempting to pass. The other car went on down the street in an erratic fashion until it struck a stop sign.

The driver and the passenger jumped out and ran. They were never located or identified. The car was the Anderson car, which had been stolen from the Sample Hart repair lot. Plaintiff's husband testified that the keys were in the ignition of the car but he did not remember whether there were two keys or a key and a tag. Plaintiff's injuries were sustained in the hit-run accident.

The plaintiff filed this action against Sample Hart Motor Company; Neff Towing Service, Inc.; Carl Anderson, the owner of the car; and Allstate Insurance Company, the owner's insurance carrier. Demurrers of the owner and his insurance carrier were sustained before trial. Motion to dismiss by Neff Towing Service, Inc., was sustained at the conclusion of plaintiff's evidence, and motion to dismiss by Sample Hart Motor Company was sustained at the conclusion of all the evidence. Plaintiff has appealed.

The plaintiff's cause of action rests on the allegation that Sample Hart was negligent as to the plaintiff in leaving the keys of the Anderson car in the ignition while the car was on the repair lot. The plaintiff alleges that Sample Hart violated section 35.28.350 of the municipal code of the City of Omaha, which provides: "No person having control or charge of a motor vehicle shall allow such vehicle to stand on any street unattended without * * * locking the ignition and removing the key, * * *." Plaintiff contends that the ordinance applies to vehicles on private property as well as to those on a street. We disagree. The ordinance by its terms applies only to vehicles standing "on any street." Even under statutes not restricted to public places by their terms, courts have almost universally held that such statutes do not apply to vehicles parked upon private property. See cases cited in Annotation, 45 A. L. R. 3d 787, § 7, p. 808. The Sample Hart repair lot was private property and the ordinance was not applicable.

The plaintiff also contends that in any event a failure

to remove the keys from an automobile may still be negligence under the rule of section 302 B, Restatement, Torts 2d: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." Comment d to that section and illustration 2 make it clear that the conduct of the defendant, Sample Hart, under the facts and circumstances here was not negligent as to the plaintiff within the meaning of the Restatement rule.

An exhaustive annotation entitled "Liability of motorist who left key in ignition for damage or injury caused by stranger operating the vehicle" appears at 45 A. L. R. 3d 787. In the approximately 70 pages of that annotation we find no cases supporting the imposition of liability on a defendant under facts and circumstances approximately matching those presented in the record here. While the grounds upon which denial of liability has been predicated vary, the vast majority of cases have denied liability in the absence of an applicable key-in-ignition statute.

In Hersh v. Miller, 169 Neb. 517, 99 N. W. 2d 878, this court held that even where there was a violation of an applicable key-in-the-car ordinance, no liability attaches to a motorist who parks a car in violation of such ordinance when the car is later taken by a thief or other unauthorized person who drives the car negligently causing injury and damage to third persons. It necessarily follows that in the absence of an applicable statute or ordinance, a motorist or bailee having control of a motor vehicle who leaves the vehicle unattended on private property without locking the ignition and removing the key is not liable to a third person when the vehicle is taken by a thief or other unauthorized person who drives it negligently and causes personal injury and property damage to such third person.

In the absence of applicable statutes or ordinances, the failure of a person having charge of a motor vehicle to remove the ignition key does not constitute a negligent omission or the breach of a duty owed to a third person in the position of the plaintiff here. To hold the defendant, Sample Hart, liable in this case would make it an insurer as to any accident in which the car might be involved while it was operated by a thief. A motorist would be an insurer in such a case even though his automobile insurance policy specifically excluded coverage to him under such circumstances. No reasonable public policy requires that result.

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

AFFIRMED.

BOSLAUGH, J., concurs in the result.

ZIMMERMAN'S ELECTRIC, INC., A NEBRASKA CORPORATION, APPELLANT, V. FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A MARYLAND CORPORATION, APPELLEE.
231 N. W. 2d 342

Filed July 3, 1975. No. 39882.

1. **Administrative Law: Settlement: Contracts.** Under section 52-118.02, R. R. S. 1943, a final settlement is a determination, made and recorded in accordance with established administrative practice by the administrative officer or department having the contract in charge, that the contract has been completed and that the final payment is due.
2. ———: ———: ———. An administrative agency settlement involves a statement of account, including all charges and credits deemed allowable by the department, after deciding, with intended finality so far as its functions are concerned, such matters as the sufficiency of performance, allowance of liquidated damages, contingent liabilities, etc. A determination that particular amounts may be due or paid merely as payments on account is not a final settlement.
3. ———: ———: ———. So long as the public body contends

that the contractor must do something more and is holding back an amount, large or small, to secure full performance, there is ordinarily no final settlement of the contract.

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

James L. Zimmerman, for appellant.

Holtorf, Hansen, Kovarik & Nuttleman, for appellee.

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

NEWTON, J.

This is an action on a contractor's bond. Plaintiff had furnished electrical materials to the contractor for installation in a public building. Plaintiff's petition was dismissed on the basis of defendant's plea of the statute of limitations. We reverse the judgment of the District Court.

The sole issue is whether the statute had run. Section 52-118.02, R. R. S. 1943, requires that the action be brought within 1 year "after the date of final settlement of the principal contract." The statute is patterned after 40 U. S. C., section 270, as it formerly existed prior to amendment, simplification, and clarification. That act limited suit to "one year after the performance and final settlement of said contract."

The record reveals that suit was brought on April 8, 1974. The architect had the authority and responsibility for checking and certifying the progress of the work, payments to be made, and completion of the contract. On August 21, 1972, he certified the work was substantially complete except for certain enumerated items and the entire amount due was paid except for a 10 percent retainer. On November 1, 1972, he certified the project was complete except for minor labor items amounting to $250 to $300 and all due was paid except a $500 retainer. On April 17, 1973, the architect certified the contract was fully completed.

It will be noted that the federal act required "completion" of the contract as a factor in a final settlement. The Nebraska act does not specifically require completion; nevertheless, it would appear that "completion" is an inherent requirement. Otherwise, there could be a final ascertainment of the amount due immediately on the execution of a contract providing for the payment of a specified sum or on issuance of each monthly statement as the work progressed, as in each instance the sum falling due is ascertainable.

The federal act has been interpreted in several cases. In Consolidated Indemnity & Ins. Co. v. W. A. Smoot & Co., 57 F. 2d 995 (4th Cir., 1932), it was held that final settlement means " 'the final determination by the proper governmental authority of the amount which the government is finally bound to pay or entitled to receive under the contract.' " Also, that final settlement refers " 'to the time when the proper government officer, who has the final discretion in such matters, after examination of the facts, satisfies himself that the government will accept the work, as it is, without making any claim against the contractor for unfinished or imperfect work, damages for delay or what not, and records that decision in some orderly way.' "

In United States v. Arthur Storm Co., 101 F. 2d 524 (6th Cir., 1939), it was held: "Final settlement is not synonymous with final payment. It precedes payment and denotes the proper administrative determination with respect to the amount due."

In United States Casualty Co. v. District of Columbia, 107 F. 2d 652 (D. C., 1939), final settlement was defined as: " 'A determination, made and recorded in accordance with established administrative practice by the administrative officer or department having the contract in charge, that the contract has been completed and that the final payment is due.' * * *

"The settlement involves an administrative statement of account, including all charges and credits deemed

allowable by the department, after deciding, with intended finality so far as its functions are concerned, such matters as the sufficiency of performance, allowance of liquidated damages, contingent liabilities, etc. A determination that particular amounts may be due or paid merely as payments on account is not a final settlement." See, also, Globe Indemnity Co. v. United States, 291 U. S. 476, 54 S. Ct. 499, 78 L. Ed. 924.

In R. P. Farnsworth & Co., Inc. v. Electrical Supply Co., 112 F. 2d 150 (5th Cir., 1940), 130 A. L. R. 192, the contract had been completed except for minor items amounting to $82.80 which sum was retained pending full completion. It was held: "Not until the wall was rebuilt and the order passed to pay the $82.80 was there a final settlement of the contract. The suit was filed within a year from that date and was not barred." On rehearing in 113 F. 2d 111, it was held: "So long as the United States contend that the contractor must do something more and is holding back an amount, large or small, to secure full performance, there is no final settlement of the contract."

In the case of Westinghouse Electric Supply Co. v. Brookley, 176 Neb. 807, 127 N. W. 2d 465, it was determined that a final settlement had been arrived at notwithstanding the contract had not been entirely completed. The case is distinguishable due to an unusual situation. The engineer in charge had submitted a final inventory and the Rural Electrification Administration approved and executed final closeout documents prior to completion of the contract. In the case before us the architect did not certify that the work had been completed and that the final retainer should be paid until the issuance of his final certificate on April 17, 1973.

We adopt the federal rules. Ordinarily final settlement means a determination by the proper authority that the contract has been completed, that final payment is due, and of the amount due. In this instance that occurred on April 17, 1973, and the action is not

barred by the statute of limitations.

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

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. WILLIE A. TURNER, APPELLANT.
231 N. W. 2d 345

Filed July 3, 1975. No. 39909.

1. **Post Conviction: Coram Nobis.** The enactment of the Post Conviction Act, sections 29-3001 to 29-3004, R. S. Supp., 1974, did not eliminate the common law remedy of writ of error coram nobis.
2. **Criminal Law: Election of Remedies.** A remedy is cumulative when it is created by statute and is in addition to a remedy which still remains in force.
3. **Criminal Law: Coram Nobis.** A writ of error coram nobis reaches only matters of fact, unknown to the applicant at the time of judgment, not discoverable by him with reasonable diligence, and which fact or facts are of such a nature that if known to the court would have prevented the entry of judgment.
4. **Post Conviction: Hearings: Records.** In an application for post conviction relief, if the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief the court may deny an evidentiary hearing.
5. **Actions: Pleadings.** In this state forms of action have been abolished and the nature of an action is to be judged by what is pled and not by the name which may have been applied to the pleading.
6. **Post Conviction: Pleadings.** In a proceeding under the Post Conviction Act the applicant is required to plead facts which, if proved, constitute a violation or infringement of constitutional rights, and the pleading of mere conclusion of fact or law is not sufficient to require the court to grant an evidentiary hearing.
7. **Criminal Law: Searches and Seizures: Trial: Evidence: Post Conviction: Waiver: Constitutional Law.** Where, in a criminal prosecution, a defendant, through his counsel, files a motion to suppress evidence taken in a search and seizure alleged to

have been in violation of the Constitution of the United States, and the parties, through counsel, enter into a stipulation for the trial of the motion upon the basis of evidence submitted in a companion case, reserving the right to present additional evidence by or on behalf of the defendant, and then proceed to trial without offering either the stipulated evidence or additional evidence, such conduct constitutes a waiver of rights on the motion to suppress, and the unexplained absence of the defendant at the session where the stipulation was entered into is not ground for post conviction relief.

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

Willie A. Turner, pro se.

Paul L. Douglas, Attorney General, and Jerold V. Fennell, for appellee.

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

CLINTON, J.

Defendant was convicted by a jury of unlawfully possessing a controlled substance with intent to deliver and was sentenced to a term of 3 to 9 years in the Nebraska Penal and Correctional Complex. On appeal to this court his conviction was affirmed. State v. Turner, 192 Neb. 397, 222 N. W. 2d 105.

The present appeal arises from the denial of what the defendant, who appeared pro se both here and in the trial court, describes as an application for a writ of error coram nobis. The error assigned is that the trial court erred in denying the application. We affirm.

The transcript indicates that the trial court's denial of the application was based upon an examination of the application itself and of the files and records in the case, including the bill of exceptions which was before this court when we affirmed the conviction. No evidentiary hearing was held on the application.

The first question which we must decide is a preliminary one. Is this proceeding truly an application for a

writ of error coram nobis, or is it an application for relief under the Post Conviction Act, sections 29-3001 to 29-3004, R. S. Supp., 1974? For reasons we outline shortly, the correctness of the action of the trial court's determination depends in part upon the answer to that question.

The remedy provided by the Post Conviction Act and that afforded under the ancient common law writ of error coram nobis overlap to some degree. 24 C. J. S., Criminal Law, § 1606(1), p. 661 et seq. In some jurisdictions the adoption of a post conviction hearing act has been said to have completely replaced the writ of error coram nobis. Strong v. Gladden, 225 Ore. 345, 358 P. 2d 520; Mitchell v. State, 229 Ark. 469, 317 S. W. 2d 1; Brady v. State, 222 Md. 442, 160 A. 2d 912. In this state, however, the Post Conviction Act does not have the broad reach of similar acts of some of the other states. The recommendation of the American Bar Association Standard 1.1, Post-Conviction Remedies, for the adoption of a unitary post conviction remedy replacing all existing procedures and encompassing "all claims whether factual or legal in nature" for reviewing the validity of judgments of conviction was not adopted by this state. Section 29-3003, R. S. Supp., 1974, provides: "The remedy provided by sections 29-3001 to 29-3004 is cumulative and is not intended to be concurrent with any other remedy existing in the courts of this state. Any proceeding filed under the provisions of sections 29-3001 to 29-3004 which states facts which if true would constitute grounds for relief under another remedy shall be dismissed without prejudice." Our Post Conviction Act reaches only the claims of a "prisoner in custody under sentence" asking to be "released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States." § 29-3001, R. S. Supp., 1974. A remedy is cumulative when it is created by statute and

is in addition to another remedy which still remains in force. People v. Santa Fe Federal Savings & Loan Assn., 28 Cal. 2d 675, 171 P. 2d 713; 10A Words and Phrases, "Cumulative Remedy," p. 414. The cumulative remedy may not be pursued simultaneously with the previously existing remedy. State v. Carr, 181 Neb. 251, 147 N. W. 2d 619; State v. Williams, 181 Neb. 692, 150 N. W. 2d 260.

In the case of Carlsen v. State, 129 Neb. 84, 261 N. W. 339, this court breathed life into the writ of error coram nobis and held it to exist by virtue of the provisions of section 49-101, Comp. St. 1929, and the provisions of our Constitution. The cited section of the statute preserved in this state the common law of England insofar as it is not inconsistent with our statutes and Constitution. As interpreted by this court in that case and others, including Parker v. State, 178 Neb. 1, 131 N. W. 2d 678, the writ reaches only matters of fact, unknown to the applicant at the time of judgment, not discoverable by him with reasonable diligence, and which fact or facts are of such a nature that if known to the court they would have prevented entry of the judgment. See, also, 24 C. J. S., Criminal Law, § 1606(7), p. 688 et seq. The remedy is not available to correct errors of law. 24 C. J. S., Criminal Law, § 1606(8), p. 694. The writ does not reach such matters as the legality of a search or seizure. Winston v. United States, 224 F. 2d 337; Engling v. State, 178 Kan. 564, 290 P. 2d 1009; People v. Cole, 152 Cal. App. 2d 71, 312 P. 2d 701.

In most states the application for the writ is regarded as a new action and not a continuation of the original proceeding. 24 C. J. S., Criminal Law, § 1606(20), p. 758. Ordinarily in such an action, if the application states a prima facie cause for relief a hearing must be held. 24 C. J. S., Criminal Law, § 1606(31), § 1606 (28), pp. 820, 783. In such an action the State is the proper party defendant and entitled to notice. 24 C. J. S., Criminal Law, § 1606(27), p. 781. The State is entitled to raise in the trial court the sufficiency of the

application. 24 C. J. S., Criminal Law, § 1606(28), p. 783; and an opportunity to reply. Op. cit.

An examination of our opinions in Parker v. State, *supra*; Carlsen v. State, *supra*; and Hawk v. State, 151 Neb. 717, 39 N. W. 2d 561, would indicate that generally the above procedure has been the practice in this state. It seems clear, therefore, that if an application pleads facts unknown to the applicant at the time the judgment was entered, which facts were not readily discoverable by him and which are of such a nature that they would have precluded entry of the judgment, then a hearing must be held for the very nature of the proceedings is to show facts not disclosed by the record. It would seem obvious in such a case that the mere examination of the files and records does not suffice except perhaps where they clearly contradict the material allegations of the application for the writ.

In this case, no one served a notice upon the State following the filing of the application, no responsive pleading was made by the State at any time, and no appearance was made by the State prior to the filing of its briefs in this court. If this case is properly to be treated as an application for writ of error coram nobis, there is no statutory sanction for the informal way in which the matter was handled.

On the other hand, if the application, despite the name which the applicant has applied to it, is to be properly treated as one for post conviction relief, then our statute provides: "Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." § 29-3001, R. S. Supp., 1974.

The writ of error coram nobis is a common law civil proceeding applicable both to civil and criminal judgments. 24 C. J. S., Criminal Law, § 1606(2), p. 669.

Although our statutes and Constitution preserve the common law remedy, forms of action have been abolished and the nature of the action is to be judged by what is pled and not by the name which may have been applied to it. § 25-101, R. R. S. 1943; 24 C. J. S., Criminal Law, § 1606(22), p. 766; State ex rel. Wright v. Barney, 133 Neb. 676, 276 N. W. 676. Defendant did not plead facts which entitled him to relief by writ of error coram nobis.

In the light of the previously stated principles, we now proceed to an examination of the relevant and material allegations of the application. It alleges that "PLAINTIFF WILLIE TURNER WAS INTENTIONALLY DENIED THE RIGHT TO BE PRESENT" at a hearing for suppression of evidence. It further alleges by way of conclusion that if he had been present, "PLAINTIFF . . . COULD HAVE PROVIDED SUFFICIENT TESTIMONY AND EVIDENCE . . . TO JUSTIFY THE EVIDENCE BEING SUPPRESSED IN HIS BEHALF." It alleges further that his defense counsel stipulated that the motion to suppress could be heard upon the same evidence as a motion to suppress in a companion case, State v. Cass. In his brief defendant alleges that Cass pled guilty and that no suppression hearing was ever held in that case. In a proceeding under the Post Conviction Act the applicant is required to allege facts which, if proved, constitute a violation or infringement of constitutional rights and the pleading of mere conclusions of fact or of law are not sufficient to require the court to grant an evidentiary hearing. State v. Russ, 193 Neb. 308, 226 N. W. 2d 775. The only fact which the application alleges is that the defendant was denied the right to be present at the suppression hearing. It is clear that the allegations present no fact or facts unknown to the defendant and his counsel and not reasonably discoverable by the defendant, and the existence of which would have prevented the judgment. See, Parker v. State, *supra*; 24 C. J. S., Criminal Law, §

1606(7), p. 688. The application presents at most a question of error of law, which is not reachable by writ of error coram nobis. 24 C. J. S., Criminal Law, § 1606(8), p. 694.

The trial court, therefore, was justified in proceeding as though the application were under the Post Conviction Act to examine the files and records in the case to determine whether they showed to the court's satisfaction that the applicant was entitled to no relief and, if the court were not so satisfied, then to order an evidentiary hearing.

What do the files and records of the case show? They show that an application to suppress was filed. This motion attacked in a variety of ways the search and the seizure. The files and the record further show that on July 11, 1973, at 11 o'clock a.m., defendant's counsel and the prosecutor appeared before one of the judges of the District Court for Douglas County, Nebraska, for the purpose of holding a hearing on the motion to suppress. At that time the trial judge noted defendant's absence, made inquiry of both counsel concerning that fact, and suggested that defendant be present. Counsel then responded that the arrangement he had made with his co-counsel was that defendant would not be present. Defendant's counsel then left the courtroom and apparently made a telephone call, and upon his return to the courtroom he stated: "I could not get in touch with the defendant, or Mr. McQuillan" (co-counsel). He stated (referring to the defendant): "I don't know if he has been notified." Further discussion concerning defendant's presence then took place. At the time the defendant's counsel and the prosecutor both understood that a suppression hearing in the companion case had just been completed or was underway, but that no ruling had been made therein.

Thereafter it was stipulated: ". . . this matter was submitted on the evidence in the other case (Cass), and that the Court has taken it under advisement." The

court then addressed defendant's counsel as follows: ". . . what you had better do, you had better go back to your client and say, 'This is the evidence that was introduced in the other case,' acquaint yourself with what is was, and 'This is the evidence that they have regarding the search.'" It was further stipulated that at that time the motion to suppress was founded upon a claim "of a defective search warrant" and the warrant, although not in the record before us, is the same warrant as was involved in the companion case. The court then, further addressing defendant's counsel, said: "If you can add anything to that, give him a chance to do it, and I will give him a chance to do it; if he can't, then he can't complain that he didn't get his full day in court." Counsel responded in a form which indicated understanding.

We accept defendant's claim that Cass pled guilty and that no suppression hearing was held in that case. The record does not show that any evidence or testimony from that hearing was ever offered or received by the trial court in this case pursuant to the stipulation in question. It appears, therefore, that no suppression hearing was in fact held. The record is absent any showing whatever that defendant, through his counsel, sought thereafter to take advantage of the court's holding the matter open for further evidence by the defendant or otherwise on the motion to suppress. Under this state of the record there appears to have been an abandonment and waiver of hearing on the issue. Before trial the court overruled the motion to suppress. It appears that the defendant's absence on July 11, 1973, was not prejudicial since, in fact, there was no hearing at which evidence was adduced.

In People v. Anderson, 266 N. Y. S. 2d 110, 16 N. Y. 2d 282, 213 N. E. 2d 445, the New York Court of Appeals held that a pretrial hearing on a motion to suppress at which evidence is adduced is a part of the trial, and the unexplained absence of the defendant therefrom

deprives him of due process of law and requires vacation of the judgment of conviction. It further held that the defendant does not have a right to be present at a hearing on a motion to decide a mere matter of law. Without in any way intimating that the primary holding of People v. Anderson, *supra*, would or would not be followed by us in an appropriate case, we deem it has no application here. The defendant was bound by the act of his counsel in failing to ask the court prior to trial for an evidentiary hearing on the motion to suppress, which hearing the court had indicated it would, upon request, hold. This failure is a waiver within the spirit, although not the letter, of section 29-822, R. R. S. 1943, and our holding in State v. Howell, 188 Neb. 687, 199 N. W. 2d 21. We hold that where, in a criminal prosecution, a defendant, through his counsel, files a motion to suppress evidence taken in a search and seizure alleged to have been in violation of the Constitution of the United States, and the parties, through counsel, enter into a stipulation for the trial of the motion upon the basis of evidence in a companion case with the right to present additional evidence by or on behalf of the defendant, and then proceed to trial without offering the stipulated evidence and without exercising the right to offer additional evidence, such conduct constitutes a waiver of rights on the motion to suppress. Consequently the unexplained absence of the defendant at the session where the stipulation was entered into cannot be ground for post conviction relief.

No question of competence of counsel is raised here. There may have been very good reasons for abandoning the suppression issue.

AFFIRMED.

BRODKEY, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. ROBERT MCCLANAHAN, APPELLANT.

231 N. W. 2d 351

Filed July 3, 1975. No. 39915.

1. **Bailments: Larceny.** In a prosecution for larceny as bailee under section 28-540, R. R. S. 1943, there must be a bailment of the property; while so held the bailee must convert the property to his own use; and such converting to his own use must be with the intent to steal the property.
2. **Bailments: Larceny: Trial: Evidence.** In order to prove a charge of larceny as bailee the burden is on the State to establish that the accused came into possession of the property which is the subject of the charge lawfully and that he thereafter unlawfully and with intent to steal converted it to his own use.
3. **Criminal Law: Evidence.** In a criminal action this court will not interfere with a verdict of guilty based upon conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt.
4. **Trial: Evidence: Waiver.** If an objection to the introduction of evidence is made, the party making the objection must insist that the trial court rule on the objection or else it is waived.

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

Holtorf, Hansen, Kovarik & Nuttleman, for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

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

MCCOWN, J.

The defendant was found guilty by a jury of the crime of larceny as bailee. The chattel involved was a registered quarter horse. The District Court placed the defendant on probation for a period of 2 years under specified conditions which included making restitution in the amount of $600 to the owner of the horse.

The defendant, Robert McClanahan, was in the business of buying horses for slaughter. On January 10, 1974, he bought approximately 20 horses at a public sale in Wheatland, Wyoming. The sale was conducted by Joe Madden, a livestock man and auctioneer. At the conclusion of the sale Madden bought one horse from the defendant and the defendant also claimed to be one horse short after the truck was loaded. Because of the blizzard conditions, sub-zero temperatures and blowing snow, Madden told the defendant to go ahead and take the horses he had and they would get it straightened out later. Two days later Madden's son loaded three horses on a truck and delivered them to the defendant near Scottsbluff, Nebraska. A registered quarter horse was included and delivered to the defendant by mistake. Madden discovered the mistake after his son had left to deliver the horses and immediately called the defendant, advised him of the mistake, and asked him to send the quarter horse back. The defendant agreed. The defendant never denied that there was a mistake nor that he had agreed that the horse was to be returned. From this point on the evidence is in sharp conflict. Madden testified that he made several trips to Scottsbluff to get the horse and that the defendant promised to return it on several occasions, but that he was never able to locate the horse. On one occasion he was informed that the defendant had taken the horse to North Platte to a certain horse buyer. Madden called the buyer, told him not to buy the horse, and requested the horse buyer to have defendant call him back. The defendant again promised to return the horse. Madden testified, and the defendant confirmed, that the defendant at no time told Madden that the horse had died. At trial, however, the defendant testified that the horse had died 2 or 3 days after it had been delivered to him and introduced evidence that a dead sorrel horse had been taken from his place to a rendering plant. The evidence, however, indicated that

the dead horse was crippled and unbranded, while the quarter horse had a VR brand on the left hip and was not crippled.

The conflicting evidence was submitted to the jury under appropriate instructions defining the crime and setting out all the necessary elements which the State was required to prove. There was and is no objection to any of the instructions given, and the jury found the defendant guilty as charged. Probation and restitution were ordered and this appeal followed.

The basic contention of the defendant on appeal is that the evidence is insufficient to sustain the verdict. The relevant portion of section 28-540, R. R. S. 1943, under which the defendant was charged and convicted, provides: "If any bailee of any money, bank bill or note, goods or chattels * * * shall convert the same to his or her own use, with an intent to steal the same, * * * he shall be deemed guilty of larceny in the same manner as if the original taking had been felonious, * * *."

We have held that the statute requires there be a bailment of the property; that while so held the bailee must convert the property to his own use; and that such converting to his own use must be with the intent to steal the property. Yost v. State, 149 Neb. 584, 31 N. W. 2d 538. The Yost case also placed the burden on the State to establish every element of the crime beyond a reasonable doubt and said: "In order to prove a charge of larceny as bailee the burden is on the State to establish that the accused came into possession of the property which is the subject of the charge lawfully and that he thereafter unlawfully and with intent to steal converted it to his own use."

Here the jury was instructed as to the meaning of the term "bailment" and the necessary elements, each of which was required to be proved by the State beyond a reasonable doubt. The instructions to the jury came almost verbatim from Yost v. State, *supra*, and from

section 28-540, R. R. S. 1943. There was and is no objection to the instructions. Although the evidence was in some measure circumstantial and in other respects conflicting, it was nevertheless sufficient to sustain the jury verdict. In a criminal action this court will not interfere with a verdict of guilty based upon conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Corfield, 189 Neb. 163, 201 N. W. 2d 818.

The defendant also contends that the trial court abused its discretion in ordering restitution in the sum of $600 to Joe Madden as a condition of defendant's probation. The argument is that there was no admissible evidence in the record to establish the value of the quarter horse at any amount in excess of $500. Section 29-2262, R. S. Supp., 1974, specifically provides that a court, as a condition of probation, may require the offender to "make restitution of the fruits of his crime or to make such reparation as the court determines to be appropriate for the loss or damage caused thereby; * * *."

Restitution and reparation are not limited to the market value of the stolen property nor is the State required to establish the exact amount of the "loss or damage" caused by the crime. The amount of financial restitution or reparation is within the sound discretion of the court. In this case the evidence established that Madden made several trips to Scottsbluff, Nebraska, from Wyoming, and the evidence was undisputed that the animal itself was worth at least $500 and may have been worth $600 to $800. There was certainly no abuse of discretion by the trial court in fixing the amount of restitution.

Although the defendant makes no complaint about erroneous rulings on his objections to the admission of evidence, he has assigned as error the court's failure to strike testimony from the record and to admonish the

jury to disregard it after an objection of counsel was sustained. The defendant did not request that such testimony be stricken nor that the jury be admonished to disregard it, and the court did all that it was asked to do by the defendant as to such evidence. The trial court can hardly be faulted for failing to make an evidentiary ruling it was not asked to make. See Bell v. Commonwealth, 473 S. W. 2d 820 (Ky. App.). The defendant complains also that the trial court failed to rule on some of defendant's objections. We think the proper rule is that if an objection to the introduction of evidence is made, the party making the objection must insist that the trial court rule on the objection or else it is waived. See Bell v. Commonwealth, *supra*. The defendant did not request any instruction that the jury disregard evidence as to which objections had been sustained, nor did he object to the instructions given. The defendant's assignments of error directed at these evidentiary issues are without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDEL BURKHARDT, APPELLANT.

231 N. W. 2d 354

Filed July 3, 1975. No. 39921.

1. **Sentences: Judges: Criminal Law.** It is preferable that all participants in one crime or series of related crimes should be sentenced by the same judge, if possible, on their conviction.
2. **Sentences.** Section 29-2308, R. R. S. 1943, authorizes this court to reduce a sentence when in its opinion the sentence is excessive, and makes it the duty of this court to render such sentence as in its opinion may be warranted by the evidence.

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

John R. Brownell, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

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

BRODKEY, J.

Defendant, Randel Burkhardt, appeals to this court requesting a modification of a sentence of 2 to 6 years in the Nebraska Penal and Correctional Complex, imposed upon him by one of the District Judges for Hall County, Nebraska, following defendant's plea of guilty to a charge of grand larceny. We modify the judgment and affirm.

Defendant Burkhardt, together with an accomplice, one Michael Jaenicke, stole some tires and "mag" wheels from one Rita Prince in Grand Island, Nebraska. Both were subsequently arrested and were each identically charged with one count of burglary and one count of grand larceny. They were bound over and arraigned, and pled guilty to the crime of grand larceny, each before different judges of the District Court for Hall County, Nebraska, following identical plea bargains with the State, whereby the respective judges, on motions made by the State, dismissed the respective charges of burglary as to each defendant in return for a plea of guilty on the charge of grand larceny. Defendant Burkhardt, as previously stated, received a sentence of from 2 to 6 years in the Penal Complex, whereas Jaenicke received 2 years probation from a different District Judge for Hall County. Counsel for defendant Burkhardt filed a motion for a discretionary stay of execution in order to investigate the disparity between the sentences, but the motion for stay was denied, and at that time the court noted and incorporated certain post-sentencing behavior on the part of defendant Burkhardt in the presentence report. In this appeal, de-

fendant Burkhardt alleges an abuse of discretion on the part of the trial court because of the disparity in sentencing, alleges that the sentence imposed was excessive under the circumstances, and alleges that the court abused its discretion in denying defendant the stay of execution requested.

At the time of the offense in question, defendant Burkhardt was 19 years of age and defendant Jaenicke was 18 years of age. Neither was married. Their past records appear to be very similar in nature and extent, although it is, of course, impossible to "color match" the records specifically. Neither had been convicted of any prior felonies. Both appear to have had juvenile records, including juvenile probation, and also traffic violations and misdemeanor offenses. One possible difference in the records of the two defendants is that it appears from the presentence report of defendant Burkhardt, forwarded to this court as a part of this appeal, that defendant has a past history of drug use. Other than this, it does not appear that either defendant could be said to be a more likely candidate for probation than the other, although, of course, we have no way of knowing what reason or motivating force was responsible for the other District Judge placing defendant Jaenicke upon probation; nor have we any way of knowing, with certainty, which of the two sentences more nearly represented the just decision.

Defendant Burkhardt contends that the case of State v. Shonkwiler, 187 Neb. 747, 194 N. W. 2d 172 (1972), is strikingly similar to this case, and should govern this appeal. In that case the defendant Shonkwiler and a codefendant, Anderson, were equal participants in the commission of a burglary. Both were 19 years of age and both were first offenders, both pleaded guilty, both were convicted at the same time, both were sentenced at the same time, and both made full financial restitution. Anderson was placed on probation for a period of 2 years, whereas Shonkwiler received a 1 to 2 year pen-

itentiary sentence. This court vacated the sentence of the District Court and remanded the cause to the District Court with directions to place Shonkwiler on probation under the same terms and conditions contained in the probation of Anderson. However, there is an important factual distinction between the two cases. In the Shonkwiler case the same judge handled both cases, knew all the facts, and imposed both sentences. In this case, different judges of the same judicial district handled the two separate cases, and had the authority to exercise their own judicial discretion. It is possible that part of the problem involved might have been a lack of communication between the judges. It has generally been recognized that all participants in one crime or series of related crimes should be sentenced by the same judge, if possible, on their convictions. In United States v. Bishop, 76 F. Supp. 866 (Ore., 1948), the court stated: "It is a cardinal principle of criminal justice that all participants of one crime or series of related criminal actions should be sentenced if possible by the same judge. Sentencing is not an exact science and therefore the balancing of all in one transaction should at least be on the same scale." It is not our intention to make this rule mandatory under all circumstances, but we commend it for consideration, to the extent applicable, should similar situations arise in the future. As stated in State v. Shonkwiler, *supra*: "The law still continues to strive for evenhanded justice."

The penalty provided by statute for the offense of grand larceny is imprisonment in the Nebraska Penal and Correctional Complex not more than 7 years nor less than 1 year. § 28-506, R. S. Supp., 1974. It is true that the sentence imposed upon defendant Burkhardt of from 2 to 6 years falls within those statutory limits. However, it is also provided in section 29-2308, R. R. S. 1943, in part that: "* * * the court may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it

shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence."

Considering the age of the defendant and the fact that he had no prior felony record, we feel that the sentence from 2 to 6 years imposed by the District Judge, under the facts of this case, appears to be excessive, and should be reduced. While the defendant contends that he should be placed on probation, as was his codefendant Jaenicke, we are not disposed to do so in this case. The record reveals that at the hearing before the court on defendant's motion to suspend the sentence, already imposed, the court was informed that the defendant had refused to go into his cell the previous day and that he had assaulted the officer who went into the cell block for the purpose of conducting the defendant into his cell. The incident was testified to in detail, under oath, by the jailor. His testimony included the following: "At this time Officer Ewoldt again asked him in a nice manner to get into his cell block and he said, no, he's already been sentenced, it doesn't matter if I hit you or not, * * *." The court thereupon made a notation of the incident on the presentence report.

It does not appear to this court that the defendant Burkhardt has earned the right to serious consideration for probation, or has the proper attitude to be benefited by probation, in view of his conduct. We conclude that a proper sentence for the defendant in this case is an indeterminate sentence of from 1 to 3 years in the Nebraska Penal and Correctional Complex, and we modify the previous sentence imposed by the District Court accordingly.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD GERALD DELOA, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. TONY ALAN HUERTA, APPELLANT.
231 N. W. 2d 357

Filed July 3, 1975. Nos. 39924, 39925.

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

Richard Gerald DeLoa and Tony Alan Huerta, pro se.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

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

BRODKEY, J.

The defendants were jointly tried and convicted of robbery and were sentenced to terms of 9 to 20 years imprisonment in the Nebraska Penal and Correctional Complex. On appeal to this court, the judgments were affirmed. See, State v. Huerta, 191 Neb. 280, 214 N. W. 2d 613 (1974); State v. DeLoa, 191 Neb. 290, 214 N. W. 2d 621 (1974). They now appeal from the order of the District Court denying their respective post conviction motions to vacate and set aside their judgments and sentences on the ground that in each case the court imposed minimum sentence exceeds the statutory requirement of one-third of the maximum sentence when imposing an indeterminate sentence under section 83-1,105, R. S. Supp., 1974. We affirm.

Defendants have failed to allege or demonstrate any infringement of constitutional rights necessary for relief under the Nebraska Post Conviction Act, sections 29-3001 et seq., R. S. Supp., 1974. See State v. Whited, 187 Neb. 592, 193 N. W. 2d 268 (1971). Section 28-414, R. R. S. 1943, provides that one convicted of robbery may be imprisoned for a term of not less than 3 years

nor more than 50 years. Defendants' sentences are clearly within the statutory limits. We have uniformly held that matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. State v. Miles, *ante* p. 128, 230 N. W. 2d 227 (1975); State v. Taylor, 193 Neb. 388, 227 N. W. 2d 26 (1975); State v. Birdwell, 188 Neb. 116, 195 N. W. 2d 502 (1972). We also note that defendant, DeLoa, raised the same issue in his first appeal that he now raises in this post conviction appeal. Our opinion in State v. DeLoa, *supra,* contains the following statement: "Defendant's contention that the minimum sentence imposed by the court cannot exceed one-third of the maximum sentence imposed by the court was answered in State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793." It still is. See State v. Wade, 192 Neb. 159, 219 N. W. 2d 233 (1974).

AFFIRMED.

CAROL JORGENSEN, APPELLEE, V. DARRELL JORGENSEN, APPELLANT.
231 N. W. 2d 360

Filed July 10, 1975. No. 39805.

1. **Divorce: Reports: Evidence.** In a divorce case, ex parte investigative reports are not evidence, and cannot be the basis for any adjudication.
2. **Trial: Reports: Due Process: Witnesses.** Ex parte statements are too unreliable to be considered in the investigation of controverted facts, and due process requires that witnesses be subject to the right of cross-examination by the parties to the proceeding.
3. ———: ———: ———: ———. Neither a judge, a juror, a judge's representative investigator, nor the party whose statement such investigator secures may lawfully contribute any competent testimony for the consideration of a jury or court, unless he takes the stand as a witness, is sworn, and is subjected to the usual test of cross-examination.

4. ———: ———: ———: ———. Where an investigative report may form the basis for the conclusions or judgment entered, the trial court must submit the report to counsel for examination and hold a further hearing at which the parties may call the person making such a report to testify and may call other witnesses to contradict any facts in the report.
5. **Divorce: Infants: Parent and Child.** Courts may not properly deprive a parent of custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
6. ———: ———: ———. When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights of a fit, proper, and suitable parent.

Appeal from the District Court for Dakota County: JOSEPH E. MARSH, Judge. Reversed and remanded for further proceedings.

Robert G. Scoville of Ryan, Scoville & Uhlir, for appellant.

C. J. Galvin of Leamer & Galvin, for appellee.

Gerald F. Fisher, guardian ad litem.

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

MCCOWN, J.

This is an appeal by a father in a divorce case from an order of the District Court changing the custody of two minor children from the mother to the maternal grandparents.

On July 9, 1970, decree was entered in the District Court for Dakota County, Nebraska, granting the plaintiff, Carol Jorgensen, an absolute divorce from the defendant, Darrell Jorgensen. The decree accepted the stipulation of the parties and gave the care, custody, and control of the two daughters, Debra, born October 17, 1963, and Jill, born May 20, 1967, to the mother; fixed amounts of child support to be paid by the father;

and granted the defendant father reasonable visitation rights. In May of 1972, the defendant filed a motion to fix reasonable times of visitation, alleging that plaintiff had repeatedly refused him reasonable visitation. When plaintiff failed to appear for a scheduled hearing, the court entered a temporary order for visitation on specified weekends and for certain holiday periods, and continued the hearing. On June 4, 1973, at a further hearing at which plaintiff also failed to appear, the court modified the decree by specifying visitation rights and times, including holiday and vacation periods. On November 27, 1973, the defendant filed an application to modify the decree by changing the custody of the two minor children from the plaintiff to himself. He alleged that the plaintiff had abandoned the children and relinquished them to the custody and control of her parents, Mr. and Mrs. Mark M. Dendinger, of Laurel, Nebraska, without prior approval or order of the court. A hearing was held on the application on February 26, 1974. The plaintiff was not present. The court found that she had frustrated attempts to serve her with process and proceeded to receive evidence and testimony on behalf of the defendant. That evidence was that the two children had been living with their maternal grandparents in Laurel, Nebraska, since the close of the school year in the spring of 1973. The plaintiff meanwhile was living and working in a city some 40 miles away. The defendant testified that he did not believe the plaintiff wanted the children, but instead wanted to keep him from getting them. His evidence was that he had remarried and had a comfortable home in good surroundings, with ample space, including a separate bedroom for the two girls which was constantly maintained for them. He had a permanent job with a steel company in Norfolk, Nebraska. His present wife enjoyed having the girls in their home and had a real affection for them. His present wife has a 7-year-old son who was living with them and the three children

get along well together. The defendant's present wife confirmed his testimony. Several other witnesses testified that the defendant and his wife were good parents, of high moral character, and of good reputation in the community. The defendant had regularly exercised his visitation rights and had taken the children into his home for weekends and vacation periods as authorized. Child support payments had been paid and were current.

At the close of the evidence the District Court continued the hearing until June 3, 1974, in an effort to secure the attendance of the plaintiff, and placed temporary custody of the children in the maternal grandparents in order that the children could complete the 1973-74 school year in Laurel. A copy of this order was served on both the plaintiff and the maternal grandparents.

The second portion of the hearing was held on June 3, 1974. Both the plaintiff and defendant appeared with counsel. Essentially, the evidence presented at this hearing was on behalf of the plaintiff. She had remarried after her divorce from the defendant but was not married at the time of the hearing. She was employed as a waitress. She worked evening hours and had take-home pay of $100 per week, plus tips. She testified that her apartment in Sioux City, Iowa, was adequate and other witnesses testified as to her fitness as a mother. She testified on cross-examination that she had visited the children once or twice a month since they had been living with her parents in Laurel. She also proposed to hire a 15-year-old babysitter to stay with the children in the evenings while she worked. She conceded that she had agreed to a guardianship of the children by her parents but had never signed a consent. At the conclusion of the hearing the court appointed Gerald Fisher guardian ad litem for the children, and continued the matter pending investigation by the guardian ad litem. The court provided that the temporary custody of the children should remain in the ma-

ternal grandparents pending final decision to be made in August 1974, and also provided for visitation and vacation custody during the summer as between the plaintiff and defendant.

On August 14, 1974, the guardian ad litem reported by letter to the court that he had interviewed various witnesses and considered the information he had been able to gather, including the wishes of the children. He reported that the children stated they would rather live with their maternal grandparents and that they would rather not live with their father because they did not like the stepson. He therefore recommended that strong consideration be given to placing the children with the maternal grandparents. In the alternative he felt that the father's home was more stable and in spite of the girls' present distaste for the stepson would be a better atmosphere for the girls than with the mother.

On August 16, 1974, without notice or further hearing, the District Court entered its order directing that the care, custody, and control of the children be given to the maternal grandparents, Mr. and Mrs. Mark Dendinger, of Laurel, Nebraska, with visitation rights of the defendant to remain the same and the plaintiff to have equal visitation rights. The defendant's motion for new trial was overruled and this appeal followed.

On the basis of the record in this case it is clear that the order of the District Court was based upon the report of the attorney for the children rather than on the evidence in the record. Copies of the report were not furnished to the parties, and the court entered its order without notice to either of the parents and without even an opportunity for a further hearing. The action taken here was in complete disregard of the basic requirements of due process. In addition, there was simply no evidence in the record, nor in the report of the attorney for the children, which could be the basis for granting custody of the children to the maternal grandparents.

Presumably the attorney for the children, although

designated a guardian ad litem, was appointed under the authority of section 42-358, R. R. S. 1943. That statute provides in part: "Such attorney shall be empowered to make independent investigations and to cause witnesses to appear and testify on matters pertinent to the welfare of the children." Section 42-351, R. R. S. 1943, authorizes the court to make such investigations as are appropriate concerning the custody of minor children. Neither of these sections authorize the substitution of ex parte reports for evidence and testimony in a divorce case, nor do they make any such reports a part of the record of the proceedings.

Under a former statute dealing with related matters this court held that such reports are not evidence and cannot be the basis for any adjudication. Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731. In that case an investigator was appointed by the court to report on the issue of child custody. Not only did this court hold that ex parte statements are too unreliable to be considered in the investigation of controverted facts but also that due process requires that witnesses be subject to the right of cross-examination by the parties to the proceeding. We said that "neither a judge, a juror, a judge's representative investigator, nor the party whose statement such investigator secures may lawfully contribute any competent testimony for the consideration of a jury or court, unless he take the stand as a witness, is sworn, and is subjected to the usual test of cross-examination." Subsequent cases confirm the holding in Dier, and also require that where such a report may form the basis for the conclusions or judgment entered, the trial court must submit the report to counsel for examination and hold a further hearing at which the parties may call the person making such a report to testify and may call other witnesses to contradict any facts in the report. See, Schuller v. Schuller, 191 Neb. 266, 214 N. W. 2d 617; Christensen v. Christensen, 191 Neb. 355, 215 N. W. 2d 111. Basically similar procedures were required by

statute prior to 1972. See § 42-307, R. R. S. 1943, repealed in 1972. See, also, Goodman v. Goodman, 180 Neb. 83 at p. 88, 141 N. W. 2d 445 at p. 449.

In any event, even if the report were included, it is indisputable that there is no evidence in this case which can be the basis for the adjudication made by the District Court. Not only is there no evidence of the fitness of the grandparents, neither is there any evidence in this record that either parent is unfit to have the custody of these minor children, nor did the court make any such finding. Over a long period of time our decisions have consistently held that courts may not properly deprive a parent of custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. It is equally clear that when a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. Carlson v. Wivell, 181 Neb. 877, 152 N. W. 2d 98; Marcus v. Huffman, 187 Neb. 798, 194 N. W. 2d 221; Bigley v. Tibbs, 193 Neb. 4, 225 N. W. 2d 27.

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

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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

I concur in the finding that the trial court erred in awarding custody of the children to the maternal grandparents. There is no evidence in the record to sustain this position.

I dissent from the remanding of the cause for further proceedings. On the record before us the mother has abandoned the children. On the other hand, the natural father of the children is requesting their custody. The

record indicates that he is a proper and suitable person to have such custody and could provide an adequate and wholesome home for said children.

Our law is well established that while the best interests of the children involved are paramount in the awarding of their custody, the natural parents of said children are presumptively entitled to the custody and the same cannot be given to a third party without a specific finding by the court based on clear, convincing, and competent evidence that the parents are unfit to have such custody.

In my judgment, rather than putting the father to the expense of another trial and a possible appeal, we should remand the cause with directions to grant him the custody of said children.

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

GERALDINE E. ANDERSON, APPELLANT, V. AUTOCRAT CORPORATION, A CORPORATON, ET AL., APPELLEES.
231 N. W. 2d 560

Filed July 10, 1975. No. 39830.

1. **Statutes.** Where the intent of the Legislature in the enactment of legislation is clearly expressed, the courts are in duty bound to accept that expression. It is not within the province of the courts to read a meaning into a statute which is not warranted by the legislative language.
2. **Process: Venue.** Service of process on the Secretary of State pursuant to section 21-20,114, R. R. S. 1943, is valid only where the action is brought in a court in a county where the cause of action, or some part thereof, arose, or in counties where the contract, or portion thereof, has been violated or is to be performed. Failure to file the action in such a court renders the service void.
3. **Process: Evidence.** Under section 25-540, R. S. Supp., 1974, of the Nebraska Long Arm Statute, when service upon a nonresident defendant is made by mail, proof of such service must

include a receipt signed by the addressee, or other evidence of personal delivery to the addressee satisfactory to the court.

4. **Process: Evidence: Affidavits.** Although an affidavit may be used to prove service of process, such an affidavit cannot be considered on an appeal of a cause to this court unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions.

Appeal from the District Court for Phelps County: NORRIS CHADDERDON, Judge. Affirmed.

Person, Dier & Person, for appellant.

James A. Beltzer of Luebs, Tracy, Dowding, Beltzer & Leininger, for appellees.

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

BRODKEY, J.

In her second amended petition filed in this action in the District Court for Phelps County, Nebraska, on August 22, 1973, plaintiff sought to recover damages for personal injuries sustained by her as the result of an explosion of a gas heater manufactured by defendant, Autocrat Corporation of New Athens, Illinois. The explosion occurred on the fairgrounds operated by the Harlan County Junior Fair Association at Orleans, Nebraska. We can, and do, take judicial notice of the fact that Orleans, Nebraska, is located in Harlan County, Nebraska. Also made parties defendant in the action were the aforesaid Harlan County Junior Fair Association, which entered its voluntary appearance in the proceedings in Phelps County; and also Kansas-Nebraska Natural Gas Company, Inc., which was served with summons, and subsequently filed its answer in the suit. Service upon the defendant, Autocrat Corporation, was attempted in the manner hereinafter set forth. Defendant, Autocrat Corporation, on September 24, 1973, filed its second special appearance, and on April 2, 1974, filed an amended second special appearance, objecting

to the jurisdiction of the court over it, and to the validity of the service of process upon it. Following a hearing on the special appearances of said defendant, held on April 11, 1974, the court, on June 27, 1974, entered an order sustaining the second special appearance and amended second special appearance filed by defendant, Autocrat Corporation. Plaintiff filed a motion for a rehearing on that order on July 3, 1974; and on September 26, 1974, the court overruled plaintiff's motion for rehearing, and dismissed plaintiff's second amended petition and causes of action contained therein as to Autocrat Corporation. Plaintiff appeals to this court, alleging that the trial court erred in sustaining the special appearances referred to, and in dismissing the action as to Autocrat Corporation. We affirm.

It is clear from the record in this case that plaintiff attempted to obtain service of process upon the defendant under the provisions of section 21-20,114, R. R. S. 1943, by service upon the Secretary of State. This is not only admitted by plaintiff in her brief, but is made clear from the praecipe filed in the District Court for Phelps County requesting that the clerk issue summons to the sheriff of Lancaster County for service upon Autocrat Corporation, by service upon the Secretary of State; and also by the return of Merle C. Karnopp, the sheriff of Lancaster County, on August 24, 1973, certifying as to such service by him upon the Secretary of State, and further stating: "* * * all of which has been done as provided by LB 564, 1971, amending 21-20,114 R. R. S. 1943 of the State of Nebraska; * * *." The affidavit of Helen R. Lang, summons clerk in the office of the Secretary of State of Nebraska, recites: "1. That on or about August 25, 1973, service was had upon Helen Lang who was then the Summons Clerk in the Office of the Secretary of State on behalf of Autocrat Corporation, a foreign corporation. 2. That on or about August 24, 1973, a copy of the summons was mailed by certified letter to Autocrat Corporation, a foreign corporation, at

New Athens, Illinois 62264. Further affiant sayeth not." Nothing further showing the service of process upon the defendant was on file on April 11, 1974, on which date the court held the hearing on the special appearances referred to. We also note that although the court entered its order on June 27, 1974, there is nothing in the record to indicate that the affidavit of Helen Lang was ever introduced in evidence at the hearing, or that any other evidence relating to service upon the defendant was introduced, or brought to the attention of the court at that time; nor did the court give its reasons for sustaining the special appearances.

We first direct our attention to a determination of whether the purported service under section 21-20,114, R. R. S. 1943, complied with the requirements of that section. Section 21-20,114, so far as material, provides as follows: "Whenever a foreign corporation shall do business in this state, and fails to appoint or maintain a registered agent in this state, or whenever any such registered agent cannot with reasonable diligence be found at the registered office, or whenever the certificate of authority of a foreign corporation shall be suspended or revoked, then the Secretary of State shall be an agent of such corporation upon which any such process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him, or, if the Secretary of State is absent from or is not found in the office of the Secretary of State in the State Capitol at the time of the attempted service, then by serving any person employed in the office of the Secretary of State who, previously to such service, has been designated in writing by the Secretary of State as the person or one of the persons upon whom such service shall be made for service upon the Secretary of State. *Such service shall constitute valid service upon such corporation in all courts of this state, in counties where the cause of action, or some part thereof, arose,* or in

counties where the contract, or portion thereof, entered into by such corporation has been violated or is to be performed; * * *." (Emphasis supplied.)

By way of background, it should be noted that section 21-20,114, R. R. S. 1943, is the counterpart of, and modeled after, section 115 of the Model Business Corporation Act. While the two sections are not identical, section 21-20,114 is generally considered and cited as being comparable to section 115. See 2 American Bar Foundation, Model Business Corporation Act Annotated (2d Ed., 1971), pp. 688, 692, and 725. One very apparent difference between the two sections is that section 115 of the Model Business Corporation Act does not contain the provision inserted in the Nebraska act that: "Such service shall constitute valid service upon such corporation in all courts of this state, in counties where the cause of action, or some part thereof, arose, * * *." The fact that the Nebraska legislators specifically included the foregoing language in their amended version of section 115 of the Model Business Corporation Act clearly indicates the importance attributed to that language by the Nebraska Legislature. That language was obviously included for a specific purpose. Where the intent of the Legislature in the enactment of legislation is clearly expressed, the courts are in duty bound to accept that expression. It is not within the province of the courts to read a meaning into a statute which is not warranted by the legislative language. Fitzgerald v. Kuppinger, 163 Neb. 286, 79 N. W. 2d 547 (1956). We interpret the language referred to as a clear mandate that service upon the Secretary of State is valid service upon the corporation only in counties "where the cause of action, or some part thereof, arose." In other words, it constitutes a condition precedent to valid service under section 21-20,114, and such service would not be proper or valid in any county in Nebraska unless the cause of action, or some part thereof, arose in such county. In this case the defendant contends that service upon it

was invalid due to the fact that the action herein was not filed in a court in a county "where the cause of action, or some part thereof, arose."

It is clear from the facts in this case, and plaintiff so alleges in her petition, that the occurrence which gave rise to her cause of action against the defendant took place in Orleans, Nebraska, which is in Harlan County. The action itself was filed in, and summons issued by, the District Court for Phelps County. It is clear, therefore, that the action was not brought in the proper county under section 21-20,114, R. R. S. 1943, and valid service of summons was not had upon, or jurisdiction obtained over, this defendant, under section 21-20,114.

Plaintiff argues, however, that where, as in this case, she has properly summoned one or more of the multiple defendants, the remaining defendant can properly be served from that court, and the improper venue, if any, can be corrected by a motion to transfer venue, under sections 25-408 and 25-409, R. S. Supp., 1974. The fallacy in her argument, however, is that those sections are "venue" sections, and presuppose a valid service of process on all parties affected, although they may have been served with summons in a wrong county for proper venue. Plaintiff cites in support of her contention Adair County Bank v. Forrey, 74 Neb. 811, 105 N. W. 714 (1905), and Lamb v. Finch, 87 Neb. 565, 127 N. W. 903 (1910). Those cases are clearly distinguishable from the facts of the case at bar. In each of said cases, *personal service* was had upon the respective defendants within the State of Nebraska. In the instant case, it is clear that no valid service was had upon this defendant, for the reason that, by the terms of the statute itself, valid service may be had by serving the Secretary of State only if the action is brought in the county where the cause of action, or some part thereof, arose. This was clearly not true in the instant case, and the trial court was correct in concluding that no valid service of

summons upon the defendant was had under section 21-20,114, R. R. S. 1943.

Plaintiff next contends that even if she must be regarded as having failed to effect service of process under section 21-20,114, R. R. S. 1943, the court should nevertheless find that she obtained valid service upon the defendant under the Nebraska Long Arm Statute, particularly section 25-540(1)(c), R. S. Supp., 1974, which provides: "(1) When the law of this state authorizes service outside this state, the service, when reasonably calculated to give actual notice, may be made: * * * (c) By any form of mail addressed to the person to be served and requiring a signed receipt; * * *." Subsection (2) of section 25-540, must also be considered in this connection and provides as follows: "Proof of service outside this state may be made by *affidavit of the individual who made the service* or in the manner prescribed by the law of this state, the order pursuant to which the service is made, or the law of the place in which the service is made for proof of service in an action in any of its courts of general jurisdiction. *When service is made by mail, proof of service shall include a receipt signed by the addressee or other evidence of personal delivery to the addressee satisfactory to the court.*" (Emphasis supplied.)

Plaintiff argues that where one makes service of process upon the Secretary of State under the terms of section 21-20,114, R. R. S. 1943, and where pursuant to that statute, the Secretary of State causes a copy of that process "to be forwarded by registered or certified mail, addressed to the corporation at its principal office in the state or county under the laws of which it is incorporated," such actions must be regarded as sufficient to meet the requirements for accomplishing service of process under section 25-540(1)(c), R. S. Supp., 1974. We do not believe this result necessarily follows. As previously pointed out, section 21-20,114 was adopted in modified form from section 115 of the Model Business

Corporation Act, and the Nebraska Legislature intentionally added to that section the provision that service as therein prescribed "shall constitute valid service upon such corporation in all courts of the state, *in counties where the cause of action or some part thereof, arose.*" (Emphasis supplied.) We must assume that the Legislature had a purpose in mind for adding that language to the model act, and we believe that we would defeat that purpose if we were to hold, under the facts of this case, that plaintiff has accomplished service of process under section 25-540(1)(c). If the two statutes overlap, as plaintiff suggests, then it would no longer be necessary for one endeavoring to accomplish service of process under section 21-20,114 to bring the action in a county "where the cause of action, or some part thereof, arose." The effect would be to eliminate that requirement from section 21-20,114, notwithstanding the fact that the language was intentionally placed therein by the Legislature.

However, even assuming, arguendo, that service of process upon the Secretary of State pursuant to section 21-20,114, R. R. S. 1943, would be sufficient to accomplish service of process within the terms of section 25-540(1)(c), R. S. Supp., 1974, it is clear that under the facts of the instant case there was no valid service of process under that part of the Long Arm Statute above quoted. As stated above, that statute requires among other things that when service is made by mail, "proof of service shall include a receipt signed by the addressee or other evidence of personal delivery to the addressee satisfactory to the court." While it appears that the summons clerk in the office of the Secretary of State probably did mail a certified letter containing a copy of the summons in this case to the defendant, Autocrat Corporation, at its principal office in Illinois, nowhere in the record is there any evidence of proof of service by a receipt signed by the addressee. Nor is there any showing of other evidence of personal delivery

to the addressee "satisfactory to the court." It is true that on September 26, 1974, the same date that the court entered its order overruling plaintiff's motion for rehearing and dismissing plaintiff's second amended petition as to defendant Autocrat Corporation, an attorney for plaintiff filed in the office of the clerk of the District Court an affidavit entitled "Affidavit In Support of Motion for Re-hearing," including as exhibits attached thereto, among other things, a photocopy of certain records in the office of the Secretary of State showing the mailing of certified letters to the defendant enclosing a copy of the summons in the case, a letter from Autocrat Corporation acknowledging receipt of summons, and a copy of a letter from one of the attorney's for the plaintiff showing that a copy of the petition was mailed to the defendant. Again assuming, arguendo, that the affidavit and documents referred to might have been found by the court to be sufficient to constitute "evidence of personal delivery to the addressee satisfactory to the court," the fact still remains that there is no showing that any of these documents was ever brought to the attention of the judge when the motion for rehearing was heard, or was introduced in evidence at that hearing. It is true, of course, that an affidavit may be used to prove the service of a summons, notice or other process in an action. See, § 25-1244, R. R. S. 1943; Erdman v. National Indemnity Co., 180 Neb. 133, 141 N. W. 2d 753 (1966). While the law permits the use of affidavits for that purpose, and thus avoids problems relating to same with reference to the "hearsay" rule, it is still a requirement of law that before such affidavit may be considered in this court, it must first be introduced and received in evidence. The mere filing in the office of the clerk of the District Court and its inclusion in the transcript is not sufficient. In State ex rel. Pierson v. Fawcett, 2 Neb. Unoff. 243, 96 N. W. 219 (1901), it was held that an affidavit may

be used to prove the service of process; but is not part of the bill of exceptions, unless presented to the trial court. In Spidel Farm Supply, Inc. v. Line, 165 Neb. 664, 86 N. W. 2d 789 (1957), this court stated: "There is no affidavit preserved or contained in the bill of exceptions in this case. The effect of this omission is that any affidavit considered by the district court is not before and may not be considered by this court. An affidavit used as evidence in the district court cannot be considered on an appeal of a cause to this court unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. Berg v. Griffiths, 127 Neb. 501, 256 N. W. 44, 102 A. L. R. 1124; Harder v. Harder, 162 Neb. 433, 76 N. W. 2d 260. The fact that an affidavit used as evidence in the district court was filed in the office of the clerk of the district court and made a part of the transcript is not important to a consideration and decision of an appeal in the cause to this court. If such an affidavit is not preserved in a bill of exceptions, its existence or contents cannot be known by this court. Harder v. Harder, supra; Frye v. Frye, 158 Neb. 694, 64 N. W. 2d 468." Numerous other cases to the same effect are collected in 2 Nebraska Digest, Appeal & Error, Key No. 523(2).

We have uniformly held that statutes prescribing the manner of service of summons are mandatory and must be strictly complied with. Erdman v. National Indemnity Co., *supra*; Nelson v. Robinson, 154 Neb. 64, 46 N. W. 2d 892 (1951). We have also recently held that a statute which authorizes the use of postal service to notify a defendant that he has been sued in court is strictly construed and must be specifically observed. Wilson v. Smith, 193 Neb. 433, 227 N. W. 2d 597 (1975). As demonstrated above, it is clear that plaintiff has failed to effect valid service of process under either of the statutes discussed above, and that the action of the trial court in sustaining defendant's special appearances

and dismissing the action as to Autocrat Corporation was correct, and must be affirmed.

AFFIRMED.

WHITE, C. J., participating on briefs.

L. J. DUROUSSEAU, APPELLANT, V. NEBRASKA STATE RACING COMMISSION ET AL., APPELLEES.
231 N. W. 2d 566

Filed July 10, 1975. No. 39874.

1. **Racing Commission: Licenses and Permits: Administrative Law.** The Nebraska State Racing Commission has authority to bring an original action on its own motion to revoke any license issued by the commission where the holder has violated the rules and regulations of the commission.
2. **Rules: Time.** Whether a proceeding be criminal or civil the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place.
3. **Administrative Law.** An administrative agency may take notice of general, technical, or scientific facts within its specialized knowledge, and may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.
4. **Judgments: Res Judicata.** If a judgment of dismissal is on the merits it operates to preclude subsequent relitigation of the same cause of action but if it is not on the merits it does not operate to preclude subsequent relitigation of the same cause of action.
5. **Licenses and Permits: Administrative Law.** An order of revocation of a license to engage in an occupation or profession will ordinarily not be disturbed on appeal in the absence of an abuse of discretion.

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

Nelson, Harding, Marchetti, Leonard & Tate, Kermit A. Brashear, II, and Thomas J. Graham, Jr., for appellant.

Edmund D. McEachen and Thomas E. Johnson of Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellees.

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

MCCOWN, J.

This is an appeal from a decree of the District Court for Douglas County, Nebraska, affirming an order of the Nebraska State Racing Commission revoking the jockey license of the appellant, L. J. Durousseau.

The appellant, L. J. Durousseau, is a professional race horse jockey who held a jockey license issued by the Nebraska State Racing Commission. In May 1974, he was riding as a jockey in a scheduled race meeting at Ak-Sar-Ben track in Omaha, Nebraska. At that time rule 18.19 of the Nebraska Rules of Racing, 1970, had been duly adopted, published, and filed, and was in full force and effect. "No electrical or mechanical device or other expedient designed to increase or decrease the speed of a horse, (or that would tend so to do) other than the ordinary whip, shall be possessed by any one or applied by any one to a horse at any time on the grounds of an Association, during a Meeting whether in a race or otherwise."

On May 9, 1974, after appellant had mounted his horse for the eighth race, he was ordered to dismount. Several witnesses observed him drop an object to the ground. The object was picked up and identified as an electrical device, possession of which was prohibited by rule 18.19. On May 10, 1974, the board of stewards for the race track held an informal hearing and issued a ruling suspending the appellant for the balance of the Ak-Sar-Ben racing season. On the same day, appellant applied to the District Court for Douglas County and was granted a temporary restraining order permitting him to continue riding at Ak-Sar-Ben. On May 14, 1974, the appellant filed an appeal from the ruling of

the board of stewards under rule 7.01 of the Nebraska Rules of Racing, 1970. That rule contained only skeletal provisions for practice and procedure. The commission set a hearing on the appeal for May 21, 1974, and at the beginning of the hearing appellant's counsel objected to the entire proceeding upon the ground that the commission and the board of stewards lacked jurisdiction to consider the matter because the commission had failed to adopt appropriate rules of procedure in contested cases as required by section 84-913, R. R. S. 1943, and related statutes. The commission adjourned the hearing to consider the objection and no evidence or testimony was taken. Apparently because of the objection, the commission then initiated action to adopt rules of procedure in contested cases. After due notice, the commission conducted a public hearing on June 13, 1974, on the proposed new rules. On June 25, 1974, the commission adopted rules of practice and procedure covering hearings in contested cases. The new rules of practice and procedure were filed with the Secretary of State and the Clerk of the Legislature on June 26, 1974, and were thereafter in full force and effect. Rule 7.02 of the new rules of practice and procedure specifically provides that the new rules govern any hearing initiated by the racing commission upon its own motion pursuant to any matter within its jurisdiction, including, but not to be limited to, the denial or revocation of any license required by statute or by the rules of racing.

On June 29, 1974, the board of stewards vacated its May 10, 1974, ruling suspending the appellant at Ak-Sar-Ben. The revocation was "without prejudice due to alleged procedural inadequacies," and referred the matter to the Nebraska State Racing Commission for further action it deemed necessary. On June 29, 1974, the commission gave notice to appellant of a hearing to be held on July 9, 1974, on the alleged violation by the appellant of rule 18.19 of the Nebraska Rules of Racing, 1970. The notice was supplemented on July 3, 1974, to specify

that it involved the alleged violation of May 9, 1974. At the hearing on July 9, 1974, it was stated that the hearing was an original hearing on a charge of violation of rule 18.19, for the purpose of determining whether appellant was guilty of the charge, and that the penalty could include suspension or revocation of his license to act as a jockey in Nebraska. A full hearing was then had at which witnesses for both parties testified under oath as to events preceding the eighth race on May 9, 1974. Several witnesses testified that they had observed the appellant drop an object from his hand. The object was picked up and identified as an illegal electrical device and tested to establish that it contained an electrical charge. The appellant denied having knowledge or possession of any device. On July 15, 1974, the appellant was found guilty of the charge and the commission revoked his Nebraska jockey license. The commission also determined that appellant would not be eligible for a jockey license in Nebraska until January 1, 1977.

On July 24, 1974, the appellant appealed to the District Court from the order of the Nebraska State Racing Commission. On November 1, 1974, the District Court found against the appellant; affirmed the action of the commission in all respects; and dismissed the appeal.

The appellant contends that the commission had no jurisdiction or power to enforce rule 18.19, nor to revoke appellant's license for a rule violation which occurred before the commission had adopted rules of practice and procedure in contested cases as required by statute. The appellant relies upon several complicated and involved theories and assumptions but the entire attack rests on the contention that the commission had no authority or jurisdiction to initiate an original proceeding on its own motion to revoke a jockey license, where the procedural rules under which the hearing was conducted were adopted after the violation charged had occurred. That contention is unsupportable.

Section 2-1203, R. R. S. 1943, provides that the State Racing Commission "shall have power to prescribe and enforce rules and regulations governing horse races and race meetings, licensed as hereinafter provided."

The Nebraska Rules of Racing, 1970, had been duly and regularly adopted by the commission and were in full force and effect at all times involved here. Rule 10.01 provides that any person engaged in racing, including jockeys, must be licensed by the Nebraska State Racing Commission. Rule 10.15 provides in part: "The State Racing Commission may deny or revoke any license where the holder thereof has violated the rules and regulations of the Commission."

Rule 13.88 provides that the board of stewards shall have power to regulate and govern the conduct of jockeys during, before, and after races, unless the power and the duty is vested in the racing commission. Rule 13.92 provides: "The Stewards have power to punish at their discretion any person subject to their control either by suspension of the privilege of attending the races during the meeting or by suspension from acting or riding during the meeting plus ten (10) days or by fine not exceeding $200.00 or both, and if they consider necessary any further punishment or additional fine, they shall so report to the Nebraska State Racing Commission." Rule 2.04 provides that the commission may rescind or modify any penalty or decision on infraction of the rules imposed or made by the racing officials, including stewards.

It is apparent that only the commission has the power or authority to issue or revoke a jockey license. It is also apparent that the power of the board of stewards to punish a jockey is limited, and the racing commission not only has authority and jurisdiction to hear an appeal from a ruling of the board of stewards and rescind or modify it, but it also has the authority to bring an original action for revocation of a license, or for further

punishment where necessary. The action here before the State Racing Commission was an original proceeding by the commission on its own motion for the purpose of determining whether appellant was guilty of violating rule 18.19 on May 9, 1974. There was also due and proper notice that the penalty might include revocation of his license to act as a jockey in Nebraska.

On May 9, 1974, and at time appellant filed his appeal from the ruling of the board of stewards, the only procedural rules for contested cases before the commission were those contained under rule 7.01 of the Nebraska Rules of Racing, 1970. Those rules, by their terms, applied only to an appeal from a ruling of the board of stewards and, in addition, they did not meet the requirements of due process required by the Administrative Procedures Act. As the trial court found, any action by the commission or an agency subordinate to it involving contested matters under those rules would have been void. The commission therefore instituted the necessary steps to adopt the new procedural rules. The substantive rules of racing which appellant was charged with violating and which were in effect at the time of the alleged violation were not altered, modified, or amended in any respects. Only the procedural rules were amended. It is a well-established principle that whether a proceeding be criminal or civil, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place. See, Thompson v. Utah, 170 U. S. 343, 18 S. Ct. 620, 42 L. Ed. 1061; Landay v. United States, 108 F. 2d 698, cert. den. 309 U. S. 681, 60 S. Ct. 721, 84 L. Ed. 1024.

As this court said more than 20 years ago: "No rule of constitutional interpretation is violated by a legislative provision declaring retroactively a procedural method of recovery upon an existing substantive right. Such a provision may be retroactive in its application."

County of Hamilton v. Thomsen, 158 Neb. 254, 63 N. W. 2d 168.

The appellant asserts that the amended procedural rules were not valid nor effective because they had not yet been filed with the Revisor of Regulations. The statutory requirement for such filing becomes effective no sooner than June 30, 1975, nor later than August 31, 1975. See § 84-902, R. S. Supp., 1974. The procedural rules adopted by the commission and filed with the Secretary of State on June 26, 1974, were valid and effective and were applicable to the hearing before the commission on July 9, 1974.

Appellant contends that the commission improperly took judicial notice of the fact that the object allegedly in the possession of the appellant was an electrical device designed to increase or decrease the speed of a horse. There was sufficient expert testimony at the hearing to establish that fact without the necessity of any judicial notice. The fact was overwhelmingly established. Even if it were not, an administrative agency may take notice of general, technical, or scientific facts within its specialized knowledge, and may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it. § 84-914(5), R. R. S. 1943.

The appellant also contends that the vacation of the ruling by the board of stewards and its dismissal "without prejudice due to alleged procedural inadequacies" was somehow a dismissal with prejudice which becomes res judicata and precludes any subsequent litigation of the issue. It is apparent that even though the original ruling of the stewards finding the appellant guilty may have been on the merits, the vacation and dismissal was not on the merits. The proposition is well established that if a judgment of dismissal is on the merits it operates to preclude subsequent relitigation of the same cause of action, but if it is not on the merits it does not operate to preclude subsequent relitigation of the same cause of

action. See 46 Am. Jur. 2d, Judgments, § 479, p. 643. The dismissal of the stewards ruling "without prejudice" did not operate to preclude any subsequent proceedings by the commission on the same cause of action.

The evidence in this case unequivocally established the appellant's violation of rule 18.19 of the Nebraska Rules of Racing, 1970. The finding of guilt on the basis of the evidence presented, and the revocation of license were fully supported by the evidence. The appellant has failed to demonstrate any abuse of discretion by the commission. An order of revocation of a license to engage in an occupation or profession will ordinarily not be disturbed on appeal in the absence of an abuse of discretion. State ex rel. Meyer v. Eyen, 184 Neb. 848, 172 N. W. 2d 617, cert. den. 398 U. S. 951, 90 S. Ct. 1872, 26 L. Ed. 2d 292.

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

AFFIRMED.

SOPHIE WEES, APPELLANT, V. CREIGHTON MEMORIAL ST. JOSEPH'S HOSPITAL, APPELLEE.
231 N. W. 2d 570

Filed July 10, 1975. No. 39894.

1. **Trial: Verdicts.** A motion for a directed verdict or its equivalent 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, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Hospitals: Torts: Negligence.** The proper measure of the duty of a hospital to a patient is the exercise of that degree of care, skill, and diligence used by hospitals generally in the community where the hospital is located or in similar communities.
3. **Trial: Proximate Cause: Negligence.** In an action for negli-

gence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.

4. **Trial: Evidence.** The burden of proving a cause of action is not sustained by evidence from which the jury can arrive at its conclusion only by mere guess or conjecture.
5. **Trial: Negligence.** Negligence is never presumed. The mere happening of an accident does not create a presumption or authorize an inference of negligence.
6. **Trial: Evidence.** In every case before an issue may be submitted to a jury, there is a preliminary question for the court, not whether there is literally no evidence, but whether there is sufficient evidence upon which a jury can properly proceed to find a verdict for the party upon whom the burden is imposed.

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

Edward F. Fogarty, Robert H. Beach, and Howard B. Westering, for appellant.

David A. Svoboda of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

SPENCER, J.

Plaintiff, Sophie Wees, appeals the order of the trial court dismissing her cause of action at the conclusion of her case-in-chief. We affirm.

Plaintiff was admitted to Creighton Memorial St. Joseph's Hospital on September 22, 1970, for psychiatric care. At that time she was 52 years of age. She was under the care of Doctor Chester H. Farrell. She had been his patient since 1947, and had been hospitalized approximately 10 times between 1947 and 1970. He diagnosed her as a catatonic schizophrenic. Her mental illness was characterized by recurring episodes during which she withdrew from contact with reality and became mute and quite withdrawn. She was hospitalized

due to the onset of one of her periods of severe withdrawal.

On October 12, 1970, about 3:30 p.m., the plaintiff mentioned to a nurse that she had a pain in her arm. The arm was red and swollen. Subsequently it was discovered the arm was broken. Doctor Farrell testified plaintiff had a comminuted fracture of the left humerus and it was such that it had to be from a fall, but that she could have fallen against the wall without falling clear down. He also testified that it wouldn't be unusual for her to have had the injury and to have kept quiet about it. The exact details of how she broke her arm are not known, nor is there any testimony as to a fall except of plaintiff, which we detail hereafter.

The case was tried to a jury. Specifications of negligence charged the fall was due to: (1) Failure to restrain the plaintiff in her bed when the hospital knew or should have known plaintiff's condition required such action; (2) failure to use side railings; (3) allowing the plaintiff to leave her room while unattended by a nurse or other aid; and (4) failure to provide reasonable supervision and assistance in the form of surveillance and attendance by hospital personnel as required by hospital rules.

We review the record in accordance with the rule enunciated in Wrasse v. Gustavson (1975), 193 Neb. 41, 225 N. W. 2d 274: "A motion for a directed verdict or its equivalent 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, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence."

In Foley v. Bishop Clarkson Memorial Hospital (1970), 185 Neb. 89, 173 N. W. 2d 881, we held: "The proper measure of the duty of a hospital to a patient is the exercise of that degree of care, skill, and diligence

used by hospitals generally in the community where the hospital is located or in similar communities." To meet this criteria the plaintiff introduced excerpts from the Creighton Memorial St. Joseph's Hospital Manual of Policies and Procedures for its Psychiatric Unit. Doctor Farrell testified these were at least equal to those of other hospitals in the community.

The plaintiff was confined in the psychiatric ward, which is a closed and controlled unit. It consisted of a number of rooms separated by a hallway, with a recreation area, a dining room, and a sun porch. The ward was locked and no one could leave it without supervision. For the first 4 days of plaintiff's confinement, she was restrained in a room by herself. Her wrists were tied down and she was unable to get out of bed. The bed had side rails. Pursuant to her doctor's orders, after the 4 days plaintiff was moved to a two-bedroom unit and all restraints were removed. She had the run of the psychiatric ward.

Plaintiff's daughter, who visited her three times a week, testified that about a week before October 12, her mother seemed to have dizzy spells, dropped a cup of coffee, and seemed a little worse to her. She wouldn't talk as much. The mother told her she felt dizzy and sleepy a lot of the time. She was not under restraint. When the daughter left, her mother walked with her to the door of the nurses' station which was about five doors from her room. She had an unsteady gait. The daughter called Dr. Farrell about it and asked him to put her mother in restraint again because she was dizzy.

When the daughter visited her mother the next Sunday she found her on the sunporch. She seemed to be worse and still was dizzy. The daughter did not notice any restraints. She again walked to the nurses' station with her mother, but held on to her to steady her. She did not discuss the mother's dizziness with the hospital personnel, or request them for assistance to get her mother back to her room. On the next day, October 12, 1970,

Dr. Farrell called her father to tell him that her mother had fallen and broken her arm. She visited her mother the next morning. Her mother was in bed with ice packs on her shoulder, still very confused, and didn't know what had happened. The mother told her she guessed she had fallen down.

At the time of the trial 4 years later, plaintiff's testimony as to how she sustained the injury was still vague. Although quizzed several times in her direct examination as to her recollection of the fall, she had none, and she had no explanation as to how she broke her arm. When asked, "Is there any recollection at all of taking a fall or bumping the arm?" her answer was, "Know when I fell out of the chair?" The rest of the examination was as follows: "Q. You recall falling on a chair? A. Yeah. Q. Do you recall where that chair was? A. No, I don't. Q. Could you describe how you fell? A. No, I can't. Q. You don't recall whether you landed on your left side on the floor? A. Yeah, I landed on the floor. Q. You landed on the floor. Do you recall if it was a hard surface or if it was a carpeted floor? A. I think it was not carpet but inlaid. Q. An inlaid floor? A. Yes. Q. Hard surface? A. Yes. Q. Was there anyone around when you fell? A. I don't remember that either. Q. Do you recall whether anybody came to assist you? A. No. Q. What did you do after you fell? A. I just walked around, I guess. Q. You got up by yourself? A. Yes. Q. Did you walk back to your room, or did you go somewhere else? A. No, I went to my room."

Plaintiff called Doctor Chester H. Farrell as her witness. He did not remember plaintiff's daughter suggesting that her mother be placed in restraint. He did testify that on October 12 he did not have any orders for the patient to be placed in physical restraint of any kind. At 2:15 p.m. he did order her to bed rest because of excessive menstruation, and requested that she be checked by a gynecologist. He testified the plaintiff's

conduct was the opposite of aggressiveness. The only time he recommends restraint is when a patient is disturbed in an aggressive fashion. He has never known the plaintiff to be aggressive. He permitted her to move about to attempt to get her to relate to other people. She was withdrawn and did not relate. She was in fact more or less mute. He had read the nurses' daily reports and was aware of plaintiff's pacing and fending falls.

The nurses' notes for Sunday, October 11, 1970, are as follows: "Awaken by roommate a couple times—appeared quite confused when awakened, called for a nurse but didn't want anything. * * * Very rigid and much pacing. Door to room was locked because was constantly in bed. On sunporch lying on couch. Needed firm direction to sit up. * * * Continues to pace and appear rigid. States she feels nervous and all she feels will help is the pacing. Husband and daughter here to visit. Needs encouragement to sit up on couch."

The notes on October 12, until the complaint about the pain in her shoulder, are as follows: "Apparently slept * * * up to breakfast, later on sunporch, began falling about on porch, does this mostly when staff is around, also seems bland and when walking, she starts to tip over on face, refused to take bath, ate lunch well. Later was bathed by staff, put on sunporch in chair. Now in bed until Dr. sees her tomorrow."

The plaintiff offered in evidence some excerpts from the Manual of Policies and Procedures of the Creighton Memorial St. Joseph's Hospital Psychiatric Unit. Portions of these excerpts set out in the plaintiff's brief, are as follows:

"OLV III is a maximum security nursing unit with limitations to provide the patient with protection from himself and the environment and to reduce stimuli. Furnishings of the unit are limited to essentials to reduce hazards.

"It is the responsibility of the nursing personnel to create an atmosphere of warmth and acceptance. This

therapeutic environment is reflected by attitudes and vigilance for the patient's well being. * * *

"Every precaution has been taken to prevent harm to the patient. * * *

"All doors leading to the nursing unit are to be locked at all times. * * *

"The patient must be supervised at all times and may leave the nursing unit only with the permission from an attending physician and when accompanied by a personnel member. * * *

"Assist ambulatory patients as needed, promote a feeling of doing as much as possible for themselves. Patients who need to use a wheel chair will also need the use of the safety belt.

"Awareness of patient's total condition is extremely important to prevent falls while resting in bed or maintaining bed rest. Protective measures for the patients are the use of siderails, safety vests and a Hi-Lo bed when available. Conditions which warrant such measures are:

"Elderly patients who are confused, weak or unsteady

"Patients under heavy sedation who may become disoriented or unaware of their ability to be up without support

"Patients who refuse to maintain bed rest, e. g., ataxia or possible postural hypotension from medications, cardiac involvement

"Comatose or hemiplegic patients

"Post-operative patients."

Plaintiff's case is predicated on the fact that the plaintiff fell. How, or when, or why is not explained in the record. The inference plaintiff seeks to draw is plaintiff could not have broken her arm unless the defendant was negligent. In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. Saab v. Omaha

& C. B. St. Ry. Co. (1960), 170 Neb. 198, 102 N. W. 2d 59.

The burden of proving a cause of action is not sustained by evidence from which the jury can arrive at its conclusion only by mere guess or conjecture. Odom v. Willms (1964), 177 Neb. 699, 131 N. W. 2d 140.

Plaintiff first argues that the hospital personnel were under a duty to restrain the plaintiff for her own protection. The fallacy with this argument is that the attending psychiatrist did not require restraints, and he had the benefit of the same hospital notes which plaintiff contends are sufficient to charge the hospital personnel with notice. In fact, when his attention was called to the notes, he stated that he relied on his own opinion. The evidence is as follows: "Q. Now, if the nurse who you talked to had dismissed these episodes of falling around on the porch as minor, attention-getting activity, your knowledge of the situation would rely pretty much on what she tells you; isn't that right? A. Well, as far as the telling, yes. I still would reserve the right to make my own opinion. I have always done that. I probably always will. I don't always pay attention to what is told me. I have to go and look for it myself because the responsibility for that patient is still on my back." Obviously, we cannot infer negligence on the part of the hospital personnel in failing to use restraints when they had advised the doctor of the situation and were following his directions. As the doctor said, he was in charge. The doctor testified he did not prescribe restraints. If he had done so, he would have made a record of it.

Negligence is never presumed. The mere happening of an accident does not create a presumption or authorize an inference of negligence. That is the plaintiff's dilemma. She did sustain a broken arm, but there is no definite testimony as to how, when, or why it may have happened. It is not known whether plaintiff was sitting in a chair and fell out of it onto the floor. It is not known whether she walked into a chair and fell.

It is not known whether the incident occurred on the sunporch or if she fell down or against the wall in the hall. In fact there is no evidence she fell except the nature of the injury and plaintiff's vague testimony. It is evident from the record, however, that she was not in her room nor in her bed, and she was ambulatory as per her doctor's orders. We have merely the inference plaintiff seeks to draw that if the hospital personnel had exercised reasonable supervision and assistance she would not have sustained the injury. At best, this is nothing more than surmise or conjecture.

It is entirely possible the hospital staff could have been providing the utmost in supervision and the plaintiff still could have sustained the injury. The staff was merely following the doctor's orders in giving plaintiff the freedom of the ward and in putting her on the sunporch. This is not a res ipsa loquitur case. Negligence is not presumed. The mere fact that the plaintiff had a broken arm does not prove that the hospital personnel were negligent. It is essential to the existence of negligence that there be some fault on the part of the person sought to be held liable. The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured. Schroeder v. Sharp (1950), 153 Neb. 73, 43 N. W. 2d 572.

What is reasonable supervision and assistance? Does it mean constant supervision? Does it mean that a hospital attendant must be with the patient every second of the day? There is no showing of any hospital standard requiring a constant, one-on-one attendance and observation by nurse, technician, or aid for every patient. In the absence of evidence to the contrary, we do not interpret reasonable supervision to require this type of care.

On October 11, when the daughter and the husband left the hospital, the plaintiff walked them to the door of the nurses' station, which was about five doors from her room. The daughter testified her mother had an un-

steady gait but did not require assistance for her mother from any of the hospital personnel nor did she discuss her mother's dizziness with any of them. We must assume that she believed that her mother would get back to her room without difficulty.

We are unable to find any evidence in the record sufficient to require the submission of this case to the jury. There is no proof of any negligence which was the proximate cause of plaintiff's injury. In every case before an issue may be submitted to a jury, there is a preliminary question for the court, not whether there is literally no evidence, but whether there is sufficient evidence upon which a jury can properly proceed to find a verdict for the party upon whom the burden is imposed. Fairmont Creamery Co. v. Thompson (1941), 139 Neb. 677, 298 N. W. 551. The trial court properly directed a verdict against the plaintiff herein.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN J. KRUEGER, APPELLANT.
231 N. W. 2d 364

Filed July 10, 1975. No. 39901.

1. **Criminal Law: Confessions.** Where an accused in custody has been fully informed as to all his constitutional rights, and thereafter makes a statement admitting criminal conduct, the statement is admissible if it was otherwise voluntarily made.
2. **Criminal Law: Confessions: Police Officers and Sheriffs.** Law enforcement officers should make sure that no statements are made which offer the defendant a benefit or an advantage dependent upon the making or executing of a statement or confession.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Arnold E. Wullschleger, for appellant.

Paul L. Douglas, 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 convicted of assault with intent to rape and sentenced to imprisonment for 2 to 4 years. He appeals contending the trial court erred in permitting the State to introduce a statement he made to the police while in custody.

The assault took place on July 25, 1974, in Beatrice, Nebraska, in a shed at a miniature golf course where the victim was employed. The victim was struck about the face and head and the evidence indicates a rape would have occurred if the victim had not suffered an asthmatic attack during the assault. The defendant was positively identified by the victim and a friend of the victim who had seen the defendant at the golf course before the assault occurred.

The defendant was apprehended at about 3:15 p.m. that afternoon and taken to the police station. When advised as to his rights, the defendant stated that he would like to have an attorney. The police advised the defendant he could use the telephone to call a lawyer, but the defendant said he did not know anyone in Beatrice and didn't have money to hire one from Lincoln. The defendant was advised as to his rights about an hour and a half later but again declined to make a statement. Although the defendant had declined to make a statement, and was not furnished counsel, the police continued to question him.

At a pretrial hearing the defendant testified a police lieutenant had told him that if the defendant made a statement he would be charged with only assault and battery. This officer did not testify at the pretrial hear-

ing or at the trial, and the defendant's testimony in that regard was not contradicted. There was also evidence of conversation concerning a possible reduction of the charge in the event of insufficient evidence or other circumstances.

A complaint charging the defendant with assault with intent to rape was filed the next day and the defendant was taken before the county judge. While the defendant was being removed from the jail to be taken to the courthouse he asked one of the police officers if a statement would help him. The officer answered that he did not know, but that the police would listen to the defendant if he had a statement to make. The defendant then wrote a statement on the back of the rights form in which he admitted the assault but did not admit its purpose. The defendant contends this statement should not have been received in evidence because it was obtained in violation of his constitutional rights as declared in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974.

In Miranda v. Arizona, *supra,* the United States Supreme Court stated: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. * * * If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." See, also, State v. Moore, 189 Neb. 354, 202 N. W. 2d 740.

The record in this case indicates the police continued to question the defendant although he had declined to give a statement and had requested counsel. If a statement had been obtained on July 25, 1974, it might have been inadmissible because of the disregard of the defendant's rights. However, no statement was obtained at that time. See State v. Silvacarvalho, 180 Neb. 755, 145 N. W. 2d 447.

The question here is whether the statements concerning a possible reduction in the charge, made on July 25,

1974, carried over to the next day and rendered the statement made at that time inadmissible. Law enforcement officers should make sure that no statements are made which offer the defendant a benefit or an advantage dependent upon the making or executing of a statement or confession. State v. McDonald, 187 Neb. 752, 194 N. W. 2d 183.

In this case there was about a 24-hour interval between the statements concerning a possible reduction of the charge and the making of the statement. In reply to the defendant's inquiry on July 25, 1974, as to whether the giving of a statement would benefit him, the officer stated he did not know. Under these circumstances the trial court and the jury could find that the statement made on July 26, 1974, was voluntary and made by a defendant who was fully cognizant of all his rights. See, State v. Godfrey, 182 Neb. 451, 155 N. W. 2d 438; State v. Woods, 182 Neb. 668, 156 N. W. 2d 786; State v. Davis, 180 Neb. 830, 146 N. W. 2d 220.

The judgment is therefore affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The record here establishes that after the 18-year-old defendant had asked for a lawyer and declined to give a statement, the police continued to question him and later renewed the questioning in direct violation of the specific requirements of Miranda. Officer Klevemann admitted he told the defendant that he might be charged with something less than assault with intent to commit rape. The defendant testified that Lt. Stevens told the defendant that if he made a statement he would only be charged with assault and battery. That testimony was completely uncontradicted. On the following day when the defendant asked one of the same police officers if a statement then would help in his defense, the officer stated that he did not know, but proceeded to inquire if the defendant wanted to give a statement. After a recitation of the Miranda rights advisory form the

critical statement was given at a time before any counsel had been appointed for the defendant and even before the preliminary hearing. Such a flagrant violation of the clear commandments of Miranda, coupled with the direct inducement of a promise of a reduced charge, ought not to go unchallenged.

The rote recitation of the Miranda rights advisory form by a police officer does not by itself constitute compliance with Miranda nor justify a violation of the clear commandment that where a defendant wishes to remain silent and wants an attorney, the interrogation must cease until an attorney is present. Neither does a repetition of the recitation of a rights advisory form on the next day cure all prior violations where the unwithdrawn and improper inducements still tainted the voluntary nature of any statement. The requirement that a defendant be advised of certain constitutional rights is only an attempt to insure that the basic constitutional protection granted by Miranda will be granted to every defendant. To give even tacit approval to the flagrant violation here is to treat the right to counsel and the right against self-incrimination as if they were constitutional ghosts to be exorcised by the incantation of a Miranda rights advisory form. A violation of such basic constitutional rights is not so easily cured. In this case it is ironic that in hard reality the critical statement the officers sought to obtain was unnecessary for the conviction.

MURIEL VOGT, APPELLANT AND CROSS-APPELLEE, V. TOWN AND COUNTRY REALTY OF LINCOLN, INC. ET AL., APPELLEES AND CROSS-APPELLANTS.
231 N. W. 2d 496

Filed July 17, 1975. No. 39688.

1. **Brokers: Principal and Agent.** A real estate broker is an agent

owing a fiduciary duty (1) to use reasonable care, skill, and diligence in procuring the greatest advantage for his client, and (2) to act honestly and in good faith, making full disclosures to his client of all material facts affecting his interests. A neglect to do so renders him liable to his client for whatever loss the latter may suffer as a consequence thereof.

2. **Brokers: Principal and Agent: Trial.** The burden of proof is upon the real estate agent to show that he satisfied the fiduciary duties he owed his principal.
3. **Brokers: Principal and Agent: Fraud.** A stockholder and officer of a real estate brokerage firm is jointly and individually liable for a breach of a fiduciary duty and constructive fraud committed by said firm where he had knowledge of and instigated such breach and fraud.
4. **Fraud.** Constructive fraud involves a breach of a fiduciary duty and neither actual dishonesty of purpose nor intent to deceive is an essential element.
5. **Brokers: Principal and Agent: Time.** A real estate broker becomes the agent of a property owner and owes the fiduciary duties incident to such relationship from the moment the parties orally agree to the listing of the property for the owner.
6. **Brokers: Principal and Agent: Fees.** A commission cannot be collected by the real estate broker for his services if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency.
7. **Trial: Witnesses: Damages.** The opinion of a witness as to the value of property will ordinarily be received if he is familiar with the property and its uses and is informed as to the state of the market, the weight and credibility of his evidence being for the trier of fact.
8. ———: ———: ———. The admissibility of expert testimony is ordinarily within the discretion of the trial court and its ruling will be upheld on appeal unless an abuse of discretion is shown.

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

Christensen & Glynn, for appellant.

Barney & Carter, for appellees.

Heard before SPENCER, NEWTON, CLINTON, and BRODKEY, JJ., and WARREN, District Judge.

WARREN, District Judge.

This is an action brought by plaintiff Muriel Vogt in the District Court for Lancaster County against the defendants Town & Country Realty of Lincoln, Inc., one of its real estate brokers Stanley Portsche, and Gerald F. Gulland and his wife Peggy A. Gulland, purchasers, to recover damages for fraud arising out of a 1971 real estate transaction in which plaintiff sold a Lincoln residence to defendants Gulland while defendant Portsche was purporting to act as the plaintiff's agent and broker, and while the defendant Gerald F. Gulland was a fellow officer, stockholder, and broker with Portsche in Town & Country Realty of Lincoln, Inc. For convenience, the defendant Town & Country Realty of Lincoln, Inc., will be hereinafter referred to as Town & Country.

The trial court found that defendants Town & Country and Stanley Portsche breached their fiduciary duties owed plaintiff in material respects; ordered them to refund the real estate commission of $810; and entered judgment against all defendants for additional damages of $2,500. Plaintiff appealed, contending that damages were inadequate. Defendants cross-appealed from the findings of the trial court with respect to both breach of fiduciary duties and the damages assessed. We affirm.

In early February 1971, plaintiff was contacted by phone at her home in Omaha by defendant Portsche, who inquired whether she had considered selling her house at 1728 South 26th Street, in Lincoln. He explained he was a representative of Town & Country, that he had someone interested in looking at the property, and that his firm would like to list her property if she decided to sell. Plaintiff replied that she had not yet decided to sell, but gave Portsche permission to call her again. A week later, Portsche called plaintiff a second time and plaintiff advised him she had decided to sell the house. Asked what he could get for it, Portsche said $12,500. Plaintiff argued that this was not sufficient, extolled the virtues of the home, and when

Portsche said that in that case maybe she could get $13,500, plaintiff told him she would list it with Portsche at that price. Plaintiff advised him she was doing redecorating work inside, and Portsche advised her not to do contemplated exterior painting and reroofing because she would not realize any more for the property as a result. Portsche was to call back as to when the house could be inspected. Plaintiff continued to do interior painting, plastering, and varnishing on weekends at the then unoccupied home, and after three further calls from Portsche agreed she would complete her work and show the property the following weekend to his interested party, whose identity had not been divulged to her by Portsche.

On Saturday, March 20, 1971, defendant Portsche and the defendants Gulland arrived at the home where plaintiff was still working. Gullands were introduced by name as the interested parties, but no mention was made of Gerald F. Gulland's capacity as a real estate broker or his connection with Town & Country. The parties inspected the home and left. The following Monday evening defendant Portsche visited plaintiff in Omaha, bearing a signed written offer from the defendants Gulland to purchase the property for $12,500. Portsche then went through a previously prepared handwritten "Seller's Closing Statement" itemizing the various expenses of sale, the mortgage balance of $6,800, and showing that plaintiff would net $4,480. The expenses so itemized included an item designated "Commission 6% $750.00." Plaintiff objected to the price, after which Portsche changed the various figures on his seller's closing statement to reflect a $13,500 selling price, an $810 commission, and a net of $5,400 to plaintiff. Portsche then changed the figures on the Gulland's offer to purchase to $13,500, had plaintiff initial the change and sign the acceptance of the offer, and informed plaintiff that he would go back to Gullands and see if they would accept the change to $13,500. A day or two later, Portsche

phoned plaintiff to advise that Gullands had accepted her counteroffer and to state that he would be down to have her sign some things including the listing agreement which he had forgotten to have her sign on the previous visit.

On March 22, 1971, or thereabouts, plaintiff received a copy of the completed contract, with the changes initialled by defendants Gulland, showing a $500 downpayment check deposited with Town & Country to be held until closing. Portsche had plaintiff sign a "Uniform Listing Contract" giving defendant Town & Country a 30-day exclusive listing of her home at a $13,500 figure, in which she agreed to pay Town & Country a 6 percent commission for professional service "In consideration of your agreement to list and offer for sale the property hereafter described, and to use your efforts to find a purchaser therefor."

The defendants Gulland took possession of the property on April 1, 1971, began making extensive repairs and improvements, moved in on May 1, 1971, and closing was had on June 1, 1971, with the commission of $810 being paid by plaintiff to Town & Country.

In March 1973, plaintiff learned that her former residence was being offered for sale by Town & Country for $31,500. On further investigation she found that it was sold by Gullands to a third party for $28,500; and that Gerald F. Gulland was one of the original incorporators of Town & Country, and was during 1971 the owner of one-seventh of its corporate stock, a licensed real estate broker, and acting as an officer of the firm. She thereupon commenced this action, claiming fraud in the 1971 transaction and praying for damages including return of the commission and imposition of a constructive trust on the $28,500 sale proceeds whereby she would receive the $15,000 excess over her selling price to Gullands.

The defendant Stanley Portsche did not testify in his own defense, and the defendant Gerald F. Gulland took

the stand to testify only with respect to improvements he and his wife made in the property after April 1, 1971. The contentions of the defendants as to their actions can only be gleaned from portions of their discovery depositions which plaintiff offered as admissions against interest. Such testimony, insofar as it differs materially from plaintiff's, was to the effect that Portsche made only one phone call to plaintiff before the inspection of the property and he did not suggest a selling price at any time before Gulland made the written offer; that at the inspection of the house both Portsche and Gulland gave plaintiff their Town & Country business cards; that the evening of the inspection Gulland prepared and delivered to Portsche the written offer to purchase at $12,500 without first discussing price with Portsche; and that Portsche at all times believed the property to be worth only $12,000, and therefore did not advertise the property or solicit any offers other than that of the Gullands. Defendant Portsche explained his behavior by testifying in his deposition that he first learned of the property when the defendant Gerald F. Gulland told him that a house located a block down the street from Gulland's home might be for sale and asked him to look into it inasmuch as Gulland might want to buy it. Portsche testified that he was acting entirely as an agent of Gulland, whom he graphically described as "the main objective, Number 1 client," right up until the time plaintiff signed the listing agreement, and at that moment he was transformed into the plaintiff's real estate agent.

The trial court found that defendants Portsche and Town & Country breached their fiduciary duties owed the plaintiff (1) by failing to disclose the relationship between defendants Gerald F. Gulland and Town & Country; (2) by failing to solicit offers to purchase the property from prospective purchasers other than defendant Gerald F. Gulland; and (3) by listing and selling

the property to defendants Gulland at a price less than its fair and reasonable value.

The trial court further found that the principles of law laid down by this court in Schepers v. Lautenschlager, 173 Neb. 107, 112 N. W. 2d 767 (1962), controlled.

" 'The duties and liabilities of a broker to his employer are essentially those which an agent owes to his principal. A broker owes to his employer the duty of good faith and loyalty, and is required to use such skill as is necessary to accomplish the object of his employment. * * * It is also his duty to give his client the fullest information concerning his transactions and dealings in relation to the property with reference to which he is employed.' * * * 'A broker is a fiduciary required to exercise fidelity and good faith toward his principal in all matters within the scope of his employment. * * * This requirement not only forbids conduct on the part of the broker which is fraudulent or adverse to his client's interests, but also imposes upon him the positive duty of communicating all information he may possess or acquire which is, or may be, material to his employer's advantage.' * * * 'A broker cannot, without violating his general duty of good faith, act for persons having interests adverse to those of his employer, unless he acts with the consent of his employer given with full knowledge of the facts.' * * * 'The rule requiring a broker to act with the utmost good faith towards his principal places him under a legal obligation to make a full, fair, and prompt disclosure to his employer of all facts within his knowledge which are or may be material to the matter in connection with which he is employed, which might affect his principal's rights and interests or influence his action in relation to the subject matter of the employment, or which in any way pertain to the discharge of the agency which the broker has undertaken.' * * * The doctrine is well settled that an agent cannot, either directly or indirectly, have an interest in

the subject matter of the agency without the consent of his principal, freely given, after full knowledge of every matter known to the agent which might affect the principal." Schepers v. Lautenschlager, *supra.*

The relationship between a real estate broker and a property owner for whom the agent has by oral or written contract agreed to sell the owner's property is that of principal and agent. A real estate agent owes a fiduciary duty (1) to use reasonable care, skill, and diligence in procuring the greatest advantage to his client, and (2) to act honestly and in good faith, making full disclosures to his client of all material facts affecting his interests. 12 C. J. S., Brokers, §§ 23 to 57, pp. 66 to 132.

Section 81-881, R. R. S. 1943, in effect at the time of this transaction, listed as unfair trade practices the following: "(5) acting in a dual capacity of broker and undisclosed principal in any transaction; * * * (13) representing or attempting to represent a real estate broker, other than the employer, without the express knowledge or consent of the employer."

The burden of proof is upon the real estate agent to show that he satisfied the fiduciary duties he owed his principal. Allied Securities, Inc. v. Clocker, 185 Neb. 524, 176 N. W. 2d 914 (1970); Jansen v. Williams, 36 Neb. 869, 55 N. W. 279 (1893).

"The general rule is that a broker can neither purchase from, nor sell to, his principal unless the latter expressly assents thereto or, with full knowledge of all the facts and circumstances, acquiesces in such transaction. * * * In the event of any litigation between him and his employer, the burden is upon him to prove both the permission and the exemplary manner in which he availed himself of it. The reason is that it is inconsistent for one to act as principal in his own behalf while in duty bound to act as the agent of another, for in the latter capacity he is bound to exercise his best skill and labor for and a high degree of fidelity and good

faith to secure for his principal the best bargain possible, even though his own conflicting interests at the same time impel him to do just the opposite and thereby gain the most advantageous terms for himself." 12 Am. Jur. 2d, Brokers, § 91, p. 844.

Here, the evidence clearly shows that the plaintiff and defendant Portsche orally agreed at the time of the second phone call, on about February 15, 1971, that plaintiff would list her property with defendant at $13,500, and from that moment on defendant Portsche and his company, Town & Country, owed plaintiff all the fiduciary duties outlined above.

We are not unmindful that section 36-107, R. R. S. 1943, provides: "Every contract for the sale of lands between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent. Such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent." This court has previously disposed of any contention that this statutory provision can be relied upon by an agent to delay imposition of his good faith obligations to make full disclosure until the actual making of a written listing agreement. In Pearlman v. Snitzer, 112 Neb. 135, 198 N. W. 879 (1924), the court said: "That defendant was plaintiff's agent, under a verbal contract, to procure a purchaser for the property plainly appears. The relationship between the parties, even before the written contract was executed, clearly constituted an agency. That is to say, defendant obtained plaintiff's confidence and was entrusted with his business. He was authorized to act for him and in his place. It follows that he owed to his principal the utmost good faith in all that he did. * * * Before his principal signed the contract defendant withheld from him the material fact, upon inquiry, that he had already obtained a purchaser and also all knowledge of the

price which the purchaser agreed to pay. In view of the relationship between the parties this showed bad faith. And so the transaction, on defendant's part, was fraudulent from its inception."

The absurdity of the explanation given by Portsche as to his sudden transformation can be demonstrated by his actions on March 20, 1971, in detailing to plaintiff the commission he was charging her for his services, which was at a time several days before the listing agreement was signed and before he abandoned his role as agent of Gulland and donned the hat of agent for plaintiff. The fact was that Portsche was the plaintiff's agent from and after the oral agreement of February 15, 1971, and her agent alone, in the eyes of the law. Portsche made only a feeble attempt by testifying to the alleged presentation of business cards to prove disclosure of Gulland's relationship to Town & Country. He had the duty to clearly and unequivocally inform the plaintiff. The trial court was clearly correct in holding that Portsche and Town & Country breached their fiduciary duty to plaintiff by that failure to disclose.

"A commission cannot be collected by the agent for his services if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency." Schepers v. Lautenschlager, *supra.* The trial court was correct in decreeing a return of the commission to plaintiff.

The evidence was uncontradicted that the defendants Portsche and Town & Country made no attempt to advertise or solicit offers to purchase the property from anyone except the defendants Gulland. Defendants contend that no such duty exists where the real estate broker has an offer in excess of what the broker believes the property to be worth. It is sufficient to answer this contention to say that such belief must be in good faith and that when the only offer the broker has obtained is from his undisclosed fellow officer and stock-

holder in the listing firm, he has such a duty to solicit other offers to purchase.

The plaintiff assigns as error the failure of the District Court to expressly find that the defendant Gerald F. Gulland owed and breached a fiduciary duty to plaintiff. This assignment is without merit. The trial court entered judgment against all defendants, including Gerald F. Gulland, for the $2,500 which it found to be the difference between the fair market value of the property when sold ($16,000) and the selling price ($13,500).

"All persons who knowlingly aid or participate in committing a breach of trust will be held responsible for the resulting loss, and will be held accountable by personal judgment for the value of the property so converted." Schepers v. Lautenschlager, *supra*. It is evident the trial court found that the defendant Gerald F. Gulland knowingly participated in committing the breach of trust. The evidence shows that Gulland initiated the first contact with plaintiff by Portsche, told Portsche he was interested in personally buying the property, told him to get a listing if he could in the name of their firm, failed to disclose his connection with Portsche and Town & Country, and purchased the property knowing it had not been advertised or offered to anyone else and that a commission was being paid by plaintiff to the defendant firm in which he would share as the owner of one-seventh of the corporate stock. As such, the defendant Gerald F. Gulland was not only a knowledgeable party but was a party to the entire transaction which was instigated for his benefit. The trial court correctly held Gerald F. Gulland personally liable. A stockholder and officer of a real estate brokerage firm is jointly and individually liable for a constructive fraud committed by said firm where he had knowledge of and instigated such fraud.

Constructive fraud involves a breach of a fiduciary duty and neither actual dishonesty or purpose nor intent to deceive is an essential element. Taxpayers'

League v. Wightman, 139 Neb. 212, 296 N. W. 886 (1941).

The finding of the trial court that the defendants Portsche and Town & Country listed and sold the property to the defendants Gulland at a price less than its fair and reasonable value brings us to the questions presented by the principal assignments of error of both parties. Both plaintiff and defendants contend that the District Court erred in finding the fair and reasonable market value of the property to have been $16,000 at the time of the sale to Gullands. The evidence was conflicting, and ranged from evidence that plaintiff had in March 1971 told a third person that she would "like to get twelve five out of it," to the testimony of plaintiff's expert, one Richard W. Putney, that it was worth $20,750 in March 1971. Defendants further assigned as error the receipt in evidence of the Putney opinion as to value. Richard W. Putney, a licensed real estate broker since 1965, testified that he did not see the property until November 1973, and that he never saw the inside of the house. He testified that he had reviewed the depositions of Portsche, Gulland, and the plaintiff Mrs. Vogt, photographs of the interior, the 1971 listing résumé of Town & Country, tax assessment data, and a report of the city housing inspector, and had talked to a neighbor and the present owner. His valuation was based upon six comparable sales of older homes in the same neighborhood during the first 6 months of 1971, computation of the average selling price per square foot, and application of that unit price to the square footage of plaintiff's property.

"The admissibility of expert testimony is ordinarily within the discretion of the trial court and its ruling will be upheld on appeal unless an abuse of discretion is shown." Y Motel, Inc. v. State, 193 Neb. 526, 227 N. W. 2d 869 (1975).

The opinion of a witness as to the value of land will ordinarily be received if he is familiar with the prop-

erty and its uses and is informed as to the state of the market, the weight and credibility of his testimony being for the trier of fact. DeVore v. Board of Equalization, 144 Neb. 351, 13 N. W. 2d 451 (1944).

"A party may not require * * * that a particular witness as to valuation follow or subscribe to any given formula or method of appraisal or require that certain factors affecting valuation be considered." Frank v. State, 176 Neb. 759, 127 N. W. 2d 300 (1964).

The District Court properly received the testimony of the expert witness Putney. It is evident from the finding of the court as to valuation that it did not give full weight and credibility to the $20,750 appraisal.

Plaintiff introduced evidence that when the defendants Gulland obtained a loan of $16,000 to purchase the property from plaintiff, the lending institution made an appraisal of $20,000. The effect of this testimony was lessened by evidence that very extensive improvements had been made by Gullands before the appraisal was made. Defendants offered evidence that the home had been occupied by eight persons as a "commune" in 1969 and 1970 and that the house was in a generally run-down condition. The finding of the trial court that the property had a fair and reasonable market value of $16,000 at the time of the sale to Gullands is supported by the record. We also consider the fact that the trial court saw and heard the witnesses and observed their demeanor, and give great weight to the trial court's judgment as to credibility. Donahoo v. Home of the Good Shepherd of Omaha, Inc., 193 Neb. 586, 228 N. W. 2d 287 (1975).

Plaintiff's last assignment of error is that the District Court erred in determining the measure of damages, contending that under the rule in Schepers v. Lautenschlager, *supra,* a constructive trust was created whereby plaintiff was entitled to the enhanced value of the property including improvements and any accrued profit. By this theory, defendants Gulland would hold in trust

for plaintiff's benefit the proceeds of their sale of the property on May 15, 1973, for $28,500, and plaintiff would be entitled to recover that sum, less the $13,500 received.

In Ericson v. Nebraska-Iowa Farm Investment Co., 134 Neb. 391, 278 N. W. 841 (1938), this court said: "An agent or other fiduciary who deals with the subject-matter of the agency so as to make a profit for himself will be held to account in equity as trustee for all profits and advantages acquired by him in such dealings. * * * An agent who fails to disclose to his principal every material fact in the transaction which is the subject-matter of the agency is guilty of fraud and bad faith, and may not retain anything acquired by him either in the performance or violation of his agency. * * * All persons who knowingly aid or participate in committing a breach of trust will be held responsible for the resulting loss, and will be held accountable by personal judgment for the value of the property so converted."

The rules so stated are correct, but they do not justify the result for which plaintiff contends. The trial court properly found that here additional factors were present, namely: That nearly 2 years passed before resale, that extensive intervening improvements were made by the Gullands, and that the property appreciated in value during the intervening period. In Schepers v. Lautenschlager, *supra,* the agent in effect sold to himself while having a purchaser at a higher price immediately available. His resale followed almost immediately without presale improvements. In the instant case, the evidence showed that defendants Gulland expended approximately $5,000 on improvements in the 2-year period beginning April 1, 1971, and that the Gullands in addition did much of the labor in improving the home.

A constructive trust is imposed to do equity and to prevent unjust enrichment. Nelson v. Seevers, 143 Neb. 522, 10 N. W. 2d 349 (1943); Box v. Box, 146 Neb. 826, 21 N. W. 2d 868 (1946). The measure of damages here

is the loss which plaintiff suffered as a consequence of defendants' breach of fiduciary duties. Plaintiff is entitled to a return of the commission, and to be made whole, but she is not entitled to obtain a windfall of the value of the improvements made by the Gullands or of the appreciation during their 2 years of ownership. The trial court found that plaintiff should have received $16,000 for the property, or $2,500 more than she did. The plaintiff is therefore entitled to judgment as found by the trial court in the sum of $810 against the defendants Stanley Portsche and Town & Country, and in the sum of $2,500 against all defendants.

The judgment of the District Court omitted any reference to interest. Plaintiff is further entitled to prejudgment interest at the rate of 6 percent per annum on the respective sums from June 1, 1971, and as so modified, the judgment is affirmed. Costs taxed to the defendants.

AFFIRMED AS MODIFIED.

IN RE APPLICATION OF NEBRASKA RAILROADS, OF OMAHA, NEBRASKA.

NEBRASKA RAILROADS OF OMAHA, NEBRASKA, APPELLEES, V. NEBCO, INC., A CORPORATION, FORMERLY ABEL INVESTMENT COMPANY, APPELLANT, IMPLEADED WITH READY MIXED CONCRETE COMPANY, APPELLEE.

231 N. W. 2d 505

Filed July 17, 1975. No. 39841.

1. **Public Service Commissions: Administrative Law.** 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. ———: ———. This court upon appeal cannot disturb findings of the Nebraska Public Service Commission unless it appears that some requirements of the law have been violated or dis-

regarded, or that the result reached cannot reasonably be derived from the facts proved.

3. **Public Service Commissions: Evidence: Carriers.** Evidence of the existing rates for services as established by the Interstate Commerce Commission constitutes prima facie evidence of the reasonableness of those rates for the same services when performed in intrastate commerce in this state.
4. **Trial: Officers.** In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties as required by law.

Appeal from the Nebraska Public Service Commission. Affirmed.

James W. Hewitt, for appellant.

Knudsen, Berkheimer, Endacott & Beam, for appellees Nebraska Railroads.

R. A. Skochdopole for appellee Ready Mixed Concrete Co.

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

BRODKEY, J.

This is an appeal from an order of the Nebraska Public Service Commission entered in a rate proceeding instituted by Chicago and Northwestern Railway Company; Burlington Northern, Inc.; Chicago, Rock Island & Pacific Railroad Company; Missouri-Pacific Railroad Company; and Union Pacific Railroad Company, hereinafter referred to as "Nebraska Railroads," to determine whether a general commodity rail rate increase authorized by the Interstate Commerce Commission on interstate traffic should be made applicable to intrastate traffic in Nebraska. A hearing was held on June 5, 1974; and on September 23, 1974, the Nebraska Public Service Commission entered its order providing that the aforesaid Nebraska Railroads "and all other railroads doing business in Nebraska intrastate commerce, be, and are hereby authorized to increase freight rates and charges on Nebraska intrastate traffic as published in

Ex Parte X-303-A, effective October 21, 1974," and further providing "Any possible future increases in X-303 will be subject to further investigation and order of this Commission." A motion for rehearing was thereafter filed by Nebco, Inc., formerly Abel Investment Company, Lincoln, Nebraska, doing business as Ready Mixed Concrete Company of Omaha, Nebraska, which had previously filed protests to the application of the Nebraska Railroads. That motion was overruled by the Commission on October 21, 1974. Protestant, Nebco, Inc., has appealed to this court. We affirm.

By way of historical background as reflected in the record in this case, it appears that prior to December 5, 1973, Nebraska carriers, as well as carriers throughout the country, had requested a 5 percent increase in rates from the Interstate Commerce Commission in a proceeding designated as "Ex Parte 295." The ICC considered the request, but granted an interim increase of only 3 percent, in lieu of the 5 percent increase originally sought. Thereafter, on December 5, 1973, substantially all the Class I railroads petitioned the ICC for authority to increase rates and charges generally in the amount of 5 percent, subject to customary exceptions. On January 3, 1974, the ICC entered its order authorizing the filing of an increased tariff on 45 days notice to the ICC and the public. Following the order of the ICC, the carriers published Tariff X-303, scheduled to be effective February 22, 1974. However, on February 21, 1974, the ICC suspended the effective date of Tariff X-303 until September 21, 1974, and at the same time authorized a 4 percent interim increase in freight rates and charges, except on recycables, to become effective on not less than 15 days notice to the ICC and the public. Thereupon the rail carriers published Tariff X-303-A, which became effective on March 9, 1974, on interstate traffic.

In their application filed with the Nebraska Public Service Commission on April 8, 1974, the Nebraska Rail-

roads sought an increase in the intrastate freight rates and charges to the same extent and in the same manner that interstate rates and charges had been increased by the ICC under Tariff X-303-A, alleging as the basis of their request that the facts and conditions requiring an interstate increase applied equally to intrastate rates in Nebraska. It further appears from the record that subsequent to the publication of Ex Parte Tariff 303-A, certain neighboring states have taken action to have the increase permitted in Ex Parte Tariff 303-A made applicable in such states for intrastate traffic. In particular, it appears that Iowa, Missouri, and South Dakota have adopted the tariff, and it is now in effect in those states. Colorado and Wyoming have had hearings on similar applications, and decisions on those matters are pending. Also the railroads have filed a section 13(4) proceeding with the ICC under Title 49, United States Code, section 13(4), to compel Kansas to adopt such rates. In its final report and order in Ex Parte 295, the ICC had admonished the carriers to "promptly seek increases in their intrastate rates."

In this case, the Nebraska Railroads seek an increase in their intrastate rates based on increased costs incurred since those involved in Ex Parte 295. These specifically include a 4 percent wage increase effective January 1, 1974, increased costs of fuel and other materials due to price increases since January 1, 1973, increased equipment rents, and other substantial increases with regard to depreciation, property taxes, personal injuries, fixed charges and other deductions.

At the hearing before the hearing examiner for the Public Service Commission on June 5, 1974, the Nebraska Railroads adduced evidence in support of their application for an increase in rates. Three witnesses testified for the Nebraska Railroads, and extensive documentary evidence, charts, and compilations of figures were received in evidence. Also included was a copy of Tariff X-303-A approved by the ICC, and showing its

action with regard to an increase in rates for interstate freight. Protestants adduced evidence from one witness only, he representing Ready Mixed Concrete Company. His testimony dealt only with the effect of increased freight charges on the contracts between Ready Mixed Concrete Company and its customers for the supplying of concrete for various construction projects. His testimony did not, in any way, challenge the validity or necessity of an increase in freight rates for the Nebraska Railroads as to intrastate traffic.

The first witness on behalf of the Nebraska Railroads was James F. Harrity of the cost and economics division of the Western Railroad Association, of which the Nebraska Railroads were members. He described the general nature of his duties with that association as making traffic studies, statistical analysis, cost computations, computing economic data relating to the transportation industry for the use of its member lines and compiling those data in exhibit form so that it may be introduced by a representative of their association at various hearings. His testimony and exhibits are quite lengthy and we shall not attempt to set forth in detail their contents in this opinion. Generally speaking, he annualized the costs and increases which were the basis of the claim of the Nebraska Railroads for an increase in rates. His exhibits reveal that the 4 percent wage increase, previously referred to, is costing the Nebraska Railroads $58,660,494 per year. The fuel increases amount to $31,965,831 per year, and the other material supplies increases amount to $47,450,800 per year, or a total increase of $138,077,125, which the railroads are now absorbing. He also introduced evidence showing that as a result of the granting of a 3 percent increase instead of the 5 percent increase requested in Ex Parte 295, the railroads were only recouping 41.1 percent of their expenses. He also introduced other testimony relating to the worsening financial situation of the Nebraska Railroads, and illustrating the inflationary pres-

sures with which the carriers were faced in 1973. The sum of his testimony was that the financial condition of Nebraska Railroads was shown to be steadily deteriorating, and that inflationary pressures had greatly increased costs, which the railroads had to absorb.

The next witness for the Nebraska Railroads was Frank T. Olsen, of the Burlington Northern, Inc. He testified that he was manager of commerce for that railroad; and that his duties included the assembly of facts and the presentation of testimony relating to rates before various state commissions and the ICC. In general, Mr. Olsen testified that although interstate and intrastate shipments are handled in the same trains and from the same stations, more intrastate traffic as a proportion of train tonnage moves in costlier local service, whereas interstate tonnage moves predominantly in more efficient and less costly "through" trains. He also offered testimony from which it may be concluded that conditions incident to local rail service in Nebraska are no more favorable than those incident to interstate service, and may even be less favorable. He was able to give some figures as to Burlington Northern's operations and revenue in the State of Nebraska in 1973, and testified that Burlington Northern's intrastate revenue amounted to $8,060,000. In one respect, his testimony varied somewhat from that of witness Harrity who testified that it was not possible to separate out intrastate costs for the operation of the railroad from the total systemwide costs. Olsen testified that he *believed* that figures were available at Burlington Northern's headquarters from which Nebraska intrastate costs could be computed, but that he did not have them in his office. He gave no costs or revenue figures for any railroad other than the Burlington Northern.

The third and final witness for the Nebraska Railroads was A. L. O'Neill, who was the assistant division superintendent of the Nebraska division of the Union Pacific Railroad. He testified that the same facilities were used

in Nebraska for both interstate commerce and intrastate commerce. He also testified that branch lines are more expensive than mainline traffic. The significant data adduced by the witnesses for the Nebraska Railroads in the hearing are contained and summarized in the opinion and order of the Commission issued on September 23, 1974.

Protestants contend that the Public Service Commission erred in granting a rate increase because there was not sufficient substantial evidence on record to justify such an increase and that the action of the Commission was arbitrary and unreasonable. It is undoubtedly true, as claimed by protestants, that most of the figures testified to by witnesses for the Nebraska Railroads were systemwide figures, and that others were rough estimates. This is not, however, completely true. There was evidence adduced by witness Olsen, of Burlington Northern, Inc., with regard to the intrastate revenue of that railroad in Nebraska. There was, however, no evidence of costs or expenses of operating any of the Nebraska Railroads specifically attributable to Nebraska intrastate operations. Witness Harrity specifically denied that it was possible to separate out Nebraska costs from the systemwide operations and said he knew of no way to do so with any degree of accuracy, or he would have done so. He also testified that each railroad used its own formula for allocating costs for this purpose. Witness Olsen, on the contrary, testified he thought it would be possible to separate out such costs and "thought" that Burlington Northern had records which would accomplish that purpose. We believe the foregoing fairly summarizes the testimony for the Nebraska Railroads in this case, and we now turn to an examination of the applicable law and the respective contentions of the parties.

We first consider the scope of review by this court of orders of the Public Service Commission. As pointed out in Safeway Cabs, Inc. v. Honer, 154 Neb. 533, 48 N. W.

2d 672 (1951): "This court is not a superior railway commission with authority to substitute its judgment for that of the commission." The same thought, in slightly different form, was expressed by the Supreme Court of North Carolina in State ex rel. The Utilities Commission v. Champion Papers, Inc., 259 N. C. 449, 130 S. E. 2d 890 (1963), where in discussing the sufficiency of evidence before the commission to support the findings of the commission the court stated: " 'It is the prerogative of that agency to decide that question. It is an agency composed of men of special knowledge, observation, and experience in their field, and it has at hand a staff trained for this type of work. And the law imposes on it, not us, the duty to fix rates.' " In United Mineral Products Co. v. Nebraska Railroads, 175 Neb. 285, 121 N. W. 2d 492 (1963), this court ruled that the rate-fixing power of the Nebraska State Railway Commission (now the Public Service Commission), if properly exercised, is legislative in character and has the force and effect of a statute on the subject. This court has also held that on an appeal to the Supreme Court from an order of the 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. Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865 (1960). With specific reference to the fixing of rates for carriers by the Public Service Commission, the rule is well established that on appeal from an order of the Commission fixing rates for common carriers, the only questions for determination are whether or not the Commission acted within the scope of its authority and whether or not the order entered is reasonable and not arbitrarily made. Howard McClean Co. v. Chicago, B. & Q. R.R. Co., 187 Neb. 30, 187 N. W. 2d 300 (1971); Nebraska Limestone Producers Assn. v. All Nebraska Railroads, 168 Neb. 786, 97 N. W. 2d 331 (1959); United

Mineral Products Co. v. Nebraska Railroads, *supra*. As bearing upon the question of when the findings of the Commission may be held to be "arbitrary and capricious," it was held in Robinson v. National Trailer Convoy, Inc., 188 Neb. 474, 197 N. W. 2d 633 (1972), that if there is evidence to sustain the findings of the Commission, this court may not intervene. It is only where the findings of the Commission are against all the evidence that this court may hold the Commission's findings are arbitrary and capricious. The test, we believe, is best summarized in In re Lincoln Traction Co., 103 Neb. 229, 171 N. W. 192 (1919), wherein this court stated the rule to be: "This court upon appeal cannot disturb findings of the commission, unless it appears that some requirements of the law have been violated or disregarded, *or that the result reached cannot reasonably be derived from the facts proved.*" (Emphasis supplied.)

In this case, protestants do not question the *authority* of the Commission to increase the rates involved herein. Their basic complaint is that the action of the Commission was arbitrary and unreasonable, in that there was not sufficient evidence to support the increase in rates as ordered by the Commission. Specifically, they complain that all the evidence and statistics adduced by the Nebraska Railroads in support of their application were systemwide in nature and that there was not "separation data," taken from the systemwide figures, applicable to Nebraska operations only, and tending to show a need for an increase in intrastate rates. While we believe this case can be disposed of without the necessity of such "separation data," as will be hereinafter discussed, we wish to comment briefly upon the necessity of such data in situations such as the present case. We are in full agreement that such data should be supplied, for example, in cases where a carrier applies for modification of rates for its own company. This would obviously require the production of evidence with regard to the particular operations of that com-

pany. Here, however, we have a different type of situation, to wit, a request for an overall general increase in rates for Nebraska carriers, due to inflation and other generalized conditions affecting railroads generally. In such a situation, it would appear that such "separation data" would not necessarily be helpful or meaningful. It is true that the Supreme Court of the United States in the Minnesota Rate Cases, 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511 (1913), stated the general rule to be that where a carrier does both interstate and intrastate business, to determine whether a scheme of maximum intrastate rates affords a fair return, the value of the property employed in intrastate business and the rates prescribed must be considered separately, and profits and losses on interstate business cannot be offset. However, later cases appear to have retreated from that rule under certain circumstances.

In the case of Illinois Commerce Commission v. United States, 292 U. S. 474, 54 S. Ct. 783, 78 L. Ed. 1371 (1934), the court stated: "Specific objections to the sufficiency of the findings, so far as they are not already disposed of by what has been said, are that there is no finding that the intrastate rates, before the increase, were less than maximum reasonable rates, and there was no finding which separated interstate and intrastate property, revenues and expenses of the carriers so as to make it possible to compare revenues with cost for the two classes of traffic considered separately. But these objections, and others which we need not stop to consider in detail, leave out of account the nature of the traffic and the significance of the principal and subsidiary findings showing that the conditions throughout the District were substantially the same for both classes of traffic, which were handled in the same manner. The inquiry in both proceedings was directed to the commerce of the District as a unit. The decision in the first proceeding, that the increase in interstate rates was reasonable, was made in the hope that the state commissions

would bring intrastate rates into harmony. When they failed to do so, the Commission reaffirmed its finding that the new interstate rates were reasonable and found that the intrastate rates must be raised in order that the intrastate traffic may bear its fair share of the revenue burden. It is plain from the nature of the inquiry that the rate level, to which both classes of traffic were raised, was found reasonable on the basis of the traffic as a whole. Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically or to separate intrastate and interstate costs and revenues." As previously stated, we have concluded that there was evidence adduced in the hearing before the Nebraska Public Service Commission from which that Commission could properly conclude that there was in Nebraska a substantial identity of conditions under which interstate and intrastate traffic move which would have a bearing on the reasonableness of the rates set.

In State of North Carolina v. United States, 128 F. Supp. 718 (E.D., N.C., 1955), the court had the same problem before it and in its opinion stated: "Plaintiffs complain because the Commission made no separate valuation of the property engaged in intrastate as distinguished from interstate commerce; but we agree with the Commission that it was not practicable and that it would serve no useful purpose for this to be done. As said by the Commission in its report: 'We have found in numerous proceedings of this character that a reasonably accurate separation of values, operating revenues, and expenses as between interstate and intrastate operations appears to be impracticable. In Wyoming Intrastate Freight Rates and Charges, 287 I.C.C. 743 (February 2, 1953), we said, at page 755: "The proportionate

percentage of each individual class of traffic moving intrastate and interstate is not shown. Nevertheless, where, as is the case here, the intrastate and the interstate traffic, as a whole, moves under substantially similar conditions, and the expense of handling the two classes of traffic is inextricably woven together, any attempt to do the impracticable, namely, to show separately the costs of the intrastate and the interstate service would serve no useful purpose. See [State of] Florida v. United States, 292 U. S. 1, 9 [54 S. Ct. 603, 78 L. Ed. 1077]; Illinois Commerce Comm. v. United States, 292 U. S. 474 [54 S. Ct. 783, 78 L. Ed. 1371]; [State of] North Carolina v. United States, 325 U. S. 507 [65 S. Ct. 1260, 89 L. Ed. 1760]; King v. United States, 344 U. S. 254, [73 S. Ct. 259, 97 L. Ed. 301]." ' "

Protestants attempt to minimize the persuasiveness of the language in the above cases by pointing out that they involve proceedings under section 13(4), of the Interstate Commerce Act, which, they assert does not require the production of separation data. 49 U.S.C.A. § 13 (4). It is true that section 13, par. (4) of the Interstate Commerce Act does provide that the ICC, after investigation and hearing, may prescribe rates and fares that intrastate carriers may charge where it finds the intrastate rates unjustly discriminate against interstate or foreign commerce, "* * * which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State * * *." We point out, however, that the above-quoted language was not in the statute in question prior to 1958, and was only added to that section in that year. Both of the cases above quoted antedate 1958, and therefore reflect the thinking of the courts at that time as to the necessity of the production of "separation data," before the insertion of the specific statutory language.

However, even assuming, without deciding, that the Public Service Commission would normally require more specific Nebraska data relative to such items as revenue, costs, and expenses in discharging its statutory duty to fix necessary rates and charges of common carriers in Nebraska in intrastate commerce, as required under section 75-118, R. R. S. 1943, we nevertheless conclude that, under prior decisions of this court, there was other sufficient evidence before the Commission to justify its order in this case. It must be remembered that the Nebraska Railroads introduced into evidence at the hearing before the Commission a copy of Ex Parte 303-A, approved by the ICC, reflecting the increase in interstate rates for the same carriers. The same situation was before this court in Chicago, B. & Q. R.R. Co. v. Herman Bros., Inc., 164 Neb. 247, 82 N. W. 2d 395 (1957), a case strikingly similar on the facts to the instant case. In that case this court applied section 75-123, R. R. S. 1943 (then section 75-402), which provides, among other things: "The lowest rates published or charged by any common carrier for substantially the same kind of service, whether in this state or another state, shall, when introduced into evidence, be accepted as prima facie evidence of a reasonable rate for the services inquired into." In that case, as here, several railroads had filed an application seeking a change in intrastate freight rates. In that case, as here, protests were filed in opposition to the rate changes sought. In that case, as here, a single hearing was held by the Commission for the purpose of receiving evidence on and deciding both the application and the protest. In that case, as here, the applicants introduced into evidence a tariff which set forth the rates for interstate rail carriage as established by the ICC. In that case, as here, the Commission authorized rates for intrastate service in Nebraska which were the same as those shown in the tariff to be the rates for identical interstate service. And finally, in that case, as here, appeal was taken to this court by

the protestants, who argued among other things, that there was not sufficient evidence to establish that the rates were reasonable. In affirming the order of the Commission, this court held that where the Commission specifically adopts the rates and charges fixed by the ICC as its own, they become the regularly fixed rates and charges of the Commission until altered or set aside.

Another pertinent case is L. E. Whitlock Truck Service, Inc. v. Shippers Oil Field Traffic Assn., 171 Neb. 78, 105 N. W. 2d 588 (1960). In that case, the record included evidence showing that the intrastate rates in neighboring states and the interstate rates were, for all practicable purposes, the same as the Nebraska intrastate rates being challenged therein. It was argued that such evidence created a presumption of the reasonableness of the Nebraska rates in question. In discussing that argument this court specifically stated that "the existing rates for the same service in other jurisdictions may create a presumption of reasonableness" of those rates, although such presumption, may, of course, be overcome by other evidence.

We believe that the foregoing cases must be regarded as establishing the proposition that evidence of the existing rates for services, as established by the Interstate Commerce Commission, constitutes prima facie evidence of the reasonableness of those rates for the same services when performed in intrastate commerce in this state. This is not to say that all rates and charges for intrastate traffic as established by the Commission, must necessarily be identical to the rates and charges established for the same services by the ICC. It is altogether possible that the situation in Nebraska may be such as to justify intrastate rates different from those established by the ICC for interstate commerce. However, in cases such as this one, the burden of going forward and producing evidence tending to show that such a situation does exist in Nebraska should be, and is, on the protestants. See Preisendorf Transp., Inc. v. Her-

man Bros., Inc., *supra,* holding that rulings by the ICC in dealing with the subject of transportation by common carriers in interstate commerce may properly be considered by the Commission, and by this court on appeal therefrom, when dealing with comparable situations in intrastate commerce.

We conclude, therefore, that the Nebraska Railroads, appellees herein, by introducing evidence of the existing rates for interstate rail carriage, as established by the Interstate Commerce Commission, provided prima facie evidence of the reasonableness of those rates as adopted by the Public Service Commission for intrastate rail carriage. Furthermore, since no evidence was offered by the protestants that establish that the rates adopted by the Commission were unreasonable, we cannot say that the result reached by the Commission could not reasonably be derived from the facts proved.

Protestants strongly argue by innuendo, and without any basis in evidence or facts, that the Public Service Commission in this case abdicated its duties and responsibilities to fix intrastate rates in this case under fear or threat, veiled or otherwise, that if the Commission did not grant the increase the railroads would institute a section 13 (4) proceeding under the Interstate Commerce Act to force the adoption of the rates applied for, on the ground that the existing intrastate rates discriminate against established interstate rates. We find no evidence in the record that this is so. There is a legal presumption that the Commissioners faithfully performed their official duties as required by law, and we cannot assume otherwise, absent evidence to the contrary. Ludwig v. Board of County Commissioners, 170 Neb. 600, 103 N. W. 2d 838 (1960).

We conclude, therefore, that the Commission acted within the scope of its authority, and the order complained of was reasonable and not arbitrarily made. It must therefore be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY M. HOLMBERG, APPELLANT.

231 N. W. 2d 672

Filed July 17, 1975. No. 39930.

1. **Motor Vehicles: Licenses and Permits: Officers: Stop and Check.** Section 60-435, R. R. S. 1943, is intended to give the officers mentioned therein the power to enforce laws regulating the operation of vehicles or the use of the highways. The licensing laws are safety measures applicable to the use of all roads or highways within the state.
2. ———: ———: ———: ———. The only practical method of enforcing the licensing laws involved in section 60-435, R. R. S. 1943, is by stopping the vehicle. The inconvenience experienced by the individual motorist is relatively slight compared to the benefits to be derived from strict enforcement of the licensing laws.
3. ———: ———: ———: ———. Due regard for the practical necessities of effective driver and vehicular licensing enforcement requires a brief stop or detention for checking purposes. It is a matter of balancing between the governmental interest in the safety of users of the highways and the individual's right to freedom and privacy. The momentary stopping of a citizen for this purpose does not violate constitutional rights.
4. ———: ———: ———: ———. A routine license check and its concomitant temporary delay of a driver does not constitute an arrest in a legal sense where there is nothing arbitrary or harassing present.
5. ———: ———: ———: ———. When the driver has produced his licenses and they are in proper form, he must be promptly allowed to continue on his way. It is only when the officer becomes aware of a reasonable probability of a law violation that the driver may be detained for further questioning.

Appeal from the District Court for Keith County: KEITH WINDRUM, Judge. Affirmed.

John O. Sennett of McGinley, Lane, Mueller, Shanahan, McQuillan & Gale, for appellant.

Paul L. Douglas, Attorney General, and Chauncey C. Sheldon, for appellee.

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

SPENCER, J.

Defendant appeals his convictions for possession of marijuana with the intent to distribute, deliver, or dispense; for the possession of amphetamines; and for the possession of cocaine. While the defendant sets out five assignments of error, they may be categorized as embraced within the ambit of the overruling of defendant's motion to suppress for an alleged unreasonable search and seizure. The issue in this case was previously decided adverse to the defendant in an opinion by a single member of this court. We affirm.

Defendant was operating a motor vehicle, a camper on a pickup, in the early morning hours of Saturday, November 24, 1973. He was proceeding in an easterly direction on Interstate 80 in Keith County, Nebraska. Trooper Hollis Compton of the Nebraska Safety Patrol, while in his official uniform, stopped defendant's vehicle for the purpose of checking his operator's license, the vehicle registration, and the vehicle identification number. There was no other reason for the stop. Reliance to make the stop is based solely upon section 60-435, R. R. S. 1943, which provides in part as follows: "* * * all members of the Nebraska State Patrol * * * shall have the power * * * (4) when in uniform, to require the driver thereof to stop and exhibit his operator's license and registration card issued for the vehicle and submit to an inspection of such vehicle, the registration plates and registration cards thereon * * *."

While checking the license and registration, the officer smelled a distinctive marijuana odor and observed what he believed to be marijuana seeds on the floor of the vehicle. Incense was burning in the vehicle. He asked the defendant if he had any marijuana and the defendant said "No." Defendant then told the officer he had been smoking his last marijuana cigarette. The trooper asked permission to look into the camper. The

defendant gave consent, obtained the key, and unlocked the camper. When the door was opened there was a very strong odor which the trooper associated with the smell of raw marijuana. In inspecting the camper, he noticed the floor had built-up sides and that there was a box on the side. The built-up portion on the sides of the box contained some screws. The trooper asked defendant what the sides contained and defendant said all he knew was insulation. The trooper asked defendant if he could look in those portions of the box. Defendant did not reply. The trooper obtained a screwdriver and while the defendant held the trooper's flashlight the trooper unscrewed the screws on the box. When the trooper pulled the sides open, he could see green plastic bags. Each bag was approximately 2 and ½ inches thick, approximately 6 to 8 inches wide, and approximately 14 to 16 inches long. There were 42 packages of marijuana in the green bags; each weighed 2 pounds apiece, for a total weight of 84 pounds. When the trooper saw the green bags, he placed defendant under arrest and read him the Miranda warnings. He then took defendant into Ogallala where he conducted a strip search and put defendant in jail. The strip search disclosed a substance containing dielamphetamine and substances containing cocaine.

The next day, Sunday, a specialized criminal investigator for the Patrol visited with the defendant. After the defendant signed a "right's waiver" form the investigator questioned him. Defendant told this investigator he did not have a prescription for the amphetamines. He had obtained them from a girl who did, and had obtained them for the purpose of staying awake on the trip. Defendant said the white powder in the yellow plastic vial found in his possession was an amphetamine he had been "snorting." He also admitted that the cigarette and the other marijuana had been in his possession.

The problem presented is whether or not the evidence

obtained by the search at the scene and later at the station should be suppressed because the initial stop to check the operator's license and vehicle registration constituted an unreasonable seizure within the ambit of the Fourth Amendment. We hold it should not. The stop made was a lawful one under section 60-435, R. R. S. 1943.

It is defendant's contention that even the momentary stopping of a motorist for an inspection constitutes an arrest and requires probable cause. He argues his freedom of movement should be immune from state interference unless there is some indication of a law violation. What we said in State v. Carpenter (1967), 181 Neb. 639, 150 N. W. 2d 129, is pertinent herein: "Defendant is laboring under the misapprehension that the same rule on probable cause applies when a person is merely stopped and questioned as when he is arrested. Defendant's approach presents a clash of interest between the protection of the public and right of an individual. His premise is false and would cripple law enforcement. * * * Individual rights on occasion must give way to the rights of society. This is the very purpose of law—to restrict the rights of the individual to provide protection for society."

Defendant argues that section 60-435, R. R. S. 1943, would be unconstitutional unless we can read into it a requirement of some reasonable cause otherwise for stopping a motor vehicle. We do not construe the statute that narrowly. This statute is intended to give the officers mentioned therein the power to enforce laws regulating the operation of vehicles or the use of the highways. The licensing laws are safety measures applicable to the use of all roads or highways within the state. It would be most unusual to have an observable indication of a licensing violation of a moving vehicle. Stopping the vehicle for inspection is the only practical method of enforcement of section 60-435, R. R. S. 1943.

Defendant is relying on Commonwealth v. Swanger,

a 1973 Pennsylvania case, 220 Pa. Super. 720, 300 A. 2d 66, rehearing at 453 Pa. 107, 307 A. 2d 875, which held an investigatory stop was unreasonable and arbitrary. It held the Pennsylvania statute constitutional, but determined that the officer only had authority to stop a vehicle to check a registration and license when he had probable cause based on specific facts which indicated to him either the vehicle or the driver was in violation of the code. To so hold would emasculate the intent and purpose of the statute.

There are cases in some jurisdictions which hold that because of the number of automobiles on the highways and their extensive use by our population, any stop to spot-check license and registration is manifestly unjust and unfair unless all automobiles using the highways at that place and time are likewise checked. While the record herein would indicate that the defendant and the trooper were apparently the only two persons using the highway at that early hour of the morning, we do not accept the rationale of these cases. We are in agreement with the many decisions in other jurisdictions which hold otherwise.

The only practical method of enforcing the licensing laws involved is by stopping the vehicle. The inconvenience experienced by the individual motorist is relatively slight compared to the benefits to be derived from strict enforcement of our licensing laws. Whether this should be accomplished by spot checks or road blocks is a question that has been raised. Certainly there is less inconvenience to the motoring public by using spot checks. Spot checks also have the advantage of always being unexpectedly possible. We believe occasional spot checks are not only more practical but can have a salutary effect in the enforcement of our traffic laws and serve to promote the safety of the traveling public. Excessive spot checks can be unduly burdensome to traffic and commerce. The line of demarcation between the two is not easily drawn. However, due regard for

the practical necessities of effective driver and vehicle licensing enforcement requires a brief stop or detention for checking purposes. It is a matter of balancing between the governmental interest in the safety of users of the highways and the individual's right to freedom and privacy.

The District of Columbia Court of Appeals in Palmore v. United States (1972), 290 A. 2d 573, upheld procedure similar to that followed in this instance. Two District of Columbia officers in an unmarked car, recognizing that the car the defendant was driving was a rental car, decided to run a spot check to determine if the defendant had a proper license and a rental agreement (equivalent of proper registration). Defendant had committed no traffic offense and his auto had no apparent equipment defect. The stop was solely to check the operator's license and the vehicle registration. During the stop, one of the officers noted the presence of a trigger mechanism of a pistol protruding out from beneath the arm rest on the front seat of defendant's car. He removed the pistol and after learning it was unregistered, placed the defendant under arrest. The narrow issue posed in that case was whether the officers could stop the defendant and demand his license and registration when they had not seen defendant violate a traffic or vehicular equipment regulation and had no cause to believe that he was about to engage in any criminal activity. The government argued that the right to stop was a duty mandated by Congress. The officers had a right to require the driver to produce his license and vehicle registration without the need of first having reasonable suspicion that the driver lacked those particular documents. The following from that case is pertinent herein: "At the outset, we reject the rigid rule which appellant urges us to adopt: That a police officer may stop an automobile for a spot check of the driver's license and car registration *only* when he has articulable suspicion as defined by *Terry,* that either of such docu-

ments is invalid. The touchstone of the fourth amendment is reasonableness. It seems to us in this age of the motor car that when the community's interest in limiting use of its highways to licensed drivers in registered autos is balanced against the momentary interruption of the motorist which is necessary to ascertain whether he is complying with these licensing requirements such intrusion is *not* so unreasonable as to be violative of the fourth amendment.

"We must keep in mind that if we were to limit the police as appellant urges, to stopping *only* those autos in which the driver might reasonably be suspected to be without a license, for example, because of his youthful appearance, the results would unjustifiably single out and discriminate against certain groups of citizens, i. e., the young. Moreover, such a restrictive ruling by us might render virtually unenforceable the Congressional prohibition against *all* unlicensed drivers and unregistered cars driving on District of Columbia streets. After all, persons who drive in the District without a valid license and registration will not necessarily exhibit conduct or the appearance giving rise to articulable suspicion that they are without proper driving credentials. Thus, they would be immune from the 'spot check' to enforce a requirement deemed necessary by Congress for public safety on the District's highways."

The Court of Criminal Appeals of Texas, in Leonard v. State (1973), 496 S. W. 2d 576, held to the same effect. There, an officer stopped a station wagon for the purpose of making a driver's license check. "The officer asked to see Leonard's 'driver's license.' Leonard said he did not have one, but offered other identification. The officer, when asked if he noticed anything about Leonard's appearance, replied: 'Yes, sir; from an odor from his clothing it was a marijuana smell.' The officer then testified: 'I proceeded over to the vehicle that I had stopped and I stuck my head into—to look at the

passenger and ask him for identification. That is when I smelled the real strong odor of marijuana * * *.'"

The Texas court held the officer was authorized to stop Leonard's vehicle by virtue of the statute to determine whether the driver had a valid license to operate the vehicle. It held the State had a legitimate interest to determine the fitness of a vehicle to be used and its driver to operate such vehicle on a public road. The court said: "The momentary stopping of a citizen for this purpose does not violate constitutional rights. See Myricks v. United States, (370 F. 2d 901 (5th Cir., 1967))." Quoting further from Leonard v. State, *supra,* the court said: "Similar statutory provisions have been construed by many courts in the same manner as Article 6687b, Sec. 13, V.A.T.C.S. has been construed by this court. See, e. g., United States v. Lepinski, 460 F. 2d 234 (10th Cir. 1972); United States v. Croft, 429 F. 2d 884 (10th Cir. 1970); Lipton v. United States, 348 F. 2d 591 (9th Cir. 1965); United States v. Ware, 457 F. 2d 828 (7th Cir. 1972); Palmore v. United States, D. C. App., 290 A. 2d 573 (1972); and State v. Garcia, 16 N. C. App. 344, 192 S. E. 2d 2 (1972)."

In United States v. Turner (8th Cir., 1971), 442 F. 2d 1146, Judge Lay wrote: "The police officer clearly had probable cause to arrest the defendant for failure to have a proper driver's license under Missiouri law. It is argued, however, that the officer's motive in stopping defendant's car was not to check his driver's license, but merely to pursue his suspicion of some other crime. Thus, it is contended that the officer wanted to make an unwarranted search for evidence of some unidentified crime. We do not find it unreasonable for an officer to inquire as to a driver's license under these circumstances. It is conceded under the state law of Missouri that an officer has a right to stop an automobile to make a routine check for an operator's license. See Jackson v. United States, 408 F. 2d 1165, 1168 (8 Cir. 1969); Rodgers v. United States, 362 F. 2d 358, 362 (8

Cir. 1966). Cf. Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Carpenter v. Sigler, 419 F. 2d 169 (8 Cir. 1969)."

In Rodgers v. United States (8th Cir., 1966), 362 F. 2d 358, in an opinion by Mr. Justice Blackmun, then a member of the Eighth Circuit, the court held a routine license check and its concomitant temporary delay of a driver does not constitute an arrest in a legal sense where there is nothing arbitrary or harassing present. Three Missouri patrol officers had received a radio broadcast on a number of stolen vehicles, including a white Buick convertible. When the defendant passed one of the officers he was violating no traffic regulation but the officer noticed he was driving a white Buick convertible similar to the car previously reported stolen. The trooper stopped the car and asked to see the driver's license of defendant. The defendant replied he did not have it with him, that he had left it in St. Louis. The trooper then detained the defendant and subsequently learned that the car had been stolen.

In Lipton v. United States (9th Cir., 1965), 348 F. 2d 591, the Ninth Circuit held if stopping a motorist for the sole purpose of inquiring whether he held a California license was in any sense a seizure, it was not an unreasonable one and did not violate any right given the motorist by the Fourth Amendment to the federal Constitution.

In Myricks v. United States (5th Cir., 1967), 370 F. 2d 901, appellant Myricks was stopped for a routine driver's license check and had none. It subsequently developed the car was stolen. The Fifth Circuit, in an opinion by Circuit Judge Brown, there said: "The Constitution is, it is often said, a living document. If it lives, it must take account of the dominant symbol of today's dynamic society. It must recognize, therefore, that Texas has a legitimate interest in the roadworthiness of automobiles which transport, but which can maim and kill. Cf. Ford Motor Co. v. Mathis, 5 Cir., 1963, 322 F.

2d 267, 3 A. L. R. 3d 1002. This comprehends both technical fitness of the driver and the mechanical fitness of the machine. After the event it is always too late. The State can practice preventative therapy by reasonable road checks to ascertain whether man and machine meet the legislative determination of fitness. That this requires a momentary stopping of the traveling citizen is not fatal. Nor is it because the inspection may produce the irrefutable proof that the law has just been violated. The purpose of the check is to determine the present, not the past: *is* the car, *is* the driver now fit for further driving? In the accommodation of society's needs to the basic right of citizens to be free from disruption of unrestricted travel by police officers stopping cars in the hopes of uncovering the evidence of nontraffic crimes, cf. Brinegar v. United States, 1949, 338 U. S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879; Clay v. United States, 5 Cir., 1956, 239 F. 2d 196; Clay v. United States, 5 Cir., 1957, 246 F. 2d 298, cert. denied, 355 U. S. 863, 78 S. Ct. 96, 2 L. Ed. 2d 69; Rios v. United States, 1960, 364 U. S. 353, 80 S. Ct. 1431, 4 L. Ed. 2d 1688, the stopping for road checks is reasonable and therefore acceptable. Likewise, an arrest is proper if the check reveals a current violation which by its nature must have been taking place in the immediate past. State and Federal Courts, including this one, have uniformly sustained such checks and arrests when not done as a subterfuge or ruse."

We are not unmindful of the possibility of abuse of the statute as we interpret it. We have no hesitancy in saying that if the facts should disclose that the stop is a mere pretext for other reasons, it would be held to be arbitrary and unreasonable and violative of the Fourth Amendment. We hasten to state, specifically and emphatically, that a spot check is not to be used as a pretext to search for evidence of some possible crime unrelated to the requirements of section 60-435, R. R. S. 1943. We hold further that when the driver has pro-

duced his licenses and they are in proper form, he must be promptly allowed to continue on his way. It is only when, as here, the officer becomes aware of a reasonable probability of a law violation that the driver may be detained for further questioning.

As the trial court found, the only reason for the stop was to check the operator's license of the defendant, the motor vehicle registration, and its identification number. This is permissible under our law. No constitutional violation was involved. Subsequent to the stop, by the use of his senses, the trooper became aware of the presence of marijuana. At that time, under our law, he had probable cause to search the camper for marijuana without the necessity of relying on consent, although he had consent in this case. In the search he discovered the marijuana and placed the defendant under arrest. Subsequently, a search at the police station disclosed the presence of amphetamines and cocaine. It would be mere conjecture to speculate on what might have happened if the defendant had continued to "snort" the white powder for the more than 300 miles of further travel across Nebraska.

As suggested by the dissent, this opinion was written prior to the release of United States v. Brignoni-Ponce, 43 Law Week 5028, (June 24, 1975), 422 U. S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607. It has been reaffirmed subsequent to that decision upon the ground that footnote 8 limits that case to Border Patrol agents, and specifically excepts the situation present herein. Footnote 8 is as follows: "Our decision in this case takes into account the special function of the Border Patrol, the importance of the governmental interests in policing the border area, the character of roving-patrol stops, and the availability of alternatives to random stops unsupported by reasonable suspicion. *Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are en-*

titled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding driver's licenses, vehicle registration, truck weights, and similar matters." (Italics supplied.)

We also note that the dissent is in error in suggesting that of the cases cited in this opinion only that of Palmore v. United States, 290 A. 2d 573, on its facts supports the conclusion we reach.

The judgment of the trial court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The majority opinion, on the strength of section 60-435, R. R. S. 1943, now holds that a law enforcement officer, when in uniform, may stop any motorist at random at any time and at any place on the public highways, streets, or roads of the State of Nebraska without any articulable reason to suspect that he has violated any law, but simply for the avowed purpose of checking his operator's license and vehicle registration. That holding emasculates the constitutional protection of the Fourth Amendment guaranties against unreasonable search and seizure and for all practical purposes repeals the Fourth Amendment by statutory fiat. The mere pronouncement of the magic words "I wanted to check the registration and driver's license" becomes the "open sesame" which removes all constitutional barriers to a random investigative stop of any motor vehicle at any time, any place, at the arbitrary whim of any police officer.

In the case at bar the officer's reason to make the stop was solely to check the operator's license, vehicle registration, and identification number. He had no other reason and there were no facts or circumstances which would justify any reasonable suspicion of the violation of any law. The majority opinion relies upon cases

which are cited as holding that a police officer may stop an automobile for a spot check of driver's license and car registration without any articulable suspicion that any law is being violated, or that either of such documents is invalid. Of the cases cited only that of Palmore v. United States, 290 A. 2d 573, on its facts supports such a conclusion. That case rests its holding that such a seizure is reasonable on the ground that the community has an interest in limiting the use of its highways to licensed drivers in registered automobiles. The community has an even greater interest in protecting itself against far more serious crimes but such a justification has not previously been sufficient to override the mandates of the Fourth Amendment.

On the other hand, many more cases, indirectly referred to in the majority opinion, have held such an investigatory stop to be unreasonable and arbitrary when there is no articulable reason to suspect a violation of any law. Such cases are not only more numerous, but far more persuasive. See, for example, Commonwealth v. Swanger, 453 Pa. 107, 307 A. 2d 875 (1973). In that case a statute also granted the right to stop a vehicle for the purpose of inspection in even broader terms than the Nebraska statute. The Pennsylvania court specifically held that the right of an individual to be free from government intrusions without apparent reason outweighed the interest of the public in insuring safety on the highways. The Pennsylvania court said: "The crux of our decision that a stop of a single vehicle is unreasonable where there is no outward sign the vehicle or the operator are in violation of the Motor Vehicle Code, goes to the Commonwealth's argument the police need no justification to stop the vehicle. We rule before the government may single out one automobile to stop, there must be specific facts justifying this intrusion. To hold otherwise would be to give the police absolute, unreviewable discretion and authority to intrude into an individual's life for no cause whatsoever."

The Nebraska statute itself has been previously interpreted by the United States District Court for Nebraska to mean that there must be some founded grounds which draw or attract the attention of an officer to a possible violation of law. See United States v. Bell, 383 F. Supp. 1298 (D.C. Neb., 1974). Although the United States court in that case deferred from ruling on the constitutionality of section 60-435, R. R. S. 1943, pending a determination of the issue by this court en banc, the court did say: "This Court, in considering future cases, will narrowly construe such a statute to the extent that there must be a founded and reasonable suspicion drawing an officer's attention in order for him to pursue a selective stop which infringes, intrudes, or molests an individual's expectation of privacy guaranteed under the Fourth Amendment." The United States District Court also said: "It is intolerable and unreasonable to allow or authorize a police officer to stop any vehicle on a pretext or in a selective manner through the utilization of a state driver's license statute or motor vehicle registration or safety statute, on the chance that such officer might perceive illegal activity; such an inconvenience and indignity is not outweighed by an overriding governmental interest." It should be noted here that that case involved the same Officer Compton who is involved in this case.

No matter what views may be held on the subject of whether or not a motorist can be stopped at random for investigation of his driver's license and registration without any reason to suspect that he has violated any law, the issue was foreclosed by the United States Supreme Court on June 30, 1975, in the case of United States v. Brignoni-Ponce, 43 Law Week 5028 (June 24, 1975). 422 U. S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607. Syllabus (b) of that case specifically holds: "To allow roving patrols the broad and unlimited discretion urged by the Government to stop all vehicles in the border area without any reason to suspect that they

have violated any law, would not be 'reasonable' under the Fourth Amendment."

That case involved a roving patrol stop of an automobile by the border patrol to question the occupants about their citizenship and immigration status. The stop was at a point approximately 65 miles north of the Mexican border. The only reason for stopping the automobile was that its three occupants appeared to be of Mexican descent. The stopping of cars without warrants in the particular area was authorized under federal statutes and current regulations of the border patrol. The United States Supreme Court reaffirmed the principle that no act of Congress can authorize a violation of the Constitution, and that an investigative stop that involves only a brief detention short of traditional arrest constitutes a seizure which must be "reasonable." "As with other categories of police action subject to Fourth Amendment constraints, the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."

The Supreme Court held that because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop and the absence of practical alternatives for policing the border, that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke the suspicion. The court specifically reiterated that the stop and inquiry must be "reasonably related in scope to the justification for their initiation."

It seems patently clear that the thrust of the Supreme Court opinion is directed at random stops of a single vehicle which are made without any reason to suspect that the motorist has violated any law. The court said: "To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular

vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. * * * Thus, if we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law.

"We are not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic."

The majority opinion of this court was written prior to the release of the Brignoni-Ponce case but has been reaffirmed subsequent to that decision upon the ground that footnote 8 in Brignoni-Ponce states: "Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding driver's licenses, vehicle registration, truck weights, and similar matters."

It seems only logical that the type of investigative stop referred to in that footnote is a fixed point or checkpoint stop and not an indiscriminate random stop of a single vehicle without reasonable suspicion. The concurrence of Mr. Justice Rehnquist and the concurrence of Mr. Justice White, with whom Mr. Justice Blackmun joins, confirm that conclusion.

There is simply no logical definitive way to distinguish between the stop of an automobile made for the purpose of determining whether driver's license and vehicular registration laws have been violated, and a stop to determine whether the laws governing entry and transportation of aliens have been violated. If any distinction can be made, it might be said that the governmental interest and the public interest in the enforcement of

alien entry laws is greater than interest in the proper registration and licensing of vehicles and drivers.

As the Supreme Court said in Brignoni-Ponce with respect to seizures of the person involving only a brief detention short of traditional arrest, "the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." It seems transparently clear that an indiscriminate random stop of a single motor vehicle without any ground for reasonable suspicion of any law violation, which can be made at the whim of any law officer, is an arbitrary interference with an individual's right to personal security and is unreasonable within the ambit of the Fourth Amendment. The initial seizure here being unconstitutional, the motion to suppress should have been granted.

STATE OF NEBRASKA, APPELLEE, V. ABE CLARK LYTLE, APPELLANT.
231 N. W. 2d 681

Filed July 24, 1975. No. 39681.

1. **Homicide: Proximate Cause: Criminal Law.** In a prosecution for homicide the act of the accused must be a proximate cause of death but need not be the direct, immediate cause. It is sufficient if the direct cause resulted naturally from the act of the accused, as where the direct cause was a disease or infection resulting from the injury inflicted by the accused.
2. ———: ———: ———. In a prosecution for homicide it is not a defense to one whose act has contributed to the death that improper treatment on the part of physicians, nurses, or the victim also contributed thereto; but one who has inflicted an injury is not responsible for homicide where death results solely from erroneous treatment by another.
3. ———: ———: ———. The proximate cause of a death is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the death,

and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the death.

4. ———: ———: ———. An efficient intervening cause is a new and independent cause, itself a proximate cause of the death, which breaks the causal connection between the original illegal act and the death.
5. **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 thereon obtained.
6. **Criminal Law: Trial: Records: Probable Cause: Arrest.** The defendant's contention that his arrest was illegal is based upon the absence of a showing in the record rather than an affirmative showing that grounds for his arrest did not exist. The legality of the arrest was not an issue in the case until the appeal to this court. Under such circumstances this court will not assume that probable cause for the arrest of the defendant did not exist at the time it was made.
7. **Confessions: Infants.** Minority is simply another factor to be considered in determining voluntariness, and there is no distinct or separate rule of evidence applicable to the confession of minors.
8. **Confessions: Trial.** It is elementary that a confession, in order to be admissible in evidence against its maker, must be voluntarily made with knowledge of the maker's constitutional rights, or in other words his rights must be voluntarily and intelligently waived.
9. **Evidence: Trial.** The rule is well established in this jurisdiction that the scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion.
10. **Infants: Trial: Courts.** Juvenile courts do not have the sole or exclusive jurisdiction of children under 18 years of age who have violated our laws.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

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

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

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

SPENCER, J.

This is an appeal from defendant Abe Clark Lytle's conviction after a jury trial of first-degree murder arising out of a purse snatching and assault under the felony-murder rule. Defendant was sentenced to imprisonment for life.

Defendant alleges five assignments of error: (1) The failure to suppress his confession for the reason that his arrest was unlawful and without probable cause; (2) the failure to suppress his confession, because of his minority he did not knowingly, intelligently, and voluntarily waive his constitutional rights; (3) the limitation of the cross-examination of defense counsel; (4) the overruling of defendant's plea in abatement; and (5) the denial of defendant's motion for a directed verdict because the evidence was insufficient as a matter of law to prove corpus delicti and defendant's guilt beyond a reasonable doubt. We affirm.

The evidence permitted the jury to find that on the evening of October 28, 1973, Camille Hugg, age 81, was a victim of an attempted purse snatch by the defendant and one Joseph Hayes Harris. She resisted, clung to her purse, was knocked to the ground by her assailants, and was kicked and stomped. She suffered a broken hip, either from the fall or the blows. She was hospitalized, surgery was performed, and a pin inserted in the hip. She died on December 17, 1973, without having been released from the hospital. The defendants were tried separately. Harris' conviction was affirmed June 5, 1975. State v. Harris, *ante* p. 74, 230 N. W. 2d 203.

We consider first defendant's fifth assignment of error, because it is the one defense common to both the defendant and to Harris. Defendant concedes the attempted robbery of the victim, the kicking and stomping of her by Harris, and the defendant's striking her in the chest.

Defendant, however, argues the proximate cause of death was the complications occasioned by the surgical procedure used to treat the victim's hip and that these complications arose independently of the injury to the hip itself.

We briefly summarize the facts pertinent to this issue. After the assault, Mrs. Hugg was taken to the Douglas County Hospital emergency room where she was treated by Doctor Thomas Tomczak, who diagnosed her condition as a fractured hip. An examination of her the next day showed some abnormal heart beats which could have been due to stress caused by the injury. Mrs. Hugg's personal physician, Doctor Thomas Gurnett, testified that as of July 1971, when he last examined Mrs. Hugg, who had been a nurse, she had minor intestinal, blood pressure, and skin problems, as well as diabetes, but was otherwise normal for a patient of her age. He served as her treating physician from October 31, 1973, until her death. He diagnosed her injury as an intertrochanteric fracture of the hip and a possible fracture of the sternum, which caused a respiration problem because of pain and tenderness. After consultation with an orthopedic surgeon, an operation was performed which consisted of nailing the two pieces of the hip together in order to immobilize it. After the surgery was performed, Mrs. Hugg began suffering from post-operative complications. Her heart action became irregular, medication was prescribed to control that situation, and anticoagulants were administered to prevent blood clotting. Doctor Gurnett considered the operation a success, and the patient was mobile and sitting up on several occasions after surgery.

As a result of the medication, the patient's heart became regular within 36 hours. However, other complications set in. Blood clots were forming, but the use of anticoagulants had to be halted because Mrs. Hugg was developing a stress ulcer—a localized, punched-out area in the lining of her stomach—which became apparent

on November 13, 1973. Doctor Gurnett was of the opinion that these conditions arose as the result of the hip injury and the surgery. At times Mrs. Hugg was unable to consume food orally and was given blood transfusions as a result of the ulcer. There were spells during this period when she became incoherent and confused. Her condition deteriorated progressively thereafter. By November 16, her internal bleeding had stopped but her heart beat had become irregular. On November 22, her heart rate was rapid and irregular. This required more medication. On November 27, she complained of chest pain and breathing difficulty which Doctor Gurnett diagnosed as a blood clot breaking loose from the lower extremities and striking the left lung. On December 7, Mrs. Hugg complained of abdominal pain and diarrhea and a staph infection in her saliva gland developed, requiring treatment. At this point, her condition was deteriorating rapidly. She was loosing strength and her blood pressure and vital signs were no longer normal. She died on December 17, 1973.

Doctor Gurnett testified, based on reasonable medical certainty: "I believe Mrs. Camille Hugg's death was caused by a fracture of the hip and the complications that followed directly in the wake of that fracture of the hip." In response to a question as to whether Mrs. Hugg died from a heart attack, the doctor testified: "I believe my testimony was that these complications with the shock, in the wake of the injury that the patient received, were complications directly as a result of those injuries, and they were terminal events."

Defendant argues that a new and independent intervening cause occurred between the time of defendant's acts and the death of Mrs. Hugg. He argues that his actions in causing the hip fracture were not the proximate cause of the death. Rather, death was due to the intervention of severe infection and complications arising out of the doctor's undertaking the surgical procedures over nonsurgical means of treatment. There is no

evidence in the record in any form, even by way of inference, that Mrs. Hugg would have recovered had the operation not been performed.

The opinion of the doctor was premised on his treatment and personal observation of Mrs. Hugg on a daily basis, from her admission to St. Joseph's Hospital to the date of her death. It would appear that the evidence raised a factual question for the jury to determine under proper instructions from the court, whether the victim's death was caused by acts of the accused or by independent, intervening acts or causes. Our holding in State v. Harris, *ante* p. 74, 230 N. W. 2d 203, where we dealt with this same issue, is controlling herein. We there said: "In a prosecution for homicide the act of the accused must be a proximate cause of death but need not be the direct, immediate cause. It is sufficient if the direct cause resulted naturally from the act of the accused, as where the direct cause was a disease or infection resulting from the injury inflicted by the accused. * * *

"In a prosecution for homicide it is not a defense to one whose act has contributed to the death that improper treatment on the part of physicians, nurses, or the victim also contributed thereto; but one who has inflicted an injury is not responsible for homicide where death results solely from erroneous treatment by another. * * *

"The proximate cause of a death is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the death, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the death. * * *

"An efficient intervening cause is a new and independent cause, itself a proximate cause of the death, which breaks the causal connection between the original illegal act and the death."

Defendant's first assignment of error is raised for the first time in this court. Defendant is contending his

arrest was illegal because it was not based upon probable cause, and therefore his subsequent confession should not be admissible as evidence against him. Defendant at no time in the trial below raised any question as to the legality of his arrest. A Miranda hearing, as it was referred to in the transcript, was held on March 28, 1974, to determine the admissibility of the defendant's confession. At this hearing, defendant only questioned the voluntariness of his confession, the intelligence of his waiver, and the adequacy of the Miranda warnings. Defendant in no way challenged the legality of his arrest. At the trial, defendant did not object to the introduction of the confession because the prior arrest was allegedly illegal. Finally, defendant's motion for a new trial not only does not contain any reference to the alleged illegality of the arrest, it does not contain any reference whatsoever to the allegedly erroneous admission of the confession into evidence.

We have repeatedly said that alleged errors not raised in the trial court and not referred to in a motion for a new trial will not be considered by this court on appeal. 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 thereon obtained. State v. Temple (1974), 192 Neb. 442, 222 N. W. 2d 356. The twofold purpose of this requirement was set out in State v. Burnside (1970), 185 Neb. 234, 175 N. W. 2d 1: "Ordinarily, preliminary to an appeal, assigned errors must be presented to and ruled upon by the trial court. This serves a twofold purpose. It affords opportunity for the trial court to correct its own errors and often enables a litigant to make a record upon which to found an appeal."

Further, there was no record made focusing upon the question of probable cause for arrest. Defendant now complains because the record allegedly does not contain an affirmative showing of probable cause for arrest. In State v. Erving (1966), 180 Neb. 824, 146 N. W. 2d

216, we said: "The defendant's contention that his arrest was illegal is based upon the absence of a showing in the record rather than an affirmative showing that grounds for his arrest did not exist. The legality of the arrest was not an issue in the case until the appeal to this court. Under such circumstances this court will not assume that probable cause for the arrest of the defendant did not exist at the time it was made."

Actually, probable cause did exist. It is undisputed that defendant was arrested somewhere around 1:30 a.m., on December 28, 1973. Between 5 p.m. on December 27, 1973, and 1:30 a.m. on December 28, 1973, police officers had interviewed Joseph Harris and had taken a statement from him regarding his involvement, along with the defendant, in the purse snatching on October 28, 1973. It was this statement of Harris, implicating the defendant, which gave the officers probable cause to arrest the defendant. This statement provided reasonably trustworthy information which would warrant a man of reasonable caution in the belief that defendant was involved in the commission of the crime. The officers could reasonably believe the information was trustworthy because it came from a statement which implicated the maker as well as the defendant.

Defendant's second assignment of error is premised on the argument that because of his minority, his confession must be viewed in a different perspective than that of an adult. Defendant at the time of the confession was 3 days from being 18 years of age. Minority is simply another factor to be considered in determining voluntariness, and there is no distinct or separate rule of evidence applicable to the confession of minors. It is elementary that a confession, in order to be admissible in evidence against its maker, must be voluntarily made with knowledge of the maker's constitutional rights, or in other words his rights must be voluntarily and intelligently waived. Miranda v. Arizona (1966), 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694.

The following from Schneckloth v. Bustamonte (1973), 412 U. S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854, is pertinent in this area: "This Court's decisions reflect a frank recognition that the Constitution requires the sacrifice of neither security nor liberty. The Due Process Clause does not mandate that the police forego all questioning, or that they be given carte blanche to extract what they can from a suspect. 'The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.' Culombe v. Connecticut, supra, at 602.

"In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding curcumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, e.g., Haley v. Ohio, 332 U. S. 596; his lack of education, e.g., Payne v. Arkansas, 356 U. S. 560; or his low intelligence, e.g., Fikes v. Alabama, 352 U. S. 191; the lack of any advice to the accused of his constitutional rights, e.g., Davis v. North Carolina, 384 U. S. 737; the length of detention, e.g., Chambers v. Florida, supra; the repeated and prolonged nature of the questioning, e.g., Ashcraft v. Tennessee, 322 U. S. 143; and the use of physical punishment such as the deprivation of food or sleep, e.g., Reck v. Pate, 367 U. S. 433. In all of these cases the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted. Culombe v. Connecticut, supra, at 603.

"The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances. See Miranda v. Arizona, 384 U. S. 436, 508 (Harlan, J., dissenting); id., at 534-535 (White, J., dissenting)."

Testing the voluntariness in this manner, it is clear that defendant's confession was voluntary and therefore admissible. Defendant was 3 days from reaching his 18th birthday. He was informed of his constitutional rights, both formally and informally before he made any statement, and he voluntarily waived them. The record indicates the police officers treated the defendant with courtesy and respect and no attempt was made to coerce a confession, either physically or mentally. Defendant confessed after a very short period of questioning. As the trial court and the jury found, the defendant's confession was the product of an essentially free and unconstrained choice. The fact that defendant was 3 days from his 18th birthday is not sufficient in and of itself to vitiate his confession.

Defendant's third assignment of error, that the court erred in limiting the cross-examination of defense counsel, is not properly before us. Defendant's motion for a new trial does not contain any reference to this assignment. What we said relative to defendant's first assignment of error disposes of this assignment. In passing, however, we note that it is quite obvious from the exchange quoted between the court and defendant's counsel that the trial court was merely precluding defendant from arguing to the jury through his questions as well as from asking for repetitive and cumulative testimony. The rule is well established in this jurisdiction that the scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion. State v. Coleman (1971), 186 Neb. 571, 184 N. W. 2d 732.

Defendant's fourth assignment of error challenges as a violation of due process the county attorney's discretion whether to charge the defendant, who was 3 days from 18 years of age at the time the confession was given, as an adult or juvenile. The constitutional issue raised by defendant's plea in abatement was decided adversely to the defendant in State v. Grayer (1974), 191 Neb. 523, 215 N. W. 2d 859. There the defendant was 15 years of age. In that case we said: "The constitutional questions raised are readily answerable. In DeBacker v. Sigler, 185 Neb. 352, 175 N. W. 2d 912, this court held that vesting in the county attorney a discretionary power to proceed against juveniles in the juvenile or criminal courts was not an unconstitutional practice and did not violate the precepts of due process. The question was before the court in United States v. Bland, 472 F. 2d 1329 (1972), and Cox v. United States, 473 F. 2d 334 (1973). Both cases dealt with a similar discretion vested in the Attorney General of the United States under federal statutes. Both cases hold: 'Congress could reasonably vest in Attorney General, rather than in a judge in a judicial proceeding, the responsibility of deciding whether or not to prosecute a juvenile as an adult.' Cox v. United States, supra. The Bland case specifically states that such discretion does not violate due process. * * *

"The assertion that one under 16 years of age *must* be referred to the juvenile court was answered in Fugate v. Ronin, 167 Neb. 70, 91 N. W. 2d 240, wherein this court held in the case of a 14-year-old defendant that: 'A careful study of the act clearly indicates it is not intended the juvenile court shall have exclusive jurisdiction and control of all juveniles. * * * "Juvenile courts do not have the sole or exclusive jurisdiction of children under eighteen years of age who have violated our laws." ' See, also, Kennedy v. Sigler, 397 F. 2d 556 (8th

Cir., 1968), which arrives at the same result in a similar case."

The 1974 Legislature amended the Juvenile Court Act to require the county attorney to attach an affidavit with his complaint, setting forth his decision, and that he had considered certain criteria. The effective date of this act was July 12, 1974. Defendant's trial had been concluded the previous month. His notice of appeal herein was filed July 8, 1974, or 4 days before the effective date of the act. The defendant now asserts that the court should require the prosecuting attorney to file an affidavit that he followed the prescribed standards in determining in which court to charge the defendant. This is frivolous to the extreme. Defendant argues that the prosecuting attorney should file an affidavit that he followed standards which the law did not require him to follow at the time the complaint was filed.

There is no merit in any of the defendant's assignments of error. The judgment is affirmed.

AFFIRMED.

STATE EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. G. BRADFORD COOK, A MEMBER OF THE NEBRASKA STATE BAR ASSOCIATION, RESPONDENT.

232 N. W. 2d 120

Filed July 24, 1975. No. 39791.

1. **Attorneys at Law: Disciplinary Proceedings: Trial.** In a disciplinary proceeding against an attorney, the burden rests upon the relator to establish each count of the complaint to a reasonable certainty by a clear preponderance of the evidence.
2. ———: ———: ———. An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal.
3. **Attorneys at Law: Disciplinary Proceedings: Rules.** Disciplinary Rule 1-102(A) provides, among other things: "A

lawyer shall not: . . . (3) Engage in illegal conduct involving moral turpitude. (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice. (6) Engage in any other conduct that adversely reflects on his fitness to practice law."

4. **Perjury: Words and Phrases.** To lie is to make an untrue statement with intent to deceive. Even though a statement as to the truth of a fact is mistaken, the statement is not a lie if the sayer himself honestly believes it to be true.
5. **Perjury: Attorneys at Law: Disciplinary Proceedings.** The commission by an attorney of perjury is ground, depending upon the circumstances, for either disbarment or suspension from the practice of law.

Original action. Judgment of suspension.

Paul L. Douglas, Attorney General, and Melvin K. Kammerlohr, for relator.

Robert B. Crosby of Crosby, Guenzel, Davis, Kessner & Kuester, and Jonathan L. Rosner of Rosner, Rosner & McEvoy, for respondent.

Heard before WHITE, C. J., BOSLAUGH, NEWTON, CLINTON, and BRODKEY, JJ., and COLWELL and WARREN, District Judges.

CLINTON, J.

This is a disciplinary proceeding under the rules of this court brought by the State of Nebraska ex rel. Nebraska State Bar Association against the respondent, G. Bradford Cook, an active member of the bar of this state, who, at the time of the offenses charged, resided in Washington, D.C., and who earlier had practiced law in the city of Chicago, Illinois.

These proceedings were instituted on April 1, 1974, as a consequence of a complaint made by an active member of the bar of this state to one of the standing Committees on Inquiry previously appointed pursuant to our rules. The complaint called attention to newspaper articles of March 29 and 30, 1974, which recited alleged admissions

of previous perjury and lying made by the respondent while testifying as a witness for the United States in the prosecution of John Mitchell and Maurice Stans in the United States District Court for the Southern District of New York on charges of obstruction of justice and conspiracy. The charges against Stans and Mitchell were related to the investigation by the Securities and Exchange Commission of Robert Vesco.

On August 5, 1974, this court, by order, transferred the complaint to the Advisory Committee of the Nebraska State Bar Association. The Advisory Committee held a hearing on September 11, 1974, at which the respondent appeared and at which evidence was received. The Advisory Committee concluded that there was reasonable ground to believe Cook guilty of the charges and filed its complaint in six counts against the respondent in this court on September 27, 1974. On November 8, 1974, John H. Kuns, District Judge, Retired, was appointed by this court as referee to take testimony on an amended complaint. The amended complaint charged that the respondent Cook violated DR 1-102 (A) (3), (4), (5), and (6) in the respects charged in the following counts:

Count I: That respondent knowingly testified falsely under oath before a Grand Jury of the United States District Court for the Southern District of New York in the matter of the United States v. Robert Vesco, on April 19, 1973.

Count II: That in the same proceeding in the same court, respondent again knowingly testified falsely under oath on May 3, 1973.

Count III: That in the same proceeding in the same court, respondent again knowingly testified falsely under oath on May 7, 1973.

Count IV: That respondent knowingly testified falsely before Senator Proxmire's Subcommittee on Appropriations for the Department of Housing and Urban Development, Space Science, Veterans and Certain Other Inde-

pendent Agencies of the Committee on Appropriations on May 1, 1973.

Count V: That respondent knowingly testified falsely under oath before the same subcommittee on May 14, 1973.

Count VI: That respondent knowingly testified falsely under oath before Representative Staggers' Special Subcommittee on Investigation of the Committee on Interstate and Foreign Commerce, on May 21, 1973.

Respondent, by his amended answer, admitted that as to count I of the complaint: "Respondent on April 19, 1973, knowingly testified inaccurately, incompletely, evasively, and in some respects falsely under oath before the Grand Jury in the United States District Court for the Southern District of New York in the matter of United States v. Robert Vesco." Respondent denied all remaining allegations of counts II to VI.

By written stipulation the respondent expressly waived the lack of specificity in the description in the complaint of the alleged untruths.

The matter was heard by the referee on January 16, 1975. The referee found the respondent had admitted his guilt of count I; found that the evidence was insufficient to support a finding of guilt on counts II to VI, inclusive; made findings in extenuation of guilt on count I; and recommended discipline of censure or reprimand by this court. The relator filed exceptions to the findings of the referee on counts II to VI and to the recommended discipline. This court then heard the matter upon the combined evidence received by the Advisory Committee and the referee. We sustain the findings of the referee of guilty on count I and not guilty on counts II, III, and VI, and make findings of guilty on counts IV and V. We enter judgment of suspension from the practice of law for a period of 3 years.

The complaint is founded upon the theory that the respondent violated the disciplinary rules contained in

the Code of Professional Responsibility, Canon 1, in DR 1-102 (A), which provide:

"(A) A lawyer shall not: . . .

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

The burden rests upon the relator to establish each count of the complaint to a reasonable certainty by a clear preponderance of the evidence. State ex rel. Nebraska State Bar Assn. v. Rhodes, 177 Neb. 650, 131 N. W. 2d 118. An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal. State ex rel. Nebraska State Bar Assn. v. Tibbels, 167 Neb. 247, 92 N. W. 2d 546; State ex rel. Nebraska State Bar Assn. v. Butterfield, 169 Neb. 119, 98 N. W. 2d 714.

In this case the respondent admits having testified falsely at the April 19, 1973, hearing before the Grand Jury of the United States District Court for the Southern District of New York in the matter of the United States v. Robert Vesco, both by his amended answer and in his testimony. There is, therefore, no question but that count I of the complaint has been established.

We deem that a recital of some of the background information and the circumstances surrounding the alleged misconduct is essential to an understanding both of the justification for the discipline we impose and the findings we make as to the respondent's guilt insofar as those findings differ from those of the referee.

Respondent was admitted to the bar of Nebraska in 1962 and his membership has continued until the present time. Shortly after his admission in this state he began the practice of law in Chicago, Illinois, and specialized in securities law. In September 1971 he became general counsel for the Securities and Exchange Commission and in November 1971 assumed supervision of the investigation of Robert Vesco in connection with violations of federal statutes regulating securities. In August 1972 while that investigation was still in progress, Cook was appointed Director of the Division of Market Regulation of the commission. As director he no longer had direct responsibility for the investigation of Vesco, but was kept advised of developments. The present charges grow out of certain of the respondent's conduct related to that investigation and the subsequent prosecution of Maurice Stans.

In August of 1972 the investigation of Vesco developed information indicating that Vesco had "looted" a mutual fund known as Investors Overseas Services of the sum of about $250,000,000 and the SEC probe was then directed to efforts to determine exactly how and by what means this had occurred, where the funds had gone, and to the taking of appropriate legal action. In October of 1972 the SEC learned of $250,000 in cash having been delivered to Vesco in New Jersey. This transaction had apparently occurred in April of 1972. It also learned that $50,000 of this amount was at that time siphoned off and the balance of $200,000 had gone to some unknown destination or recipient. At about that time the Committee to Reelect the President, sometimes referred to as "CREEP," reported a contribution from Vesco of $50,000. Cook suspected at the time the SEC learned of the $250,000, and without having any direct evidence, that the $50,000 was a part of the looted funds. He further suspected that the $200,000 also might have become a political contribution. He mentioned his hunch to one member of the enforcement division of the SEC,

but that person indicated he had information that the money had probably gone to Vesco in the Bahamas.

On Saturday, November 11, 1972, the respondent went goose hunting at Eagle Lake near Houston, Texas. There Cook met Maurice Stans for the first time. The outing had been arranged by Cook's father, who was a friend of Stans through work done together in connection with the 1968 and 1972 political campaigns of Richard Nixon. At that time Stans, a former Secretary of Commerce in the Nixon administration, was chairman of a section of CREEP responsible for raising funds. The following outline of events at Eagle Lake and those which subsequently followed comes in part from an affidavit made on May 23, 1973, by the respondent while he was cooperating with the United States District Attorney in the prosecution of Mitchell and Stans, and in part from his testimony in these disciplinary proceedings and the evidence adduced in these proceedings. In the affidavit Cook stated: "I went to this goose shoot in part to meet and socialize with Maurice Stans and other individuals who could be helpful in my efforts to seek the chairmanship of the SEC." In the course of a conversation at Eagle Lake, the respondent mentioned to Stans his desire to become chairman of the SEC when the present chairman, William Casey, quit, which event the respondent believed to be imminent. Some further discussion ensued between Cook and Stans during which Stans indicated he favored an accountant for the position. Cook urged reasons supporting the proposition that a securities lawyer should be appointed and particularly urged his own qualifications. Stans made no commitment. Later, in the same conversation, Cook brought up the matter of the Vesco investigation and mentioned in particular the $250,000 cash fund and noted the receipt of the $50,000 by CREEP from Vesco. Stans indicated he had no knowledge of the contribution. Cook asked him to check on it. Cook, in his testimony, stated that his purpose was to discover if CREEP might

also have received the $200,000 and also apparently to give Stans an opportunity to make the information public if CREEP had, in fact, received the money. During the conversation Cook also mentioned that the complaint against Vesco would shortly be filed. When, at the end of the hunting outing, Cook and Stans parted at the Houston airport, Stans stated he would check on the Vesco contribution and get back to Cook, and, according to the affidavit, "In the same conversation I also recall Mr. Stans making some mention of the SEC chairmanship and that I should proceed in seeking it."

On November 13, 1972, when Cook returned to his office in Washington, D. C., he received, apparently routinely, a copy of a draft of the proposed complaint against Vesco. It contained a paragraph outlining in some detail the movement of the $250,000 cash. Previous drafts of this particular paragraph had been in very general language, omitting dates, amounts, and identity of persons. In the draft then before him Cook noted that a certain date coincided with the last day in the preceeding April during which cash political contributions could lawfully be made without being publicly reported.

On November 15, 1972, Stans called Cook and indicated he wanted to talk "about what we discussed at Eagle Lake." Cook then brought up the Vesco investigation and paraphrased to Stans the allegations of the paragraph. Stans indicated the pleading gave him problems and wondered if it had to be done that way. Cook told Stans he did not know, but would find out. Then Cook spoke to a Mr. Stan Sporkin of the SEC enforcement staff, who was one of the persons then having prime responsibility for the projected litigation against Vesco. Cook's affidavit, insofar as it pertains to that particular matter, is as follows: ". . . asked him why this particular paragraph was in the complaint and whether it was necessary to our case. He stated that it had to be in the complaint. I then asked him

if it was necessary to have such great detail. I expressed my opinion that it would be more professional and better style to have a general description of this particular transaction. I believe he took the particular paragraph on a single sheet of paper from my hand, glanced at it and said to the effect that he would see what he could do to make it more general and left for his office."

The affidavit of Cook also recites: "Following my conversation with Mr. Sporkin I recall some discussions of this paragraph with Mr. Casey. I believe that I expressed to Mr. Casey my concern over the paragraph as originally drafted. I told him that I had discussed it with Sporkin and that Sporkin was going to redraft the paragraph to be more general. He in effect asked me to work it out with Stan Sporkin. I also believe that he made a comment to the effect that our primary objective was to stop Vesco from looting the IOS funds and the complaint should be worded to accomplish this objective and that we should not detract in any way from the main focus or thrust of our case. I have some recollection of stating that the paragraph may have political overtones."

On November 17, 1972, Cook called Stans and told him the paragraph had to stay in the complaint, but would be pleaded in a more general way without the specifics. Stans expressed the opinion " 'that's better'," or " 'that's fine'." Cook went on to tell him that transcripts of discovery depositions of witnesses would be filed and that when that was done all the information the SEC had on the $250,000 transaction would be on public record. Stans inquired as to why that needed to be done. Cook said he did not know, but would find out. Cook then again conferred with Sporkin. On November 27, 1972, the complaint against Vesco was filed. The transcripts were later filed and Stans ultimately became aware of that fact.

On February 1, 1973, Stans called Cook and asked him to meet him at the White House Mess. At that

time Stans showed Cook a copy of a transmittal letter to Vesco, returning a $250,000 political contribution. Stans said no announcement would be made, but, because of the size of the contribution, the matter would become public when the GAO filed its report (apparently upon audit under the Disclosure Act). Cook testified during the disciplinary proceedings that, up until the time of this disclosure by Stans, he had believed CREEP had not been the recipient of the $200,000 because of Stans' implicit denial, and that this belief had, despite his initial suspicions, been reenforced by Sporkin's statement that the money had gone to the Bahamas. The day following the meeting with Stans at the White House Mess, Cook notified Sporkin of Stans' disclosure. Later Cook contacted Stans urging the matter be made public, and the latter indicated to Cook that there would be no disclosure until the GAO filing. On March 3, 1973, Cook became Chairman of the Securities and Exchange Commission.

Such is a sketchy summary of the pertinent background. We now turn to the events directly pertaining to the offense charged.

While the previously cited events were occurring, a Grand Jury of the United States District Court for the Southern District of New York was investigating the charges against Mitchell and Stans. In February or March 1973, Cook turned over to the United States District Attorney's office, at its request, some documents which presumably would be useful in the Grand Jury probe. These items included "logs, telephone books, calendars and some memoranda and correspondence." Shortly thereafter, Cook, at Stans' request, again met Stans at the White House Mess. The request for the meeting was made apparently by telephone and Stans, either then or at the beginning of the meeting, stated that he wanted it to be "One of those conversations that does not take place." At this meeting Stans informed Cook that he had testified before the Grand

Jury and that in that testimony had stated that he had no communication with Cook regarding the Vesco investigation *until after* the complaint against Vesco had been filed. At the trial of Mitchell and Stans, Cook testified concerning this meeting as follows: "And he said that in connection with our meeting at that time, that the meeting would be—it was being held to discuss a trip to Haiti which both he and myself had been invited to attend.

"Q Was there any further conversation?

"A I looked at Mr. Stans, or actually I looked into my coffee cup, and I said, 'Well,' and I kind of hesitated, and he said, 'Well, Brad, that's the way it happened, and there is no sense in getting everybody embarrassed here. There was nothing done wrong here. The gift was a legal gift. Your suit was brought and all it would do is cause a great deal of embarrassment to everybody.'

"Q What did you say?

"A I said, 'Well, if that's the way it is going to be, I guess that's the way it is going to be,' or words to that effect.

"Q Was there any further conversation that day?

"A I believe that was the substance of it."

Apparently, earlier in February 1973 previous to the meeting with Stans we have just described and before Cook had assumed his duties as Chairman of the SEC, he had received a request from Kenneth Parkinson, attorney for the fund-raising section of CREEP of which Stans was the head, to meet Parkinson at the latter's office. There Parkinson informed Cook that he had received from Stans some notations of meetings between Stans and Cook and he wanted to go over them with Cook to verify the information therein. As indicated by the memoranda, as related by Parkinson to Cook, these meetings between Cook and Stans were said to have taken place *after* the filing of the Vesco complaint. According to Cook's testimony before the referee: "And he gave me a piece of paper which had various dates

written, and he went through each date and he said 'Well, Mr. Stans said that he talked to you on this date about this matter, and on this date about this matter.' And on one or two of the dates I corrected him on the date itself, and on the, with respect to the discussions that took place and what the subject of those discussions were. I didn't say yes, I didn't say no, I just sat there and didn't correct Mr. Parkinson."

On April 19, 1973, Cook appeared before the Grand Jury and, as he judicially admits, knowingly testified falsely that he had no conversation with Stans concerning the Vesco complaint until after the complaint was filed.

On May 1, 1973, Cook, as Chairman of the SEC, together with other members of the staff of that agency, were testifying before a subcommittee on appropriations of the United States Senate headed by Senator Proxmire. The subject was the SEC budget. Those testifying were not under oath. After the testimony on budget matters was concluded, Senator Proxmire brought up the subject of the Vesco investigation. After an introductory question and answer by Cook, the following occurred: "Senator Proxmire. Well, the reason I asked this question is I want to know whether any member, any Commissioner or any staff member could tell us this morning whether they have been approached by anyone in the administration with respect to activities of the SEC vis-a-vis Vesco. Why don't we just go through the Commissioners?" Each of those witnesses testified negatively until Cook was reached and he responded as follows: "Mr. Cook. Both before and after our suit was filed I had discussions concerning a particular facet of the case with a member of the Re-Election Committee. These discussions focused in general on the source of a large sum of cash which was ultimately described in paragraph 64 of our complaint. The first discussion arose in the context of a social gathering.

"Senator Proxmire. Who was the member?

"Mr. Cook. It was Maurice Stans.

"Senator Proxmire. What were the dates of these discussions?

"Mr. Cook. I couldn't give you specific dates but it would have been immediately before the complaint was filed in November and subsequent discussions were held in January."

In the brief of respondent, our attention is called to the fact that the question asked was irrelevant to the subject of inquiry of the committee and could have been truthfully answered by Cook in the negative since, at the time of the various conversations between Stans and Cook, the former was not a member of the Nixon administration, but one of the members of the CREEP committee. It is to be noted, however, that the response was in fact a coverup of the falsity of some of the items concerning which Cook had lied before the Grand Jury and would therefore appear to be at least a volunteered continuation of the original lie. The untruth evident here is that the answer limits the subject of the conversation to the source of the funds, whereas the incriminating conversations were those relating to restricting the pleading and the feasibility of not filing certain discovery depositions. It also lies in the fact that *all* these conversations took place *before* the filing of the complaint. In his later and second appearance before the Proxmire committee on May 14, 1973, the respondent acknowledged the knowing falsity of his statement of May 1, 1973, in the following exchange: "Senator Proxmire. So you knew at the time you made the response it was not true?

"Mr. Cook. I knew at the time I made the response here on that day it was not true and, again, as soon as I got back, when I got back, on Friday when I saw the transcript I immediately tried to reach you and to tell you."

On May 2, 1973, the day following the Proxmire subcommittee budget hearing, Cook received a telephone

call from Mr. Seymour, United States District Attorney for the Southern District of New York, inquiring whether Cook would be coming to New York within a few days as there was a very important matter concerning which he wished to speak to Cook. Cook responded that he would be in New York that evening to make a speech and would see the District Attorney that afternoon. At the hearing before the referee in which Cook described this telephone conversation, he stated he felt that he knew what the District Attorney had in mind and was anxious to discuss it with the District Attorney. Cook kept the appointment and was there told, in Mr. Cook's words: "Seymour said that they had reason to believe that my Grand Jury appearance on the 19th, my testimony had not been completely truthful.

"And I said to him I was relieved that he had raised this question and that, and that he was correct, that I had not leveled with the prosecutors and that I would do everything in my power to tell him everything that I could recall concerning these, this investigation."

Cook appeared before the Grand Jury on May 3, 1973, and testified. He was recalled for further testimony before the same Grand Jury on May 7, 1973. Between these two Grand Jury appearances Cook, after being unable to contact Senator Proxmire by telephone, wrote a letter to Senator Proxmire in which he stated: "In my response I interpreted the question in the spirit I thought it was asked and recounted a conversation that I had with Mr. Stans even though at that time he was not a member of the administration.

"While that conversation was the one which most readily came to mind at the time, I was mistaken in indicating that it had occurred subsequent to the filing of our law suit.

"It is my recollection that the conversation occurred prior to the date on which we brought our case. In addition, there were several other conversations which I had with Mr. Stans, both prior and subsequent to the

filing of our law suit." We observe that the acknowledgement in this letter is not one of having told a falsehood, but merely one of being "mistaken."

On May 10, 1973, Vesco, Mitchell, Stans, and others were indicted.

On May 14, 1973, Cook was called to testify again before the Proxmire subcommittee and at this time he did testify under oath. A principal subject of inquiry at this hearing was whether the generalized, rather than particularized, pleading of the paragraph in the SEC complaint against Vesco was motivated merely by the legal appropriateness of the method of pleading, or whether it was motivated by desire either to conceal or delay disclosure of the information. This same matter was also a matter of critical importance in the prosecution of Stans. In that connection Cook testified contradictorily as to whether he had discussed the pleading of that paragraph with Sporkin before or only after his conversation with Stans on November 15, 1972. The thrust of the inferences to be drawn are that if he discussed the matter with Sporkin on November 14, 1972, then the changes in the pleading were not motivated by Stans' importunations and, on the other hand, if he did not discuss it with Sporkin until after the conversation with Stans, then the opposite could be concluded. (We note here parenthetically and for the purpose of the clarification of later comments in the opinion that the issue raised by the paragraph in question is the one under which evidence of the $250,000 Vesco cash, which ultimately found its way to CREEP, would be admissible in evidence in the case against Vesco.)

In an affidavit prepared between May 17, 1973, and May 23, 1973, and signed on the latter date, during the time while Cook was cooperating with the United States District Attorney, Cook stated: "Following this conversation with Mr. Stans, I spoke to Sporkin and asked him why this particular paragraph was in the complaint. . . ." At the Mitchell-Stans trial on cross-examination,

Cook acknowledged unequivocally that the conversation with Sporkin came after the conversation with Stans. That testimony was as follows: "And directing your attention to the date November 14 of 1972, when you returned to the SEC from your goose hunt, is it not a fact that you found paragraph 33A, so to speak, before you for the first time?

"A That's my best recollection, Mr. Bonner.

"Q And that was a day before your telephone conference with Maurice Stans on November the 15th, is that not so?

"A Yes, sir.

"Q And is it not a fact that a day prior to ever speaking to Maurice Stans on May [sic] the 15th, you talked to Sporkin about this paragraph on the 14th?

"A That's not a fact, Mr. Bonner. . . .

"Q And that on May 14th, 1973, before the Senate Committee, before Senator Proxmire and Senator Brook, you stated on three or four or five different occasions that the decision not to use the expanded paragraph was made by you in consultation with Mr. Sporkin on November 14th?

"A Essentially, that's correct, Mr. Fleming." Respondent, at the Mitchell-Stans trial, acknowledged that his testimony before the Proxmire committee on May 14, 1973, had been false in that respect. A part of that testimony, as shown in the record of that hearing, is as follows: "Mr. Cook. All I can do is look at the memoranda that set the complaint down and stated the 13th of November. And I have on my calendar a meeting with Mr. Sporkin on the 14th. I assume it was that conversation in which we talked about this. And I had the conversation with Mr. Stans on the 15th. I can't be specific. I just don't know." At the committee hearing on May 14, 1973, Cook was also interrogated to a considerable extent concerning the motivation for his inquiries or suggestions to Sporkin with reference to not filing the transcripts of testimony of the discovery

witnesses. He at that time attributed those inquiries or suggestions to his independent judgment and not to the importunations of Stans. Sporkin testified before the Proxmire committee that Cook indicated to him he would be "appreciative, if the transcripts that dealt with the $250,000 were not filed if they did not have to be filed at that time." The conclusion that Cook's suggestion relative to amending the pleading and against filing the transcripts was motivated by his prior conversations with Stans is inescapable.

On May 16, 1973, Cook resigned as Chairman of the SEC. On May 21, 1973, he testified before the Staggers committee.

We have carefully read the testimony of Cook before the Grand Jury on May 3 and 7, 1973, and his testimony before the Staggers committee, just as we have read the testimony in the other proceedings. The relator has not pointed out the specific testimony in those hearings which it claims is knowingly untruthful. Our reading of the testimony of those three hearings and comparing it with the facts stated in Cook's affidavit and his testimony at the Mitchell-Stans trial has uncovered no testimony which we can conclude is untruthful.

To lie is to make an untrue statement with intent to deceive. Webster's Third New International Dictionary, Unabridged. Even though a statement as to the truth of a fact is mistaken, the statement is not a lie if the sayer himself honestly believes it to be true. The relator, in support of its contention that the respondent lied before the Grand Jury on May 3 and 7, 1973, and before the Staggers committee on May 21, 1973, relies principally upon the seemingly unequivocal admissions of the respondent made on cross-examination during the Mitchell-Stans trial that he had lied on those occasions. The respondent, in his testimony before the referee, explains these admissions made during the Mitchell-Stans trial in the following manner. During a recess after the admissions were made, he had a conversation

with one of the prosecutors. We now quote from the hearing before the referee: "A Well, I was disturbed because I had admitted on cross-examination concerning the truthfulness of prior testimony and the term perjury and the word lied, and I said that I really wasn't given an opportunity to explain those answers.

"I also said that many of the questions that I had been, especially Mr. Fleming was asking me, I had never been asked before, and that it made me appear as though I was in fact lying and had lied on many occasions, and I thought that had an adverse effect upon my personal integrity and credibility, and also was detrimental as far as the jury was concerned.

"You [Mr. Rosner] said that you'd make a list and that you had a list that had been made up of various sections, that you wanted them on redirect permit me to explain exactly my answers, why I said 'Yes, yes, yes.' especially to Mr. Bonner.

"Mr. Wing said that he was so pleased with my direct examination and that my credibility was such that he thought that all it would do would confuse the jury, the jury would know my own prior direct testimony, and that he did not want to go back and reconstruct each of these issues. He did say that he would ask me the one question, actually two questions, one, had I been asked all these questions before, which he did; and also permit me to say, which I was directing towards the April testimony, as to why I might have lied or why I did lie at that time, and that's the way it was left."

He was asked to explain his state of mind while undergoing cross-examination at the trial. "A The first time that Mr. Fleming, I believe he used the word 'perjury,' before I answered I looked at Mr. Wing hoping that, assuming that he would object. I then looked at Mr. Rosner, and there was a pause, a hesitation, and I thought at that time that the, the only answer under those circumstances could have been 'Yes.'

"Now in respect to Mr. Bonner, when he was going to

the first, the second, the third, the fourth time at the end of his cross-examination, I again said 'Yes,' or 'That's correct,' I believe. I had no idea at that time what the consequences would be of those admissions which I feel really are not admissions in the sense that, yes, I lied, yes, I perjured, other than for the April date.

"But what I was really trying to say to them and what I tried to explain to Mr. Wing during the recess and what I tried to explain to Mr. Bonner and Mr. Fleming once or twice on cross was that each time after May 2nd that I gave sworn testimony additional facts were coming out. And even the affidavit itself which took four or five days to execute still does not have complete truth, and even today as I testified here this morning I recalled Mr. Sporkin's comment to me after I testified in the May 14th Proxmire Committee, where he said that was a helluva question to ask at a budget hearing.

"And each time that I do review these things I do think of some little fact which comes out which makes the truth more complete each time. And that's what I in myself felt when Mr. Bonner and Mr. Fleming were asking 'Did you tell the whole truth?'

"The answer would be 'No, I did not tell the whole truth.' On many occasions I wasn't given the opportunity to tell the whole truth. The people who were asking the questions didn't want the whole truth as that existed, nor did I recall the whole truth. That's what I meant when I made the admissions to Mr. Bonner and to Mr. Fleming."

We accept, as did the referee, the respondent's explanation insofar as his admissions of lying relate to the May 3 and 7, 1973, Grand Jury appearances and the Staggers committee appearance. An examination of the respondent's testimony at those three hearings discloses at most variances concerning dates, whether a particular thing was said at one time or another, and summaries of conversations which differ in language or completeness

but not in substance. We believe the record shows the respondent did not lie on those occasions. Accordingly, there is no occasion to decide whether guilt of lying or perjury may be founded *solely* upon an extrajudicial admission without some other evidence of such conduct.

The respondent argues that censure or reprimand is, under the circumstances, a sufficient sanction for his admitted misdeed and any others of which the court may find him guilty. In support of this position respondent urges (paraphrased by us): (1) He made an early and complete disclosure and thereafter fully cooperated with responsible authorities. (Attested by letter from the prosecutor.) (2) He is a relatively young man who occupied a sensitive position in a governmental agency, and was subject to the direction of persons senior to him in age and experience and closely identified with the highest civil authority in the nation. (3) His conduct was an isolated transgression involving essentially a single course of conduct in an otherwise unblemished career. (His record of previously high ethical standards as well as his present high legal competence is attested by witnesses and numerous letters from persons of good repute.) (4) He was motivated simply by desire not to injure Maurice Stans. (5) The office of the United States District Attorney, with whom the respondent cooperated, believed his cooperation with that office was complete and forthright. (Attested by letters from the United States District Attorney.) (6) Only two persons could testify as to what occurred in the conversations between Cook and Stans and, if Stans persisted in his version (as he did), Cook could have probably succeeded, had he so wished, in concealing the evidence from the government, but he did not seek to do so. (Attested by letter from the United States District Attorney.) Accordingly, he might have been better off if he had not admitted his involvement, which he nonetheless did to his personal detriment. (7) Cook cooperated without seeking or having been promised immunity on the charge

of perjury. (Attested by letter from the United States District Attorney.) (8) He voluntarily resigned as Chairman of the SEC. (9) The publicity and humiliation attended upon Cook's disclosures and resignation are, in themselves, substantial punishment. (10) His continuation in the practice of law does not, under the circumstances, constitute a risk to clients, the public, or the administration of justice. (11) The untruths, whatever they may have been, hurt no individual and did not result, and were not intended to result, in the obstruction of justice. (12) Certain other lawyers involved in recent national scandals have been lightly dealt with. (13) He did not seek to plea bargain with either the District Attorney or the Watergate Special Prosecutor's force, and decisions by those offices not to prosecute Cook either for perjury or conspiracy to obstruct justice were based respectively on policy consideration to encourage recantation and on the merits. (Attested by letters from those offices.)

The determination of what is appropriate discipline in this case is not without difficulty. Many matters must be considered. These include the nature of the offenses, the need for deterrence of similar future misconduct by others, maintenance of the reputation of the bar as a whole, protection of the public and clients, the expression of condemnation by society on moral grounds of the prohibited conduct, and justice to the respondent, considering all the circumstances and his present or future fitness to continue in the practice of law. Drinker, Legal Ethics (1963), pp. 48, 49; State ex rel. Spillman v. Priest, 123 Neb. 241, 242 N. W. 433; In re Dreier, 258 F. 2d 68; State ex rel. Nebraska State Bar Assn. v. Butterfield, *supra*; State ex rel. Nebraska State Bar Assn. v. Mathew, 169 Neb. 194, 98 N. W. 2d 865; State ex rel. Nebraska State Bar Assn. v. Strom, 189 Neb. 146, 201 N. W. 2d 391.

The offense of perjury is most serious, tending, as it clearly does, to defeat the administration of justice

and is always held to be ground for either disbarment or suspension. Matter of Sleeper, 251 Mass. 6, 146 N. E. 269; State ex rel. Nebraska State Bar Assn. v. Butterfield, *supra*. The record discloses that the offense under count I was a premeditated perjury, committed at the solicitation of a highly placed political figure from whom respondent had sought political favor. The lie before the Proxmire committee was essentially a spontaneous occurrence and a continuation of the original lie. The two, for purposes of discipline, may be regarded as one offense. The lie before the Proxmire committee on May 14, 1973, pertaining basically to the respondent's motivation for his suggestion of changes in the Vesco pleadings, seems to have a slightly different genesis and motivation, and appears in part, at least, to have arisen from the self-delusion to which even the best of men are sometimes susceptible. Not infrequently a particular action may be the consequence of diverse motivations, some of which may be unworthy or morally wrong and the others quite proper. After the fact there is a very human tendency, founded in part on the frailty of memory, to attribute one's actions to the more worthy motive. That may be true in this instance. At one point in his testimony Cook described a conversation with the prosecutors in which he, at that time, believed he recalled that he did, in fact, have a conversation with Sporkin relative to the pleading change even before he talked to Stans on November 15, 1972. When Cook was testifying before the Proxmire committee on May 14, 1973, on the line was his position as chairman of the commission. He could not yet then bring himself to admit that the conversation with Sporkin had not taken place until after the conversation with Stans.

We observe, because it is a circumstance surrounding the offenses which affect their gravity, that the record does not support any inference that Cook's actions, relative to the pleadings, were intended to obstruct justice. It is clear that this was not his intention as he, at all

times, realized that the same evidence was admissible whether the matter was pled generally or specifically. He had no control over what evidence would be presented, and he knew as well that his colleagues in the enforcement division of the SEC fully intended to bring the $250,000 transaction to light. It would appear that what Cook desired was to cooperate with Stans in postponing a politically embarrassing disclosure. Cook did not then know of evidence, later coming to light, which indicated that other high-placed persons in the Nixon administration were attempting to exert influence upon the SEC to quash the Vesco litigation.

It is true that Cook made an early and ultimately complete disclosure and cooperated thereafter with the United States District Attorney. The disclosure, however, did not come until he was confronted with the accusation that he had lied. To his credit, however, it appears that his confession came with a sense of relief and that his wrong had weighed heavily upon his conscience.

Most of the specific items urged by Cook, as listed above, in favor of light discipline are either shown by the record or may be conceded, except insofar as our recital of the facts or comments have otherwise indicated. However, some others are deserving of special comment. One such item is the assertion that his acts hurt no one. This may be true as far as individuals are concerned. It may not be true as it relates to the administration of justice. Cook was a principal witness against Stans. His having to admit before the jury in the Mitchell-Stans trial that he had earlier perjured himself on the same matter concerning which he was then testifying could not but affect his credibility with that jury. Whether the result was a miscarriage of justice need not and cannot be judged for the whole record of that trial is not before us. Suffice it to say that his admitted perjury may well have affected his credibility and so, as a consequence, the administration of justice.

The fact that certain lawyers in other jurisdictions may have been lightly dealt with can be no consideration with this court. We are responsible for the discipline only of members of the bar of this jurisdiction and must adhere to disciplinary standards we believe appropriate.

The misconduct of respondent was not done at the behest of his superiors, but at that of a political figure having no official connection with the SEC.

It is clear from the record that Cook has previously observed high ethical standards in the practice of law and that his reputation in this respect, as well as professional competence, was excellent. Devious means do not appear to have been a way of life with him. The evidence of those who know him tends to show great honesty and fairness. Evidence in the record supports the conclusion that he is sincerely contrite for the offenses committed by him. This, indeed, the record indicates, is in part responsible for his perhaps too ready admissions that he was not truthful in his appearances of May 3 and 7, 1973, before the Grand Jury and later before the Staggers committee.

A judgment of permanent disbarment is a most severe penalty, as anyone who is dependent upon some special skill or knowledge for his own livelihood will quickly recognize if he contemplates for a moment the impact of being deprived by judicial fiat of the use of that skill and knowledge. Disbarment ought not to be imposed for an isolated act unless the act is of such a nature that it is indicative of permanent unfitness to practice law.

The nature of the acts here do, however, go to the heart of the administration of justice. We are, nonetheless, persuaded that there is no likelihood of repetition of this or any other unlawful or unethical conduct. Mere reprimand or censure, however, cannot, we believe, accomplish the multiple purposes of discipline as we have previously outlined them. Under all the circumstances,

we find that the respondent should be suspended from the practice of law for a period of 3 years, provided that at the end of that period the suspension may be lifted upon an affirmative showing by him that he has not, during the period of his suspension, engaged in the practice of law in any manner whatsoever in this or any other jurisdiction and that he has not, during that time, engaged in any conduct which would subject him to discipline under the Disciplinary Rules if he were engaged in the practice of law and that he will not do so in the future. In the absence of such showing, the suspension will become permanent.

Costs of the proceeding are taxed to the respondent.

JUDGMENT OF SUSPENSION.

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

231 N. W. 2d 513

Filed July 24, 1975. No. 39808.

1. **Sentences: Criminal Law.** A sentence within the statutory limits will not be disturbed on appeal unless there appears to be an abuse of discretion.
2. **Sentences: Probation and Parole: Criminal Law.** The action of a trial court in denying probation and imposing a sentence will not be disturbed on appeal unless there appears to be an abuse of discretion.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Richard L. Kuhlman, for appellant.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

WHITE, C. J.

In this case the defendant was sentenced by the District Court to an indeterminate term of 3 to 10 years in the Nebraska Penal and Correctional Complex for the crime of burglary. He contends, on appeal, that the sentence was excessive and that he should have been granted probation. We affirm the judgment and sentence of the District Court.

On June 6, 1974, the defendant entered a plea of guilty to the charge of burglary. § 28-532, R. R. S. 1943. The sentencing was deferred pending a presentence investigation and the defendant was freed on $1,000 bond. On September 13, 1974, after considering the presentence investigation, the court imposed the sentence heretofore recited.

We consider the contention as to excessiveness of the sentence and the failure to grant probation together. A sentence within the statutory limits will not be disturbed on appeal unless there appears to be an abuse of discretion and the action of a trial court in denying probation and imposing a sentence will not be disturbed unless there likewise appears an abuse of discretion. State v. Atwater, 193 Neb. 669, 228 N. W. 2d 876; State v. Holzapfel, 192 Neb. 672, 223 N. W. 2d 670.

We deem it unnecessary to repeat all the facts revealed in the presentence investigation report that was before the court before and at the time it sentenced the defendant. Suffice it to say that in 1966, the defendant was convicted of driving while intoxicated. That same year he was convicted of auto theft under the Dyer Act and was sentenced to 5 years in a federal penitentiary. After serving 2 years, he was paroled but violated this parole by leaving the jurisdiction against the direct order of his parole officer. The defendant was subsequently arrested in 1970 on a capias for his parole violation and was returned to prison until his release in 1972. In light of these facts, undenied in the record, it is obvious that there was no abuse of discretion by the Dis-

trict Court in imposing the sentence that it did and in its refusal to grant probation.

The defendant also claims that his constitutional rights were violated in the presentence hearing by allowing the presentence investigation to be considered by the judge in handing down his sentence. The defendant does not claim that any information in that report was false or that he or his attorney was denied an opportunity to examine the report and file objections. The contention that the court could not consider the presentence investigation was answered in an extensive discussion in State v. Holzapfel, *supra*, a case in which we affirmed a rule of long standing as to the validity of sentencing judges' power to have and consider a presentence investigation and report. There is no merit to this contention.

The judgment and sentence of the District Court are correct and are affirmed.

AFFIRMED.

LOY RANDALL ET AL., APPELLANTS, V. LYDIA ERDMAN, APPELLEE.

231 N. W. 2d 689

Filed July 24, 1975. No. 39819.

1. **Summary Judgments.** A motion for summary judgment can be granted only where there is no general issue as to any material fact in the case where under the facts the moving party is entitled to a judgment as a matter of law.
2. ———. The party moving for a summary judgment has the burden of showing that no issue of fact exists, and the court should consider all the evidence in the light most favorable to the party opposing the motion.
3. **Contracts: Waiver.** Generally, a party cannot accept the benefits of a contract, and then claim that the contract is forfeited.
4. ———: ———. Where a party to a contract, with knowledge of a breach by the other party, receives money in the per-

formance of the contract, he will be held to have waived such breach.

5. **Contracts: Landlord and Tenant: Waiver.** The courts have generally held that the acceptance of rent after the lessee's breach or default in the terms of the lease constitute a waiver of the default so as to entitle the lessee to enforce the option to purchase.
6. **Contracts.** The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract and of the parties. Such a construction of the contract should ordinarily be enforced.
7. **Summary Judgments: Trial: Judgments.** Section 25-1333, R. R. S. 1943, provides that the court shall if practicable ascertain what material facts exist without substantial controversy, and 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.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded with directions.

Wright & Simmons, for appellant.

Richard A. Douglas of Herman & Herman, for appellee.

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

WHITE, C. J.

In this action for the specific performance of an option to purchase real estate, the District Court rendered a summary judgment in favor of the defendant. The plaintiffs appeal and contend that the District Court erred in not granting summary judgment in their favor decreeing performance of the option to purchase. We reverse the judgment of the District Court and grant summary judgment in favor of the plaintiffs.

On December 30, 1970, the plaintiffs, Loy Randall

and Marian Randall, and the defendant, Lydia Erdman, executed a contract in which the defendant leased certain land which she owned to the plaintiffs. The lease was for a term of 1 year from January 1, 1971, to December 31, 1971. The lease granted to the plaintiffs an option to extend the lease under the same conditions for two additional terms of 1 year each, conditioned upon written notice to the defendant 30 days prior to the termination of the lease or the extension thereof. Paragraph 9 of the leasing contract also gave the plaintiffs the option to purchase the property upon giving written notice 30 days prior to the expiration of the lease or an extension thereof. This clause provided, in the event of the exercise of the option, that the plaintiffs were to pay the defendant $25,000 at the time of the exercise of the option to purchase.

Central to the question involved in this case is the dispute as to the performance of paragraph 5 of the lease which dealt with the use of the grazing land for cattle. Paragraph 5 provided: "Lessee agrees that he will pasture on said lands no more than 165 head of cows or 400 head of yearlings the year round."

In February 1971, the plaintiffs began to move cattle on the property. By April 1971, the plaintiffs had over 200 head of cattle on the property, a condition which continued until the last week in October 1971. At this time the plaintiffs removed all the cattle to adjacent land which was also in their possession. Then, on December 8, 1971, the plaintiffs moved over 200 head of cattle back onto the defendant's property. A dispute almost immediately arose concerning the number of cattle permitted on the property under paragraph 5 of the lease. The defendant interpreted paragraph 5 as meaning that at no time could there be more than 165 head of cattle on the property. The plaintiffs, however, alleged that at some time during 1971, the defendant had told them that for purposes of interpreting paragraph 5 of the lease, the number of cattle could be

averaged between the land which the plaintiffs leased from the defendant and the adjacent land in the possession of the plaintiffs. The record is silent as to what figure would have resulted from the averaging.

The contention of the defendant was that the plaintiffs were overgrazing under the terms of the lease. She became disturbed. On January 3, 1972, the plaintiffs received a letter written by the defendant's attorney on December 31, 1971, stating that due to the plaintiffs' failure to follow the terms of paragraph 5 of the lease as to the number of cattle grazing on the property, the defendant was terminating the lease as of March 31, 1972, *unless satisfactory arrangements were made before January* 31, 1972. There was an exchange of letters which did not resolve the problem. On January 17, 1972, the plaintiffs' attorney sent a letter to the defendant's attorney, along with the plaintiffs' check for the *1972 rent,* urging that the defendant accept the check. The letter stated *that the plaintiffs intended to move enough cattle off the property so that there would be no more than 165 head of cattle remaining.* A week later, in a letter dated January 24, 1972, the defendant, through her attorney, accepted the proposal. The letter stated that the defendant accepted the rent check since the plaintiffs had removed enough cattle from the property, but that the defendant was not waiving any rights to insist on her "*interpretation of Paragraph 5 of the lease.*" *The plaintiffs' check for rent was cashed by the defendant.* This resolution of the dispute and the problem is demonstrated by the fact that there is no indication or contention that any dispute arose between the parties during the remainder of 1972 or 1973 as to overgrazing. We observe that in the record there is now a contention there were in excess of 165 head of cattle on the property during the period of 1972 and 1973. In any event, in December 1972, the defendant accepted the rental payment *for the year 1973.*

Pursuant to the option clause in the contract, on No-

vember 1, 1973, the plaintiffs sent the defendant a check for $25,000, the amount of the downpayment under the option clause. The defendant endorsed the check and deposited it in her savings account in a savings and loan association. The defendant received a letter, dated November 20, 1973, from the plaintiffs' lawyer stating that the letter was written notice of the plaintiffs' exercise of the option to purchase. The plaintiffs then purchased insurance for the buildings on the property. On or about December 11, 1973, the defendant wrote a letter to the plaintiffs which indicated that the defendant fully intended at that time to sell the property. The letter, in fact, mentioned that the abstracts were being prepared for examination by the plaintiffs. Between December 11, 1973, and January 25, 1974, the defendant changed her mind, and in a letter dated January 25, 1974, she advised, through her attorney, the plaintiffs' lawyer that the defendant had decided not to sell the property. On the same date the defendant tendered a check for $25,000 to the plaintiffs, labeling it as a return of the plaintiffs' downpayment. The plaintiffs did not cash the check, and returned it to the defendant in a letter dated February 1, 1974.

At the hearing on this case, both parties moved for summary judgment. The District Court granted the defendant's motion for summary judgment on the basis that the option was no longer binding. A fair inference from the record is the District Court held that the plaintiffs breached the contract as to the grazing provision (paragraph 5), and that therefore the lease terminated on December 31, 1971. Implicit in the District Court's holding granting summary judgment to the defendant, was the finding that the option did not exist in November 1973 because of the previous breach, and that the attempt to exercise and the cashing of the check by the defendant was an exercise in futility.

A motion for summary judgment can be granted only where there is "no general issue as to any material fact

in the case and where under the facts he is entitled to judgment as a matter of law." Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152. See, also, Friedrich v. Anderson, 191 Neb. 724, 217 N. W. 2d 831; Grantham v. General Tel. Co. of Midwest, 191 Neb. 21, 213 N. W. 2d 439. The party moving for a summary judgment has the burden of showing that no issue of fact exists, and the court should consider all the evidence in the light most favorable to the party opposing the motion. See, Fay Smith & Associates, Inc. v. Consumers Public Power Dist., 172 Neb. 681, 111 N. W. 2d 451 (1961); Youngs v. Wagner, 172 Neb. 735, 111 N. W. 2d 629 (1961); Green v. Village of Terrytown, *supra.*

The District Court was clearly wrong in granting summary judgment to the defendant. Assuming, arguendo, that the breach of the overgrazing clause (paragraph 5) was a material issue, the question of whether the plaintiffs breached the clause was clearly in dispute. We will not rehearse this dispute further except to state that in an affidavit, Loy Randall, one of the plaintiffs, stated that the defendant had agreed to the plaintiffs' interpretation of paragraph 5, the clause dealing with overgrazing. In an answer to the defendant's interrogatories, the plaintiffs alleged a similar understanding between the plaintiffs and the defendant. It was the duty of the court to view the evidence in the light most favorable to the plaintiffs. The plaintiffs' evidence clearly showed that there was an issue as to a material fact, assuming that such fact was material to a judgment for the defendant. We therefore reach the point in the decision in this case that summary judgment for the defendant was erroneous.

But, as we view it, the decision upon this "question of fact" is immaterial to the proper resolution of this controversy on a joint motion for summary judgment. Whatever the merits of the dispute as to the overgrazing of the land under paragraph 5, in the years 1971 and 1972, the parties had resolved the controversy by their

conduct and particularly by the defendant's acceptance of the rent and the renewal successively of the two 1-year options provided for in the original leasing contract. Generally, a party cannot accept the benefits of a contract, and then claim that the contract is forfeited. In Einot, Inc. v. Einot Sales Co., Inc., 154 Neb. 760, 49 N. W. 2d 625, this court said: "'* * * that where a party to a contract, *with knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived such breach.*'" (Emphasis supplied.) See, also, Wegner v. West, 169 Neb. 546, 100 N. W. 2d 542; McLeod v. Crawford, 176 Neb. 513, 126 N. W. 2d 663.

This broad general rule of contract construction has been applied to the landlord-tenant area, where the lessor refuses to allow a lessee to exercise an option to purchase due to the lessee's breach of a provision in the lease. The general rule is well stated in an extensive annotation in 53 A. L. R. 3d 435, at page 449. Therein it is stated: "Accordingly, the courts have generally held that the acceptance of rent after the lessee's breach or default in the terms of the lease constitute a waiver of the default so as to entitle the lessee to enforce the option to purchase." In Chesnut v. Master Laboratories, 148 Neb. 378, 27 N. W. 2d 541, this court rejected an argument that the breach of a nonassignability clause in a lease could be asserted after the lessor's acceptance of the rent because, the court held, that the lessor waived any breach of the lease by such acceptance. See, also, Jamson v. Poulos, 184 Neb. 480, 168 N. W. 2d 526. We observe that, in a broad sense, the parties themselves here, by their conduct, had settled any contention as to the validity of the contract by the continuation of the possession of the property by the plaintiffs and the acceptance of the rent in the two subsequent years of 1972 and 1973. On principle here, the parties had interpreted and resolved the dispute as to the overgrazing clause, and they did all this while engaged in the per-

formance of the contract, with full knowledge of the terms of the contract and the nature of the dispute. We have said many times that the interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract and of the parties. Such a construction of the contract should ordinarily be enforced. Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448.

Because of our holding herein that the plaintiffs are entitled to a summary judgment for enforcement of the option to purchase, we pursue the relevant facts in minute detail. Under the principles of law already recited that are applicable to this case, defendant's receipt and cashing of the plaintiffs' checks accomplished an inescapable waiver of any claimed prior breach of the grazing provisions of the lease. She claims that the plaintiffs first breached the terms of the lease in *April 1971*. Yet the defendant received and cashed in January 1972 the plaintiffs' check for $9,200 in payment for rent for the year 1972. In December of 1972, the defendant received and then cashed another check for $9,200 which was in payment for rent for the year 1973. And again, on November 1, 1973, the defendant received a check from the plaintiffs for $25,000, which the plaintiffs represented as the downpayment on the purchase price under the option terms of the lease (paragraph 9). The defendant accepted the check and cashed it, placing the funds in her savings account. The defendant received these three checks *after* she was aware of what she considered to be a breach of the lease by the plaintiffs, yet she nevertheless cashed the checks, thereby waiving her right to claim that the plaintiffs breached the provisions of the lease.

But the defendant's waiver of any possible breach by the plaintiffs as to the grazing clause manifested itself in ways other than the acceptance of money. The letter from the plaintiffs' attorney to the defendant's attor-

ney, dated January 17, 1972, and the return letter, dated January 24, 1972, taken together indicate that the situation at that time was satisfactory to the defendant. This is true because these letters state that the defendant did not waive any right to insist upon her *interpretation* of the lease provisions, but it appears that the letters were referring to future disputes, and not past disputes. These letters conclusively show that the defendant agreed to an extension of the lease, irrespective of the crucial acceptance of the rent checks. It therefore appears that by extending the lease and accepting the rent money, and by the peaceful possession by the plaintiffs, with knowledge of all the circumstances, the defendant waived any possible claim of prior breach by the plaintiffs.

We point out that at no time since January 1, 1971, has the defendant taken any action to remove the plaintiffs from the premises. All the defendant's actions have been consistent with the notion that the plaintiffs were legitimate tenants. After allowing the plaintiffs to remain on the premises and accepting their rent, the defendant cannot now claim that the plaintiffs violated the terms of the lease and retroactively reject the operation of paragraph 9 providing for the option to purchase, and reject her clear and unequivocal receipt and cashing of the downpayment on the option, which she accepted and cashed, and arranged for the bringing of the abstracts of title up to date in order to consummate a final settlement.

In further detail, we call attention to the defendant's letter to the plaintiffs dated December 11, 1973, over 1 month after the defendant received and cashed the $25,000 downpayment check. This letter clearly shows that the defendant planned on recognizing the option to purchase.

It was not until approximately January 25, 1974, almost 3 months after receiving the $25,000 check for the downpayment, that the defendant took any action to

render the option invalid. This was too late. We hold that after acting as though the lease was effective and receiving all the benefits of the lease, the defendant cannot now be heard to challenge the validity of the lease, nor paragraph 9 providing for the option purchase contained in the lease. We therefore come to the conclusion that, as matter of law, the plaintiffs are entitled to a summary judgment in their favor enforcing the option agreement.

Generally, an order denying a motion for summary judgment is interlocutory in nature, and hence not appealable. But this court recognized in Lesoing v. Dirks, 157 Neb. 183, 59 N. W. 2d 164, that when both parties file motions in the District Court for summary judgment, this court can consider the motions of both parties and determine the controversy. This rule is recognized in other jurisdictions. See, 15 A. L. R. 3d 899; Stewart v. United States, 186 F. 2d 627 (7th Cir., 1951); Tobin v. Garcia, 159 Tex. 58, 316 S. W. 2d 396 (1958); Algernon Blair, Inc. v. National Surety Corp., 222 Ga. 672, 151 S. E. 2d 724 (1966). In this case both parties moved for a summary judgment. The above rule is in harmony with our summary judgment statutes. Section 25-1333, R. R. S. 1943, provides that the court: "* * * shall if practicable ascertain what material facts exist without substantial controversy * * *" and further provides: "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.*" (Emphasis supplied.) We therefore hold that under the undisputed material facts in this case the plaintiffs' motion for summary judgment should have been granted and the District Court is directed to enter such judgment accordingly.

The judgment of the District Court granting summary judgment to the defendant is reversed and the cause is

remanded with directions to enter judgment for the plaintiffs.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JESSE JAMES FORD, APPELLANT.
231 N. W. 2d 515

Filed July 24, 1975. No. 39828.

1. **Sentences: Statutes: Intent: Criminal Law.** The interpretation of the indeterminate sentence statute, section 83-1,105 (1), R. S. Supp., 1974, announced in State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793, is adhered to.
2. **Sentences: Criminal Law.** A sentence imposed within the statutory limits will not be disturbed on appeal without a showing of an abuse of discretion by the sentencing court.

Appeal from the District Court for Dakota County: JOSEPH E. MARSH, Judge. Affirmed.

Ryan, Scoville & Uhlir, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

WHITE, C. J.

In this case, the District Court, after considering a presentence investigation report, sentenced the defendant to an indeterminate term of not less than 15 nor more than 25 years in the Nebraska Penal and Correctional Complex for the crime of rape. The defendant is a 27-year-old plumber's apprentice, married and having two children of his own, who abducted a young woman and man and after taking approximately $7 from the girl, raped her. The facts as related both by the defendant and by the victim are set out fully in the presentence investigation report.

The sole assignment of error relates to the sentence imposed by the trial court. The defendant assigns as error that the minimum term of 15 years was in excess of one-third of the maximum actually imposed, and therefore in violation of section 83-1,105 (1), R. S. Supp., 1974. The defendant asks us to reconsider and to overrule our recent holding in State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793 (1973). He contends, as was contended in Suggett, that the minimum sentence of 15 years imposed in this case is in excess of one-third of the maximum sentence of 25 years imposed by the court. In Suggett this court interpreted the term "maximum term" as referring to the maximum term provided by law, and rejected the interpretation which the defendant now seeks to establish. We have consistently followed the interpretation in State v. Suggett, *supra*. State v. Pratt, 190 Neb. 110, 206 N. W. 2d 45 (1973); State v. DeBerry, 190 Neb. 177, 206 N. W. 2d 642 (1973); State v. Deloa, 191 Neb. 290, 214 N. W. 2d 621 (1974); State v. Wade, 192 Neb. 159, 219 N. W. 2d 233 (1974).

The statute, section 28-408, R. S. Supp., 1974, authorizes a maximum possible sentence of 50 years for the crime of rape, to which the defendant herein pled guilty. Consequently, the sentence imposed in this case is clearly within the limits provided by the statute and follows our interpretation of the indeterminate sentence law announced in State v. Suggett, *supra*. We will not repeat or discuss herein the detailed argument made by the defendant. We reiterate our holding and the rationale therefor announced in State v. Suggett, *supra*. There is no merit to the defendant's contention.

The defendant assigns as error the severity of the sentence of 15 to 25 years in the Nebraska Penal and Correctional Complex. He fails to argue or discuss this assignment of error, and we have examined the record and no abuse of discretion appears. No objection or question is raised concerning the accuracy of the pre-

sentence investigation report. The sentence is within the 3 to 50 year range provided by the statute. Both the defendant's counsel and counsel for the State made reference to it in their arguments to the court at the hearing on sentencing. Suffice it to say that this was not the defendant's first conviction for rape. It is apparent that the sentencing court considered this fact as well as all the other circumstances of the crime and the defendant's record. There appears no abuse of discretion.

The judgment and sentence of the District Court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM BASLER, APPELLANT.
231 N. W. 2d 517

Filed July 24, 1975. No. 39839.

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

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

T. Clement Gaughan, Richard L. Goos, and Robert I. Eberly, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

WHITE, C. J.

In this case the defendant assigns as error the excessiveness of a sentence of 6 months in the county jail for the crime of burglary. The statutory penalty is a

sentence of 1 to 10 years in the Nebraska Penal and Correctional Complex, or a fine up to $500, or up to 6 months in the county jail. We affirm the judgment and sentence of the District Court.

In order to sustain his position that the sentence in this case was excessive and that probation should have been granted to the defendant, the defendant cites two cases in his brief which are inapposite. We deem it unnecessary to discuss and compare these specific cases. The defendant received the minimum period of incarceration provided by the statute. The record reveals that he is a person of normal intelligence and has completed part of his high school education. He has a record of three convictions for drunken driving and a juvenile record. The following colloquy from the bench by the sentencing judge is self-explanatory. The judge said:

"You were in juvenile court and looks to me like they tried just about everything in the book to help you with apparently no success. * * * It looks to me like the only thing that would make an impression on you, Mr. Basler, is a rather steep penalty—stiff penalty at this point. I think probation is not proper in this case. It would just be a wasted effort on the part of the probation officers. Because of your age (20), I'm not going to send you to the penitentiary, although perhaps that is the proper thing to be done, but there will have to be some confinement. This is done also to try to make an impression upon you that you are going to have to behave yourself."

In imposing sentence and denying probation in a criminal case, the judgment of the District Court will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Heckathorn, 190 Neb. 418, 208 N. W. 2d 689. It is clear, without further discussion of the record, that the District Court did not abuse its discretion in making the determination that the defendant was not a good subject for probation, and at the same

time balancing the sentence by giving the minimum period of incarceration permitted under the statute.

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

AFFIRMED.

ATS MOBILE TELEPHONE, INC., OMAHA, NEBRASKA, APPELLEE, V. CURTIN CALL COMMUNICATIONS, INC., ET AL., APPELLANTS.
232 N. W. 2d 248

Filed July 31, 1975. No. 39855.

1. **Constitutional Law: Commerce: Conflict of Laws.** The Supremacy Clause (Article VI, paragraph 2), together with the Commerce Clause (Article I, section 8, clause 3), of the United States Constitution gives Congress the right and power to regulate interstate commerce, and this power acts to preempt state regulations in the area of interstate commerce if Congress intended to preempt the area, or if the state and federal laws irreconcilably conflict, or if in the nature of the subject regulated, there is a need for national uniformity.
2. **Constitutional Law: States: Conflict of Laws: Statutes.** In areas of the law not inherently requiring national uniformity, it is required that state statutes, otherwise valid, must be upheld unless there is found such actual conflict between the two schemes that both cannot stand in the same area, or evidence of a congressional design to preempt the field.
3. **Telecommunications: Commerce: States: Statutes.** Title 47 U.S.C.A., section 221 (b), provides: Subject to the provisions of section 301 of this title, nothing in this act shall be construed to apply, or to give the commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in the connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a state commission or by local governmental authority.
4. **Telecommunications: States.** Mobile radio telephone services

are essentially intrastate in nature even though the radio portion of such services may spill over into an adjoining state.

5. **Telecommunications: States: Statutes.** Congress, in enacting section 221 (b) of Title 47 U.S.C.A., intended to reserve to the several states the right to regulate such intrastate mobile radio telephone services in the manner specified in section 221 (b), even though such mobile radio telephone services involved interstate communication.

Appeal from Nebraska Public Service Commission. Affirmed.

Einar Viren of Viren, Epstein & Leahy, for appellants.

Donald H. Erickson of Erickson, Sederstrom, Johnson & Fortune, for appellee.

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

WHITE, C. J.

This is an appeal by the defendants, Curtin Call Communications, Inc. (Curtin Call), and Ben and Mary Ciaccio, doing business as Telephone Secretaries of Omaha and Telephone Answering Service of Omaha, from a ruling by the Nebraska Public Service Commission sustaining a complaint filed by the complainant, ATS Mobile Telephone, Inc. (ATS). The Commission ordered Curtin Call to cease and desist from offering communication services to Nebraska customers without first receiving a certificate of public convenience and necessity from the Nebraska Public Service Commission. We affirm the judgment of the Nebraska Public Service Commission.

The facts in this case are undisputed. Both Curtin Call and ATS are involved in mobile radio telephone paging services. The paging device functions as follows: A caller who desires to communicate with one of the paging services' customers dials a seven-digit number on a normal land exchange telephone. This number connects the caller to the paging system. The system then connects the caller to the customer via a radio

signal which activates the paging device carried by the customer. The paging device, depending on the type, emits either a tone or a tone-and-voice message after being activated by the signal. The system can also be set up to provide two-way paging service; that is, the customer can communicate in return with the caller, and he can also dial into the land-exchange telephone system through the use of the paging device.

ATS holds a certificate of public convenience and necessity issued by the Nebraska Public Service Commission and a license from the Federal Communications Commission to operate a mobile radio telephone paging service in Omaha, Nebraska, and Council Bluffs, Iowa.

Curtin Call applied for a Nebraska certificate of public convenience and necessity to provide a similar paging service in Omaha, Nebraska, but the Nebraska Public Service Commission denied the request. In May 1972, the Federal Communications Commission granted a frequency channel to Curtin Call to operate a paging service in Council Bluffs, Iowa. In granting Curtin Call's application, the Federal Communications Commission noted that the application was to serve the Council Bluffs area, not the Omaha area. In its order, the Federal Communications Commission pointed out that the permit did not authorize Curtin Call to serve customers in Nebraska, and if Curtin Call desired to serve customers in Nebraska, it should first apply to the Nebraska State Railway Commission (predecessor to the Nebraska Public Service Commission).

Curtin Call, through its sales personnel, has secured customers from Omaha, Nebraska. The defendant admits that some of its customers are located in Nebraska. The president and one of the stockholders of Curtin Call, Ben Ciaccio, has an office in Omaha, from which he solicits orders for Curtin Call. Another stockholder, William Curtin, solicits orders for Curtin Call in Omaha, Nebraska, under the tradename of Radio Contact Communications.

On April 19, 1974, ATS filed a formal complaint with the Nebraska Public Service Commission charging that Curtin Call was offering mobile radio telephone paging service in Omaha, Nebraska, without a Nebraska certificate of public convenience and necessity. Four days later, on April 23, 1974, ATS filed a petition with the Federal Communications Commission requesting a cease and desist order to be issued against Curtin Call. That petition is still pending.

On September 3, 1974, the Nebraska Public Service Commission sustained ATS' complaint and ordered Curtin Call to cease and desist from offering paging service to customers in Nebraska without first receiving a certificate of public convenience and necessity. The defendants appeal from that order.

The sole issue to be decided on appeal is whether the Nebraska Public Service Commission has jurisdiction over both the subject matter of the complaint and the defendant.

Under the Supremacy Clause, Article VI, paragraph 2, of the Constitution of the United States, the federal constitution and laws are the supreme laws of the land. State regulation in an area legitimately regulated by the federal government can avoid being preempted if three tests are passed. First, did Congress intend to preempt the area? Second, do the state and federal laws irreconcilably conflict? Third, by the very nature of the subject regulated, is there a need for national uniformity? The answer must be "no" to all three questions if the state regulation is to be upheld.

This three-pronged test is set out in Florida Lime & Avocado Growers, Inc. v. Paul, 373 U. S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248. In that case, as in the case at hand, state regulation of interstate commerce was challenged. The Commerce Clause, Article I, section 8, clause 3, of the Constitution of the United States, gives Congress the right to regulate interstate commerce. Thus, the Supremacy Clause, together with the Com-

merce Clause, acts to preempt state regulation in the area of interstate commerce if the three tests are not met. First, the United States Supreme Court determined that there was no actual conflict between the state and federal regulations. Next, the court applied the two remaining tests. "The issue under the head of the Supremacy Clause is narrowed then to this: Does either the nature of the subject matter, * * *, or any explicit declaration of congressional design to displace state regulation, requires § 792 (California statute) to yield to the federal marketing orders?" See 373 U. S. at p. 143.

In Head v. New Mexico Board of Examiners in Optometry, 374 U. S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983, the United States Supreme Court again indicated that state regulation in the area of interstate commerce must pass the three tests. The court said: "In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that state statutes, otherwise valid, must be upheld unless there is found 'such actual conflict between the two schemes that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field.' "

The first and major question then to ask in this case is: Did Congress, in enacting the Communications Act of 1934, Title 47 U. S. C. A., sections 151 to 609, intend to occupy the area of mobile radio telephone communications to the exclusion of the states? The answer is clearly "no." One section of the Communications Act of 1934 is precisely on point. Title 47 U. S. C. A., section 221 (b), reads: "Subject to the provisions of section 301 of this title, nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign

communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority."

The section specifically covers mobile radio telephone exchange service, exactly the type of service we are dealing with in this case.

The proper standard to be used in determining if Congress intended to preempt an area was given by the United States Supreme Court in Florida Lime & Avocado Growers v. Paul, *supra*. The court said: "The settled mandate governing this inquiry, in deference to the fact that a state regulation of this kind is an exercise of the 'historic police powers of the States,' is not to decree such a federal displacement 'unless that was the clear and manifest purpose of Congress.' "

There is certainly no "clear and manifest purpose of Congress" to preempt the states in section 221 (b). To the contrary, there is a clear and manifest purpose of Congress in section 221 (b) to permit the states to regulate activities such as mobile radio telephone paging services.

In Radio Telephone Communications, Inc. v. Southeastern Telephone Co. (Fla.), 170 So. 2d 577, the Florida Supreme Court was presented with the same question as faces this court, that is, whether the state could regulate mobile radio telephone services which involved interstate communication. The court held that Congress did not preempt the area, saying: "These communications services are essentially intra-state in nature, *even though the radio portion of such services might 'spill over' into an adjoining state,* since a radio signal cannot recognize nor stop at a state line; and it is clear that Congress intended *to reserve to the several states* the right to regulate such intrastate services in the manner specified in Section 221 (b)." (Emphasis supplied.)

In addition, the Federal Communications Commission has interpreted section 221 (b) so that the Federal Communications Commission does not preempt state regu-

lation in the area of mobile radio telephone services. There is a general rule of statutory construction that the interpretation of a statute given by an administrative agency to which the statute is directed is entitled to great weight. See Udall v. Tallman, 380 U. S. 1, 85 S. Ct. 792, 13 L. Ed. 2d 616. When applying to the Federal Communications Commission for a license to operate a mobile radio telephone service, the following Commission requirements must be met. "Where required by applicable local law, a certified copy of the franchise or other authorization issued by appropriate regulatory authorities. If no such local requirement exists, a statement to that effect should be included in the application." 47 C. F. R., § 21.15 (c)(4).

The Federal Communications Commission applied 47 C. F. R., section 21.15 (c)(4) and section 221 (b) of the Communications Act of 1934 in a case dealing with mobile radio telephone services in In re Application of Souris River Telephone Mutual Aid Corporation, 28 F. C. C. 275. The Commission held that the state had the primary jurisdiction in regulating mobile radio telephone service.

Also, in its granting of a permit to the defendant Curtin Call, the Federal Communications Commission stated that: "It should be made clear however that neither the construction permit, nor the one for the one-way service authorized Curtin Call to serve customers located in the State of Nebraska, unless and until it should receive appropriate authority from that state."

Thus it is clear that the Communications Act of 1934 did not preempt the states in the regulation of mobile radio telephone service, since neither the language of the act indicates an intent to preempt nor does the interpretation of the statute by the Federal Communications Commission indicate such an intent to preempt.

After concluding that Congress has not intended to preempt the area, we must now determine if there is a

need for national uniformity in the area of mobile radio telephone services. The answer is clearly "no."

The service provided in this case is local in nature. There are some incidents of interstate communications but there is a limit to the area in which such services can be provided. Generally a company furnishing mobile radio telephone services provides the services in a relatively small area. There is no need for national uniformity here. The type of service given customers of mobile radio telephone paging services in Omaha, Nebraska, has no effect on customers of such paging services in New York or California. Differences in the system nationwide are irrelevant. The services are entirely local in nature.

In Jordaphone Corp. of America v. American Telephone & Telegraph Co., 18 F. C. C. 644, the Federal communications Commission recognized that communication systems can involve some interstate communication and still retain their local nature. In Jordaphone, one issue was whether automatic telephone answering devices could be regulated by the Federal Communications Commission or by the state regulatory agencies. The Federal Communications Commission said that there was joint jurisdiction. Local regulatory agencies were not preempted because the automatic telephone answering service was primarily local in nature, even though it would incidentally be used to answer interstate calls.

A recent federal case, TV Pix Inc. v. Taylor, 304 F. Supp. 459, decided by a three-judge District Court, and affirmed by the Supreme Court, 396 U. S. 556, permitted the state to regulate cable television services, although interstate communication was obviously involved. The court said that the service was an integral part of interstate commerce but that its incidents were more local than national. "Appropriate state regulation of such primarily local facilities or services in interest (interstate) commerce, in the absence of federal legislative

intervention, is not proscribed by the Commerce Clause of the Constitution."

Thus it is clear that the mobile radio telephone paging service is local in nature and there is no need for national uniformity.

Lastly, we must determine if there is an actual conflict between the state and federal regulations. The answer is again unquestionably "no." The test in this area is not whether there is any *possible* conflict between the state and federal regulations, but rather is there *necessarily* any conflict between the two sets of regulations. In Florida Lime & Avocado Growers v. Paul, *supra,* the United States Supreme Court said that a federal license does not immunize the licensed commerce for more demanding state regulations. The court said: "A holding of federal exclusion of state law is inescapable * * * where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." But the court noted in that case, "there is neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, * * * the present record demonstrates no inevitable collision between the two schemes of regulations."

In the case at hand, there is no actual conflict between the state regulations and the federal regulations. A federal license issued by the Federal Communications Commission neither guarantees an applicant receiving a license from the Nebraska Public Service Commission nor guarantees an applicant being denied a license by the Nebraska Public Service Commission. Thus, there is no actual conflict between the two sets of regulations.

We have found that first, Congress did not intend to preempt state regulation of mobile radio telephone paging services; second, mobile radio telephone paging services are primarily local; and third, there is no actual conflict between the state and the federal regulations.

Therefore, the State of Nebraska is not preempted from regulating mobile radio telephone paging services, and the Nebraska Public Service Commission had the jurisdiction to order the defendant, Curtin Call, to cease and desist from offering services in Nebraska.

The decision of the Nebraska Public Service Commission is correct and is affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

J K & J, INC., DOING BUSINESS AS "THE DUMP," APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.
231 N. W. 2d 694

Filed July 31, 1975. No. 39873.

1. **Intoxicating Liquors: Administrative Law.** The Nebraska Liquor Control Commission is an agency within the provisions of the Administrative Procedures Act. § 84-901, R. S. Supp., 1974.
2. **Intoxicating Liquors: Administrative Law: Licenses and Permits.** When an objection is filed to an application for a liquor license and the Nebraska Liquor Control Commission is required to set the matter for hearing under the provisions of section 53-133, R. R. S. 1943, the matter becomes a contested case under the provisions of section 84-901(3), R. S. Supp., 1974.
3. **Intoxicating Liquors: Administrative Law: Notice.** At the hearing on a contested case, the applicant is entitled, under the provisions of section 84-901(3), R. S. Supp., 1974, to notice of the issues.
4. **Intoxicating Liquors: Administrative Law: Notice: Licenses and Permits: Evidence.** The applicant for a liquor license in a contested case is entitled to notice of any facts which will be judicially noticed by the Nebraska Liquor Control Commission.
5. **Intoxicating Liquors: Administrative Law: Licenses and Permits.** The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably.
6. **Intoxicating Liquors: Administrative Law: Records.** After an administrative hearing, the Nebraska Liquor Control Commission must base its findings and orders on a factual foundation

in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised.

7. ———: ———: ———. Where the record of the proceedings before the Nebraska Liquor Control Commission contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary.

8. **Intoxicating Liquors: Administrative Law.** The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as specifically delegated in Chapter 53, R. R. S. 1943, is vested exclusively in the Nebraska Liquor Control Commission. § 53-116, R. R. S. 1943.

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

Paul L. Douglas, Attorney General, and Robert R. Camp, for appellant.

Nicholas J. Lamme of Yost, Schafersman, Yost & Lamme, for appellee.

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

CLINTON, J.

This is an appeal by the Nebraska Liquor Control Commission from an order of the District Court for Dodge County, Nebraska, granting the motion for summary judgment of J K & J, Inc., applicant for a class C liquor license within the city of Fremont, Nebraska, and directing the commission to issue the license. The issue before us on appeal is whether, on the record, the action of the commission in denying the application was unreasonable and arbitrary. See Hadlock v. Nebraska Liquor Control Commission, 193 Neb. 721, 228 N. W. 2d 887. We affirm the order of the District Court.

On April 30, 1974, J K & J, Inc., filed its application with the commission. The commission forwarded the application to the city of Fremont as required by section 53-131, R. R. S. 1943. The city council of Fremont, pursuant to section 53-134(7), R. R. S. 1943, held a public

hearing on the application and unanimously recommended that the license be issued. On June 3, 1974, the chief enforcement officer of the commission filed, under the provisions of section 53-133(1)(c), R. R. S. 1943, an objection to the issuance of the license. This protest did not specify any ground for the objection. As required by section 53-133, R. R. S. 1943, the commission then set the application for hearing and gave notice to the applicant of the time and place. The notice recited as a reason for the hearing: "1. Due to a protest having been filed against your application." There was no further specification of the ground of protest.

On July 11, 1974, a hearing was held on the application and sometime after the hearing the application was denied. At the hearing before the commission the only evidence adduced was by the applicant. Neither the commission nor the objector presented testimony of any kind. The evidence established the fitness and eligibility of the applicant, its officers, and manager for the license sought. On the appeal to the District Court the record made before the commission was received in evidence. It was at that time further established by answers of the commission to the request for admissions from the applicant that the applicant, its officers, and manager were qualified to be issued a license and that there were no statutory or other disqualifications on their part. The record of the hearing before the commission shows that upon cross-examination of the applicant's witness the following questions and answers were adduced:

"Q This is a new license, is it not?
"A Yes, it is.
"Q Within the downtown area?
"A Yes.
"Q Within that block there are three other licenses?
"A Two.
"Q Two. You would be the third one?
"A Yes.

"Q Is this correct?
"A Yes.
"Q How about across the street, are there any licenses?
"A No.
"Q Or in that four-block area, that square-block area?
"A No, none.
"Q Do you know how many licenses there are in Fremont, Nebraska?
"A No, I don't.
"Q If I told you that there were approximately 52, would that appear to be about right?
"A Yes.
"Q There are a number of licenses, are there not?
"A Yes.
"Q Do you believe there is a need for another license in Fremont?
"A Yes.
"Q And in that particular area?
"A Well, the location is perfect for my needs, with the parking, but there is not another establishment suitable for the people for that age group that I'm intending to cater to. There is no six-night entertainment in that—you know, with the type of a group they like, the loud dance group."

At the hearing in the District Court the following interrogatory propounded to the commission and its answer were received: "2. INTERROGATORY. Please state completely and accurately each item of evidence presented to the Nebraska Liquor Control Commission on the 11th day of July, 1974, or at any other time, which supports a finding that J K & J, Inc., d/b/a 'The Dump' is unfit to hold a retail Class C Liquor License." "2. The number of licenses already within the City of Fremont, Nebraska, the location of the proposed license, the type of operation planned, and a lack of a need for an additional license are all reasons for the denial of the license." In connection with the applicant's motion for summary judgment there was also received in evi-

dence an affidavit which incorporated data showing populations of 12 Nebraska cities over 10,000 and the number of liquor licenses of all classes in each such city. This affidavit was apparently in response to the commission's answer to the interrogatory which we have just quoted. As far as the record discloses, the answer to the interrogatory is the first information the applicant had that the commission's denial of the application was founded upon a policy decision by the commission to limit the total number of licenses of all classes in the city of Fremont.

The commission introduced no evidence before the District Court.

The Nebraska Liquor Control Commission is an agency within the provisions of the Administrative Procedures Act. § 84-901, R. S. Supp., 1974; The Flamingo, Inc. v. Nebraska Liquor Control Commission, 185 Neb. 22, 173 N. W. 2d 369. When the objection was filed to the application and the commission was required to set the matter for hearing under the provisions of section 53-133, R. R. S. 1943, the matter became a contested case under the provisions of section 84-901(3), R. S. Supp., 1974. Section 84-913, R. R. S. 1943, provides, among other things, that not only must there be an opportunity for hearing, but the notice shall state the time, place, "and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable. Opportunity shall be afforded all parties to present evidence and argument with respect thereto." See, also, County of Blaine v. State Board of Equalization & Assessment, 180 Neb. 471, 143 N. W. 2d 880.

Section 84-914, R. R. S. 1943, among other things, provides: "(3) All evidence including records and documents in the possession of the agency of which it desires to avail itself shall be offered and made a part of

the record in the case. No other factual information or evidence shall be considered in the determination of the case. . . . (5) An agency may take notice of judicially cognizable fact and in addition may take notice of general, technical, or scientific facts within its specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed. They shall be afforded an opportunity to contest the facts so noticed."

It seems self-evident that, as applied to the proceedings such as this before the Nebraska Liquor Control Commission, the issues are to be stated with more specificity than just, shall or shall not the license be granted. The applicant already knows that much without being told. In this case, it is clear the applicant went to the hearing before the commission prepared only on the issue of its fitness and that of its owners and manager. It had no notice that the hearing was, in fact, to be, or that the commission would later determine it to be, an after the fact policy-making decision. It had no notice that the commission might take judicial notice of certain facts within its own knowledge, nor what the nature of those facts might be. It had no opportunity to rebut any such facts, nor to present argument thereon, to which rights and opportunity it was entitled under the provisions of section 84-913, R. R. S. 1943.

It seems to us there is a significant difference between the effect to be accorded a policy decision made and properly promulgated before any individual rights are an issue and one made after a hearing which was to determine those rights. We will develop this idea a little later in the opinion.

Let us first set forth the rules of law applicable generally to the matter before us. "The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably. Its discretion is to

be exercised reasonably and not whimsically nor capriciously. As in the case of other administrative bodies, the Nebraska Liquor Control Commission, after an administrative hearing, must base its findings and orders on a factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised. Where the record of the proceedings contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. (Omitting citations.)" Hadlock v. Nebraska Liquor Control Commission, *supra*. In passing we note the issue in the case just cited arose in a different manner than in the present instance. That case was decided under the provision of the statute which, in effect, provided that where no hearing is required and there is no evidence to warrant denial, a license is to be issued routinely.

In Allen v. Nebraska Liquor Control Commission, 179 Neb. 767, 140 N. W. 2d 413, this court reviewed generally the history of the authority of agencies empowered by the Legislature to control and regulate the intoxicating liquor industry to limit the number of licenses as part of that regulatory power. Such agencies have been held to have this power from the earliest times. See, State ex rel. Brockett v. City of Alliance, 65 Neb. 524, 91 N. W. 387; In re Application of Jorgensen, 75 Neb. 401, 106 N. W. 462; In re Jugenheimer, 81 Neb. 836, 116 N. W. 966. In Allen v. Nebraska Liquor Control Commission, *supra*, this court held that a previously established policy of a city council, limiting the total number of licenses which it would recommend, was a sufficient basis for the commission to deny a license in the absence of some showing by the applicant that such policy was arbitrary or unreasonable.

In City of Lincoln v. Nebraska Liquor Control Commission, 181 Neb. 277, 147 N. W. 2d 803, we pointed out: "The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic

liquors, except as specifically delegated in Chapter 53, R. R. S. 1943, is vested exclusively in the Nebraska Liquor Control Commission. § 53-116, R. R. S. 1943." That opinion further noted that the policy of the municipality on limiting the number of licenses issued is not binding upon the commission.

Insofar as the record in this case is concerned as it relates to the applicant's entitlement to a license, it is absent any evidence justifying the denial. It was, therefore, arbitrary and unreasonable.

On the abstract question of the authority of the commission to make and announce a policy decision limiting the number of licenses in a particular community, it seems clear that on the basis of the authority we have earlier cited, it does have such authority under the statute, subject to the exception that the policy must not be arbitrary or unreasonably established or applied.

The particular issue in this case arises in the context of the determination of the entitlement of a particular applicant to a license. Because of the failure of the commission in this case to give notice of the issue as required by section 84-913, R. R. S. 1943, the applicant had no opportunity before the commission to challenge the policy on the ground of its being arbitrary or unreasonable for it had no notice of such a policy until after its application was denied. It seems clear that if such a policy had been earlier determined and announced, the burden would, under the doctrine of Allen v. Nebraska Liquor Control Commission, *supra,* have been upon the applicant to show that it was arbitrary and unreasonable.

No doubt, the commission can, in determining policy on limiting the number of licenses, take legislative cognizance of the facts shown by its own records, such as the number, kind, and locations of the licensed establishments in a given community, as well as cognizance of the population of the community on a given census date. It could, of course, in determining such policy, also take notice of other facts not shown by its records which it

might have to determine by investigation, such as specific conditions in a particular community affecting the determination of how the public welfare is affected by the number of licenses. In that context such facts are clearly legislative facts and no notice need be given anyone unless some statutory requirement provides otherwise. See 2 Davis, Administrative Law Treatise, § 15.03, p. 353, and Administrative Law Text (3d Ed.), § 15.03, p. 296. Whether the establishment of such a policy as we are here discussing requires notice under the Administrative Procedures Act, we are, of course, not called upon to determine. That will have to be determined by the provisions of the act itself.

As pointed out by Davis, op cit., adjudicative facts are those applied in the process of adjudication. These are the facts which are normally considered by the trier of fact whether it be jury, judge, or administrator acting quasi-judicially. Legislative facts are those which help a tribunal determine policies of the law. "The exceedingly practical difference between legislative and adjudicative facts is that, apart from facts properly noticed, the tribunal's findings of adjudicative facts must be supported by evidence, but findings or assumptions of legislative facts need not be, frequently are not, and sometimes cannot be supported by evidence." Davis, op cit.

However, when there has been established no previously existing policy and the issue arises in the course of the determination of the entitlement of an applicant to a license, then facts otherwise legislative are, no doubt, to be held to be of an adjudicative nature. See Davis, op cit. Such being the case, applicant would be entitled to notice under the Administrative Procedures Act of the facts of which judicial cognizance is to be taken by the commission.

The act of the commission denying the applicant a license was arbitrary and unreasonable because it had

before it no evidence to support such a denial. Accordingly, the judgment of the District Court is affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

WALTER F. STOVER ET AL., APPELLANTS, V. ED MILLER & SONS, INC., A NEBRASKA CORPORATION, APPELLEE.
231 N. W. 2d 700

Filed July 31, 1975. No. 39888.

1. **Negligence: Contracts: Contractors.** Generally a construction contractor is not liable for injuries or damage to a third person with whom he is not in contractual relation resulting from the negligent performance of his duty under his contract with the contractee where the injury or damage is sustained after the work is completed and accepted by the owner.
2. **Contracts.** The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of their contract, and should be given great if not controlling influence.
3. ———. In the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument.

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

Marks, Clare, Hopkins, Rauth, Garber & Batt, for appellants.

L. J. Tierney and T. J. Stouffer of Cassem, Tierney, Adams & Henatsch, for appellee.

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

WHITE, C. J.

This is an action for personal injuries and damages that the plaintiff Stover suffered resulting from the par-

tial collapse of one side of an earthen wall in an excavation pit in which the plaintiff was working. The District Court granted summary judgment in favor of the defendant. On appeal the plaintiffs claim that there was a genuine issue of fact present for trial and ask a reversal of the summary judgment in favor of the defendant. We affirm the judgment of the District Court.

On November 19, 1970, Russell Cook, the executive vice president of Wiebe Construction Company (hereinafter referred to as Wiebe), met with Robert Miller of the defendant corporation, at Ed Miller & Sons, Inc., an excavating firm, to discuss a proposed excavation at the Westroads Shopping Center in Omaha, Nebraska. Wiebe was the general contractor working at the Westroads Shopping Center, and the defendant was a construction company specially engaged in the business of subcontracting excavation work. The parties came to an agreement that the defendant would do the excavating work for Wiebe. It is undisputed that at this meeting, it was agreed that Wiebe, the general contractor, would do all *the shoring work.* Shoring refers to the support built next to the sides of an excavation to prevent caving in of the earthen walls. This meeting between Cook and Miller on November 19, 1970, resulted in a contract, written in letter form, dated November 25, 1970, and sent from Cook to Miller. Miller accepted the contract. The contract provided for the defendant excavation corporation to "complete excavation & concrete removal work." The contract also provided that: "The Subcontractor (Ed Miller & Sons, Inc.) shall protect the work of others, prevent and/or repair damage to work of others." There was no *written* provision in the letter contract which stated which party was responsible for the shoring.

The defendant corporation began the excavation work in late November 1970. The defendant completed the work, and removed all men and equipment from the site by December 31, 1970, and did not return to the site

thereafter. The excavation was 30 to 35 feet deep and the sides were approximately perpendicular to the bottom of the excavation. Johnson, a foreman for Wiebe, the general contractor, was in charge of checking the excavation grades as the work progressed, to supervise and inspect the work and insure that the work was being done properly. There is no issue as to this fact. At no time did Johnson inform the defendant that the excavation was not being properly done. In his deposition, introduced in evidence, Johnson testified that at all times he was satisfied with the defendant's work. The evidence undisputedly shows that when the excavation by the defendant was completed, Cook, as the agent of Wiebe, accepted the work as satisfactory. Cook testified that the defendant's work was done properly. Subsequently the defendant was paid in full by Wiebe, the general contractor, for the excavation work, and as mentioned, defendant did not return to the site thereafter. The transaction, the contract, and its performance were completed and accepted.

On or about January 21, 1971, approximately 3 weeks after the defendant completed the excavation work, Wiebe, the general contractor, then began to put in the shoring. Both Johnson and Cook testified that the shoring structure was intended to prevent the wall of the excavation from collapsing.

During the progress of the shoring work, specifically, on January 22, 1971, the plaintiff Stover, an employee of Wiebe, the general contractor, who had accepted the work and was performing the shoring work, began working on the shoring job. After the plaintiff had been working for about 1 hour part of the wall unexpectedly collapsed. A large chunk of the dirt fell on the plaintiff causing the injuries that he complains of in this action.

The general theory of the plaintiff in his action against the defendant subcontractor is that the defendant was negligent in failing to shore the walls. It appears that

the District Court granted a summary judgment to the defendant on the basis that the defendant owed no duty to the plaintiff at the time of the accident, because the defendant had completed the contract, it had been accepted by the general contractor Wiebe, defendant had relinquished control of the premises, and that Wiebe, the general contractor, was actually doing the shoring work at the time the accident happened. The plaintiff now contends in this court that the defendant owed a duty to the plaintiff and that there was sufficient evidence of the defendant's negligence to render summary judgment improper.

In Nebraska, as in the majority of the jurisdictions, the general rule is that one not a party to a construction contract cannot, for injuries received after the acceptance of the completed work by the contractee, maintain an action in tort for the negligent performance of the contract. In Wilson v. North Central Gas Co., 163 Neb. 664, 80 N. W. 2d 685, the plaintiff sustained injuries when she fell over the backfill of an excavation performed by the defendant. The backfill was 3 to 8 inches above the surface of the adjoining land. The defendant had completed the work, and it had been accepted by the owner of the land over 1 month prior to the accident. In holding that the defendant owed the plaintiff no duty since the defendant had no control over the property when the plaintiff was injured, and that the completion of the work had been accepted and approved by the owner of the land, this court said as follows: "A construction contractor is not liable for injuries or damage to a third person with whom he is not in contractual relation resulting from the negligent performance of his duty under his contract with the contractee where the injury or damage is sustained after the work is completed and accepted by the owner." In Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710, this court stated: "But we have said of such private contractors that when there is an actual acceptance of

the work this relieved him (subcontractor) from any further duty." See, also, Haynes v. Norfolk Bridge & Constr. Co., 126 Neb. 281, 253 N. W. 344.

We come to the conclusion that the defendant corporation had completed the job at least 3 weeks before the accident occurred, had removed all its equipment and men from the site, and that the general contractor Wiebe had accepted the job as satisfactory and paid the defendant in full, and that therefore under the applicable law, there was no duty owed by the defendant to the plaintiff, and the motion for summary judgment was properly sustained on that ground alone. There is no merit to the plaintiff's contention.

We point out further, that irrespective of whether the defendant owed a duty of care toward the plaintiff, the record demonstrates there is absolutely no evidence that would indicate the defendant acted negligently in the performance of the excavation work or that the defendant should have acted in a manner other than it did. The plaintiff argues that the defendant was negligent in failing to do the shoring work. We have already pointed out that there was no duty on the part of the defendant subcontractor to perform the shoring work. It is apparent that there could be no inference of negligence drawn for a failure to do something that the defendant had no contractual or other duty to perform. On the other hand, the evidence is conclusive to the effect that the duty to shore the walls rested with Wiebe, who assumed this duty subsequent to the performance of the defendant's excavation work, and was engaged in it at the time the accident happened. Even in the absence of the undisputed evidence between the parties as to the responsibility for the shoring, it is clear that by Wiebe's action of beginning to construct the shoring, it left no doubt as to what the terms of the contract were as to the responsibility for the shoring. "The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications

of the true intent of their contract, and should be given great if not controlling influence, * * *." Donahoo v. Home of the Good Shepherd of Omaha, Inc., 193 Neb. 586, 228 N. W. 2d 287. See, also, Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448. We therefore come to the conclusion that as a matter of law, under the undisputed facts, there was no negligence on the part of the defendant subcontractor in failing to perform the shoring work.

Although unnecessary to the determination of the issue of liability in this case, we discuss the plaintiff's contention that the parol evidence as to the agreement between Wiebe and Miller as to who would be responsible for the shoring work is not admissible in evidence. It is true that the parties to the contract neglected to mention the shoring work in the contract. The plaintiff relies upon the contract provision which stated that: "The Subcontractor shall protect the work of others, prevent and/or repair damage to work of others." It is quite obvious that this provision is equivocal and cannot be said to refer to the responsibility of shoring. If the plaintiff's contention is correct, it would require us to construe this provision to mean that an excavation contractor assumed a liability for all subsequent work done at the location of the excavation under the unwarranted interpretation that the subcontractor "shall protect the work of others." In any event at a minimum there is an ambiguity or a lack of a material provision in the contract that warrants the admission of parol evidence to establish the truth. In Wilderman v. Watters, 149 Neb. 102, 30 N. W. 2d 301, this court said: "It is well established, in the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument." The undisputed and uncontradicted mutual agreement between Wiebe and the defendant is that they did have

an agreement as to shoring and that the agreement was that Wiebe would be responsible for it. There is no merit to the plaintiff's contention.

In summary, the record conclusively shows that the defendant did not owe a duty toward the plaintiff and further that there was no general negligence or evidence of general negligence of the defendant in failure to perform the shoring obligation.

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

AFFIRMED.

SKY HARBOR AIR SERVICE, INC., APPELLANT AND CROSS-APPELLEE, V. ALYCE LANG, DOING BUSINESS AS LANG AIRCRAFT ET AL., APPELLEES AND CROSS-APPELLANTS.
231 N. W. 2d 704

Filed July 31, 1975. No. 39892.

1. **Aircraft: Damages.** Where an aircraft can be repaired at reasonable cost and restored to substantially its original condition, such cost is the proper measure of damage.
2. ———: ———. Where the aircraft cannot be restored to substantially the same condition as it was before the injury, the measure of damages is the difference between the reasonable market value immediately before and immediately after the accident.
3. ———: ———. Where personal property can be repaired so that when repaired it will be in as good condition as it was before the injury, then the measure of damages is the reasonable cost of the repair plus the reasonable value of the use of the aircraft while being repaired with ordinary diligence, not exceeding the value of the article before the injury.
4. ———: ———. Where the measure of damages is the difference between the reasonable market value immediately before and immediately after the accident, the injured party is not permitted to recover, in addition thereto, damages for loss of use.

Appeal from the District Court for Douglas County:

PATRICK W. LYNCH, Judge. Affirmed in part, and in part reversed and remanded.

Wellensiek & Davis, for appellant.

John A. Rickerson of Rickerson & LaFrance, for appellees.

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

SPENCER, J.

Plaintiff appeals from a judgment in its favor awarding it the cost of repairing two aircraft. Plaintiff contends the proper measure of damages is the difference in the fair market value of the aircraft immediately before the accident and their fair market value in their damaged condition immediately after the accident. Plaintiff further contends it should have been compensated for loss of use during the time one of the aircraft was being repaired. Appellees cross-appeal, contending that the plaintiff was not the owner of the aircraft at the time of the accident.

It is uncontroverted that defendant Lane, an employee of defendant Lang, was driving a refueling truck at Omaha's Epply Airfield when the truck skidded on the ice and collided with one of the aircraft, pushing it into the other. The two aircraft involved are a 1969 Cessna Skylane and a 1969 Cessna Skymaster. The cost of repairing the Skymaster was $1,393.95. The repairs on the Skylane were $417.12.

Plaintiff argues it was not possible to restore the two planes to substantially the same condition they were in before the accident. Plaintiff, in support of its contention, draws our attention to a rather unique situation which surrounds damages to aircraft. Log books are required to be kept of all services and repairs which involve aircraft. These log books accompany the aircraft throughout their useful lives and are examined by any prospective purchaser. It is uncon-

troverted that an aircraft with a damage history reflected in its log book has a diminished market value. Thus, plaintiff contends these aircraft, due to their damage history, could never be placed in substantially the same condition as before the accident, and consequently the difference in market value immediately before and immediately after the accident is the only fair measure of damages.

The question of the proper measure of damages for injury to aircraft appears to be one of first impression in this state. The general rule in Nebraska with respect to the proper measure of damages for injury to personal property is well settled. It is the rule now applied in automobile damage actions. The general rule is that where a damaged automobile can be repaired at reasonable cost and restored to substantially its original condition, such cost is the proper measure of damage. Where the automobile cannot be placed in substantially the same condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident. Sober v. Smith (1965), 179 Neb. 74, 136 N. W. 2d 372.

There is no question here, after repairs the aircraft involved were in substantially the same physical condition as before the accident. Both of them after repair were certified as airworthy. Plaintiff contends, however, because the log book indicates damage to the plane, its after-damage market value is necessarily greater than the repair bill and that plaintiff, as an innocent victim of defendants' negligence, should be reimbursed for its actual damages.

It is a truism that no one would knowingly pay full value for an article which has been damaged and repaired. In this respect an aircraft is in no different position than a motor vehicle. The difficulty is the aircraft because of its log book carries a record indicating damage requiring repairs. Yet, because the

aircraft were admittedly restored to an airworthy status or substantially their original condition, the reasonable market value of the aircraft while damaged, deducted from their pre-damage value, would seem to overestimate plaintiff's actual loss. In balancing the considerations present, where personal property is damaged and can be restored to substantially its original condition, this court in the past has never deemed it proper or equitable to award a plaintiff the difference in value between the reasonable market value of his property before the accident and the reasonable market value of the property when still in its damaged condition. To do so would overcompensate the owner of the property. Balancing considerations, the present personal property damage rule appears the most equitable. In the interests of uniformity, we are not inclined to apply a different rule for damage to aircraft merely because a log book records the fact that the plane has been repaired. On the record herein, the cost of repairs was the proper measure of damages.

Where personal property can be repaired so that when repaired it will be in as good a condition as it was before the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the use of the article while being repaired with ordinary diligence, not exceeding the value of the article before the injury. Helin v. Egger (1931), 121 Neb. 727, 238 N. W. 364.

The plaintiff, in paragraph 9 of its original petition, alleged loss of use of the Skymaster as an element of damages in addition to the allegations in paragraph 8 on diminution in market value. The defendants moved to strike paragraph 9 of plaintiff's petition on the ground that it presented an inconsistent theory of damages. That particular portion of defendants' motion was overruled. However, defendants' motion to strike a portion of paragraph 8 of the original petition was sustained. Plaintiff then amended its petition by adding amend-

ments numbered paragraphs 8 and 9. Paragraph 8 covered the damages for the Skymaster, while paragraph 9 covered the damages to the Skylane. The original petition gave only the amount of damages claimed for each aircraft. The amendments set out the values to claim the difference between the fair market value immediately before the accident and the fair and reasonable market value immediately after. It is well established in this state where the measure of damages is the difference between the reasonable market value immediately before and immediately after the accident, the injured party is not permitted to recover, in addition thereto, damages for loss of use. Neill v. McGinn (1963), 175 Neb. 369, 122 N. W. 2d 65.

Plaintiff did not file an amended petition. Rather, it filed an amendment to the petition. The amendment reads: "Comes now the plaintiff, and for its Amendment to its petition against the defendant alleges and states as follows: 1. Comes now the plaintiff and amends Paragraph 8 of its Petition as follows * * *." Then it sets out paragraphs 8 and 9. Nothing was said about amending paragraph 9 of the original petition. The problem arises because plaintiff has two paragraphs 9, the one in the original petition and the one in the amendment to the petition which should have been designated differently. It is evident that plaintiff did not intend to eliminate original paragraph 9 praying for loss of use of the Skymaster from its original petition. Defendants' motion to strike paragraph 9 had been overruled.

Plaintiff attempted to introduce evidence of loss of use but defendants' objection was sustained on the theory the claim for loss of use had been eliminated from the petition. Plaintiff attempted to make an offer of proof to prove loss of use of the aircraft and the court sustained defendants' objection to the offer of proof. The trial herein was to the court, a jury having been waived. At the time of the court's rulings on the motion to ex-

clude loss of use it was not certain as to which measure of damages was the proper one. When the court determined that the cost of repair rather than the reasonable value before and after damage was the proper measure of damages, it should have permitted evidence of the loss of use of the Skymaster.

Finally, defendants contend on cross-appeal that the trial court erred in finding plaintiff was the owner of the aircraft at the time of the accident. Exhibits 3 and 4, which are notarized aircraft bills of sale, indicate that D.A.D., Inc., sold both the Skylane and Skymaster to plaintiff on November 12, 1968, which was prior to the accident. Defendants' claim is based on exhibits 12 and 13, which are certified copies of aircraft registration filed with the F.A.A. They contain notarized copies of bills of sale dated subsequent to the accident. The two bills of sale for each aircraft bearing the later sales dates were explained as regular business procedure between plaintiff and D.A.D., Inc. The trial court found that as between D.A.D., Inc., and plaintiff, the November 12, 1968, bills of sale would be valid and that for the purposes of this record plaintiff was the proper party to seek recovery for the damages sustained by the two aircraft. We see no reason to disagree with this finding.

For the reasons given, the judgment of the trial court is affirmed insofar as it allows the repair bills for the two aircraft, and the cause is remanded to the District Court for further testimony on the loss of use of the Cessna Super Skymaster 337. Costs are taxed to the defendants.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

BOSLAUGH, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. LLOYD W. KILMER, APPELLANT.
231 N. W. 2d 708

Filed July 31, 1975. No. 39966.

1. **Public Officers: Malfeasance: Words and Phrases.** Malfeasance by a public officer consists of doing some act which is wholly wrongful and unlawful.
2. **Criminal Law: Nolo Contendere Plea.** A plea of nolo contendere admits the matters alleged in the information and has the same effect as a plea of guilty so far as issues of fact are concerned.

Appeal from the District Court for Douglas County: C. THOMAS WHITE, Judge. Affirmed.

Edward F. Fogarty and Einar Viren, for appellant.

Paul L. Douglas, Attorney General, and Melvin K. Kammerlohr, for appellee.

William B. Craig, for amicus curiae.

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

BOSLAUGH, J.

The defendant is the county clerk of Douglas County, Nebraska. He was charged with malfeasance as the result of letters mailed by him to county employees concerning a union election held on July 3, 1974. The election was held to determine whether certain county employees desired to be represented by the American Federation of State, County, and Municipal employees, AFL-CIO, for collective bargaining purposes.

The complaint alleged the defendant had ordered certain literature reproduced, which was intended for the private use of the defendant and not for any governmental use by the county, and had directed that requisitions and claims for the expense thereof be prepared, audited, and approved by employees of his office for presentation to the county board. The complaint did not allege the claims had been presented to the

county board or approved by the board and paid by the county.

The complaint further alleged the defendant had used 1,500 envelopes, obtained from the county purchasing department, to mail the literature to county employees.

The defendant pleaded nolo contendere and was fined $50. On appeal he contends the statute under which he was prosecuted was unconstitutional as applied to the facts in the case and that the complaint failed to state a crime.

Section 28-724, R. S. Supp., 1974, provides in part: "Any clerk * * * who shall be guilty of any palpable omission of duty or who shall willfully or corruptly be guilty of malfeasance or partiality in the discharge of his official duties, shall be fined in a sum not exceeding two hundred dollars, * * *."

Malfeasance by a public officer was a crime at common law. 67 C. J. S., Officers, § 133, p. 430; 63 Am. Jur. 2d, Public Officers and Employees, § 346, p. 837. It consisted of the doing of an act which was wholly wrongful and unlawful. See Minkler v. State ex rel. Smithers, 14 Neb. 181, 15 N. W. 330.

The complaint in this case charged, in substance, that the defendant had ordered literature, which was intended for his private use, to be reproduced at the expense of the county and had then mailed the literature to county employees in envelopes supplied by the county.

Much of the argument was devoted to the proposition that the defendant as county clerk had a right to campaign against union representation of county employees. The plea of nolo contendere foreclosed this argument because it admitted the allegation that the literature was intended for the private use of the defendant rather than official use in his capacity as county clerk. A plea of nolo contendere admits the matters alleged in the information and has the same effect as a plea of guilty so far as issues of fact are concerned. State ex rel. Nebras-

ka State Bar Assn. v. Stanosheck, 167 Neb. 192, 92 N. W. 2d 194.

The defendant's contention that the statute was unconstitutionally vague, if applied to the facts in this case, seems to overlook the allegation that the literature was "reproduced on his instruction for his own private use and not for any governmental use." We find no merit in the defendant's contention that the statute was unconstitutional if applied to these facts.

The complaint was not sufficient to allege that the literature was reproduced at county expense. There was no allegation that any county funds had been expended. The acts which were alleged were merely preliminary in nature and had no legal effect unless and until a claim was actually presented to the county board.

The allegations concerning the use of 1,500 county envelopes to mail the literature did state an offense. The plea of nolo contendere eliminated any claim that the defendant was acting in his official capacity or that the use was justified or privileged.

The judgment of the District Court is affirmed.

AFFIRMED.

OMAHA ASSOCIATION OF FIREFIGHTERS, LOCAL 385, APPELLEE, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.
231 N. W. 2d 710

Filed July 31, 1975. No. 40030.

1. **Court of Industrial Relations: Municipal Corporations: Wages.** Prevalent wage rates to be determined by the Court of Industrial Relations for firemen in the City of Omaha, Nebraska, must of necessity be determined by comparison with wages paid for comparable services in reasonably similar labor markets.
2. **Municipal Corporations: Wages: Statutes: Court of Industrial Relations.** Under section 48-818, R. R. S. 1943, in selecting cities in reasonably similar labor markets for the purpose of comparison in arriving at comparable and prevalent wage rates

the question is whether, as a matter of fact, the cities selected for comparison are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate.

3. **Court of Industrial Relations: Wages.** In establishing wage rates under section 48-818, R. R. S. 1943, the Court of Industrial Relations is required to take into consideration the overall compensation received by the employees, including all fringe benefits.
4. **Court of Industrial Relations: Trial: Evidence: Appeal and Error.** An issue not supported in the evidence and not presented to the Court of Industrial Relations will not ordinarily be considered in this court on appeal.

Appeal from the Court of Industrial Relations. Affirmed.

Herbert M. Fitle and Thomas J. Young, for appellant.

James P. Costello of Costello & Dugan, for appellee.

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

McCOWN, J.

The city of Omaha has appealed from an order of the Court of Industrial Relations which fixed and determined wages and certain conditions of employment for employees of the fire division of the public safety department of the City of Omaha pursuant to section 48-818, R. R. S. 1943. This action was brought by the Omaha Association of Firefighters, Local No. 385, the bargaining agent for the firemen and employees involved.

This action was filed in the Court of Industrial Relations on September 6, 1974, to resolve disagreements between the parties relative to a contract for the fire division of the public safety department of the City of Omaha for the calendar year 1975. Under section 48-818, R. R. S. 1943, the findings and orders of the Court of Industrial Relations may establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same. The evidence for both parties consisted largely of statistical data and expert testimony as to

wages and working conditions of firemen in Omaha and in other cities.

The Omaha Association of Firefighters, hereinafter called Union, based its testimony essentially upon wages, hours and working conditions for firefighters in seven cities, namely Cincinnati, Toledo, Akron, and Dayton, Ohio; Minneapolis and St. Paul, Minnesota; and Wichita, Kansas. These cities were selected because thier population was within about 100,000 above or below the population of Omaha, and they were all within the Bureau of Labor Statistics North Central Region, a region which includes Omaha. The starting salary of firemen in Omaha was 20.9 percent below the arithmetic mean of the seven cities. The Union witness concluded, however, that maximum salary in Omaha with no longevity needed to be increased by 12 percent to meet total mean average salaries then being paid in the other cities. Other testimony, however, established that the general wage rates in Ohio and Minnesota were significantly higher than those in Nebraska because of the presence of unionization and intensive manufacturing, and that salaries paid to employees in the public sector were therefore also elevated above those in the City of Omaha.

The City's evidence supported proposed wage rates based upon a differential between Omaha and Lincoln, Nebraska, which would produce an 8.2 percent increase in wages. There was evidence, however, that the proper differential in previous years was 9 percent rather than 8.2 percent. In addition, the city also used Des Moines and Kansas City as comparables. Those wage levels, however, were currently lower than those the city conceded would be proper on the basis of a comparison with Lincoln.

The court did not accept the evidence of either party but instead analyzed the evidence and determined that a wage increase of 10.2 percent in the starting salary of firemen represented a wage level comparable to the prevalent. The court also determined that it was more

appropriate to apply the 10.2 percent figure to each rank and grade among firemen rather than to attempt to arrive at different percentage figures for different ranks and grades. The court also determined that there should be no change in the hours of work; that holiday pay should be increased from 96 to 108 hours a year; increased maximum longevity pay from $180 to $360 per year; ordered the city to provide and pay the premiums for $5,000 of life insurance coverage; increased the annual uniform allowance by $20 to $140 per year; and ordered the city to provide turn-out gear at its own expense. The court refused to alter call-out pay, overtime pay, injured-on-duty pay, and current practices of payment of tuition for fire technology classes. The court also refused to grant the Union request to permit union activities on city property during city time and granting pay for union officials during the time of contract negotiations. Finally, the court allowed the union to deduct dues on a percentage basis rather than on a flat dollar amount. The City of Omaha has appealed.

The city contends in substance that the Court of Industrial Relations did not comply with the statutory requirements in establishing rates of pay and conditions of employment. The basic contention is that the method of selection of the cities used for comparisons and the method of establishing the hypothetical labor market were erroneous and improper.

Section 48-818, R. R. S. 1943, provides in part: "The findings and order or orders may establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same. In making such findings and order or orders, the Court of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions. In establishing wage rates the court shall take

into consideration the overall compensation presently recieved by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including vacations, holidays, and other excused time, and all benefits received, including insurance and pensions, and the continuity and stability of employment enjoyed by the employees." That portion of the statute remains after an amendment by the Legislature in 1969 deleted language which restricted comparisons to "the same labor market area and, if known, in adjoining market areas within the state and which in addition bear a generally comparable relationship to wage rates paid and conditions of employment maintained by all other employers in the same labor market area." See Laws 1969, c. 407, § 6, p. 1410. The Legislature, by virtue of the amendment, removed all restrictions on the labor market areas to be considered, and completely removed provisions restricting comparisons to areas within the State of Nebraska. The Legislature recognized that virtually every city and public employer is distinct and different from every other city or employer in some material respects. The parties here tacitly concede that there is no other city in Nebraska directly comparable to Omaha.

Prevalent wage rates must of necessity be established by nonlocal comparisons whenever the public employer is the only employer for a specified type of work in a local labor market. Prevalant wage rates to be determined by the Court of Industrial Relations for firemen employees of Omaha, Nebraska, must of necessity be determined by comparison with wages paid for comparable services in reasonably similar labor markets. A prevalant wage rate to be determined by the Court of Industrial Relations must almost invariably be determined after consideration of a combination of factors. In Crete Education Assn. v. School Dist. of Crete, 193 Neb. 245, 226 N. W. 2d 752, this court accepted the dictionary definition of the word "comparable" as "having enough like characteristics or qualities to make comparison appropriate." We also de-

termined that the standard of prevalent wage rates now is one of general practice, occurrence, or acceptance. It must be noted also that in this case the Court of Industrial Relations did not determine the prevalent wage rates for firemen by any direct computation or application of average or mean rates from seven cities nor from ten cities. Instead, it weighed, compared, and adjusted all the factors involved in each of the cities, which resulted in a determination of prevalent wages paid for comparable services in reasonably similar labor markets. Under section 48-818, R. R. S. 1943, in selecting cities in reasonably similar labor markets for the purpose of comparison in arriving at comparable and prevalent wage rates the question is whether, as a matter of fact, the cities selected for comparison are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate. Those determinations here were within the field of expertise of the Court of Industrial Relations, were made after a consideration and comparison of all the evidence, and the methods of selection and comparison were in accord with the requirements of section 48-818, R. R. S. 1943.

The city also contends that the Court of Industrial Relations did not take into consideration the overall compensation presently received by employees in determining prevalent wage rates as required by section 48-818, R. R. S. 1943. In this connection the evidence presented by the city was directed only to wage rates and was not directed to fringe benefits. The inference that plaintiff's evidence on these issues did not properly reflect overall compensation is unsupported by the record. The Court of Industrial Relations specifically noted that it did not cost out the total compensation package because it was not necessary. The wages it allowed and each of the other economic fringe benefit issues were resolved in conformity to prevalent practice, and in the absence of any showing that any economic fringe benefits are out of line with the prevalent, the total compensation package was a

composite of practices each and all of which, including the total, are comparable to the prevalent. In establishing wage rates under section 48-818, R. R. S. 1943, the Court of Industrial Relations is required to take into consideration the overall compensation received by the employees, including all fringe benefits. In this case the Court of Industrial Relations did take into consideration the overall compensation presently received by the employees, including all fringe benefits, as required by section 48-818, R. R. S. 1943.

The final contention of the city is that the Court of Industrial Relations improperly imposed the 10.2 percent wage increase here across the board in each rank or grade instead of making a separate determination of the specific percentage increase to be allowed to each rank or class of fireman. Neither party questioned the existing differentials among ranks of firemen or the existing differentials within ranks among grades. Under such circumstances the Court of Industrial Relations determined that it would be more appropriate to apply the 10.2 percent figure to each rank and grade of fireman in order that the present contract differentials as established by agreement and past practice would be maintained rather than distorted. The evidence at trial, as well as previous offers by both parties, dealt only with an across-the-board increase and neither the city nor anyone else ever challenged such an approach until the case reached this court. The action of the Court of Industrial Relations simply maintains the relationship between ranks and grades that have been built into the previous labor arrangements. An issue not supported in the evidence and not presented to the Court of Industrial Relations will not ordinarily be considered in this court on appeal.

The judgment of the Court of Industrial Relations was correct and is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

Section 48-818, R. R. S. 1943, provides the Court of Industrial Relations, in altering the scale of wages, hours of labor, or conditions of employment, shall establish rates of pay and conditions of employment which are comparable to the prevailing wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions.

As I interpret the statute, this does not permit the Court of Industrial Relations to establish a hypothetical labor market in order to determine prevalent wage rates and prevalent fringe benefits. Even if the Court of Industrial Relations were to be permitted to construct a hypothetical labor market to reach its determination, that hypothetical labor market must be based upon competent evidence and not on mere assumptions, speculations, or conjectures.

I concede that for purposes of comparison in arriving at comparable and prevalent wage rates, the Court of Industrial Relations may select for comparison cities that are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate. While these determinations are within the field of expertise of the Court of Industrial Relations, as suggested by the majority opinion, I maintain that we have here an arbitrary and unreasonable abuse of that so-called expertise. Nor do I agree that the court was able to make a proper adjustment to achieve similarity.

The union based its testimony for comparison purposes on seven cities: Cincinnati, Toledo, Akron, and Dayton, Ohio; Minneapolis and St. Paul, Minnesota; and Wichita, Kansas. All these cities have a great deal more maufacturing firms, greater industrialization, and unionization, and therefore higher wage rates. The city's expert, on the other hand, utilized for comparison purposes Lincoln, Des Moines, and Kansas City, which were similar to Omaha because their economies were

similar. They are geographically close, and they draw upon the same labor supply.

The city's expert testified that population is not directly related to wages; that population density is, because density is related to the type of construction found in a city and five of the cities employed by the union had greater population density than Omaha. The distance between Omaha and the union's proposed cities made it unlikely that there would be an interchange of laborers. Based upon population, population density, manufacturing, unionization, geographic location, and common labor supply, Lincoln, Des Moines, Kansas City, and Omaha are similar and can be properly compared to one another.

It should be obvious that if the Court of Industrial Relations is to accept any city selected by the union for comparison purposes, it essentially is permitting the union to dictate the wage scale in Nebraska.

I would reverse this case because the Court of Industrial Relations should not be permitted to construct a hypothetical labor market in order to determine prevalent wage rates and prevalent fringe benefits. However, even if it were conceded to have this right, then I would reverse the case because the hypothetical labor market herein was not based upon competent evidence but was based upon mere assumptions, speculation, or conjecture.

I would also reverse the case because I do not believe the Court of Industrial Relations in establishing wage rates and fringe benefits took into consideration overall compensation. To do so requires consideration of not only wages for time actually worked but also for time not worked, including vacations, holidays, and other excused time and all benefits received, including insurance and pensions. Further, fringe benefits and wage rates must be considered together. The same array of employers should be used to determine prevalent wage rates

and prevalent fringe benefits. This was not done in this instance.

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

BOSLAUGH, J., concurring.

While I join in the opinion of the court and believe that the order of the Court of Industrial Relations was within its discretion, I share Judge Spencer's concern in regard to evidence concerning wages paid in Cincinnati, Toledo, Akron, and Dayton, Ohio. It seems to me that such evidence had little or no relevance to the issues in this case.

STATE OF NEBRASKA, APPELLEE, V. SAMUEL SHELBY, JR., APPELLANT.
232 N. W. 2d 23

Filed August 7, 1975. No. 39812.

Criminal Law: Sentences: Time. An erroneous or invalid sentence, unauthorized under the law or the statute, may be set aside by the District Court during the period of time that it retains jurisdiction of the defendant, and a valid sentence authorized by law may be pronounced providing the record shows a personal appearance of the defendant and counsel and the sentence and proceedings are otherwise properly entered.

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

Seb Caporale, for appellant.

Paul L. Douglas, Attorney General, and Melvin K. Kammerlohr, for appellee.

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

WHITE, C. J.

The assignment of error in this case relates to the sentencing of the defendant to a period of 3 years in the Nebraska Penal and Correctional Complex, a period of

5 to 15 years for shooting with intent to kill, wound or maim, and 5 to 15 years for assault with intent to rob, all to be served consecutively. The record shows that prior to the time of imposition of sentence, the court, pursuant to section 29-2261 (2), R. S. Supp., 1974, ordered a presentence investigation report. After receiving the report, the court desired more detailed information and committed defendant to the Division of Corrections for a period of 90 days for a complete study and evaluation, under the provisions of section 83-1,105, R. S. Supp., 1974. Upon receipt of the evaluation report, the court sentenced defendant to the security section of the Lincoln Regional Center for such time as was necessary to be determined by the director, and that the director shall provide such psychiatric, social, and vocational therapy as is needed. The director of the Lincoln Regional Center refused to accept the defendant pursuant to this sentence, and this controversy followed.

It is undisputed that subsection (4) of section 29-2261, R. S. Supp., 1974, only authorizes the court to order the offender to submit to psychiatric observation and examination *for a period of not exceeding 60 days or a longer period as the court determines necessary for that purpose.* It is abundantly clear that this section of the statute was designed as an aid to the court before imposing a valid legal sentence.

The original "sentence" or order of the District Court sentencing the defendant after receiving the report from the Division of Corrections stated and ordered: "Center to provide such vocational, social and psychiatric treatment as is necessary." As we have already pointed out, that while observation and examination are authorized under section 29-2261(4), R. S. Supp., 1974, for the purpose of aiding the court to impose a lawful and legal sentence or disposition of the case under the statute, *there is no provision* for treatment or confinement of the defendant in the Lincoln Regional Center under the discretion of the director.

It is apparent from the record that the District Court realized its error, and that this "sentence" was unauthorized, not provided for by statute, and either erroneous or void. Consequently the court required the defendant to appear again before it on September 11, 1974, and the court at that time gave the defendant and his attorney full opportunity to make any objections they might have to the procedure being followed, and no objections having been made, the court proceeded to sentence the defendant to the Nebraska Penal and Correctional Complex for the periods stated above in this opinion.

This case is here on direct appeal. It is settled law that the District Court has the power to impose a lawful sentence where the one pronounced was erroneous or void as being beyond the power of the trial court to pronounce and where the accused himself has invoked appellate jurisdiction for the correction of error. In re Fanton, 55 Neb. 703, 76 N. W. 447; State v. Gaston, 191 Neb. 121, 214 N. W. 2d 376. See, also, State v. Brevet, 180 Neb. 616, 144 N. W. 2d 210; Quinton v. State, 112 Neb. 684, 200 N. W. 881.

The action of the trial court in sentencing the defendant to the Nebraska Regional Center as a final disposition of the case was erroneous, invalid, and perhaps void. The defendant remained under the jurisdiction of the court, was brought back before the court, personally appeared with his attorney, and a valid sentence was legally imposed. No question or contention is made in this case as to the validity of the conviction of the defendant for the crimes charged. The final sentence of the District Court, as heretofore mentioned, is correct and is affirmed.

AFFIRMED.

GENE BUSBOOM ET AL., APPELLEES, V. SOUTHEAST NEBRASKA TECHNICAL COMMUNITY COLLEGE, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.
232 N. W. 2d 24

Filed August 7, 1975. No. 39835.

Colleges and Universities: Schools and School Districts. A technical community college board may act officially only when convened and meeting in such capacity.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Reversed and remanded with directions to dismiss.

Douglas L. Curry of Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellant.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for appellees.

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

NEWTON, J.

This is a class action brought for and on behalf of the teachers in the Southeast Nebraska Technical Community College with a view to enforcing wage increases provided for in a negotiated settlement entered into for the 1973-1974 school year by the Lincoln School District Board of Education and the Lincoln Education Association representing the teachers in the Lincoln School District. The question presented is whether the negotiated settlement is binding on the defendant college. The trial court found that it was binding but applicable only to teachers with tenure. We find the agreement was not binding on the defendant in any respect and dismiss the action.

Originally the defendant was known as Area Vocational Technical School No.5. By legislative change it became known as Lincoln Nebraska Technical Community College Area. By legislative fiat the Lincoln Board

of Education served also as the college board. Section 79-2617 (3), R. R. S. 1943 (Reissue of 1971), provided: "The technical community college board for the Lincoln Nebraska Technical Community College Area shall be the board of education for the Class IV school district whose territory comprises the technical community college area. The officers of such board of education may function as the officers of the area board." Laws 1973, L.B. 533, expanded the area covered by defendant college, designated it as the Southeastern Nebraska Technical Community College Area, and provided for the appointment of a new governing board.

The facts are stipulated to. The stipulation provides that plaintiffs were employees of the Lincoln School District for the 1972-1973 school year. It lists the teachers in the defendant college with tenure and those without tenure. Tenured teachers were automatically rehired by the district but others were subject to termination. Salaries paid plaintiffs by defendant were not in accordance with the negotiated settlement. The Lincoln Board of Education convened in separate session when dealing with matters affecting the technical school but followed the same operational and personnel policies applied to the Lincoln School District. The technical school was under the direction of an assistant superintendent for post high school programs and the technical school was operated under a separate tax levy and budget.

The stipulation also discloses that the negotiated settlement was approved by the Lincoln School District Board of Education but does not reveal any action by that board when sitting as the Lincoln Nebraska Technical Community College Board. The negotiated settlement was approved by the school district board on May 8, 1973, but on February 27, 1973, the board had postponed the election of certified personnel with the Lincoln technical college pending clarification of its status, and affected teachers were notified by letter with a request for the return of an intent card.

Exhibit 11, attached to the stipulation, comprises the only minutes appearing of a meeting of the Lincoln Nebraska Technical Community College Board while still comprised of the same membership as the Lincoln School District Board. It reflects a report of a meeting with the new Southeastern Nebraska Technical Community College Board and at the request of this board, all employees of the Lincoln technical college were reappointed and placed on the current salary schedule with an increment if due.

Under Laws 1971, L.B. 759, and subsequent amendments to Chapter 79, article 26, of the Nebraska statutes, the state was divided into technical community college areas, with separate governing boards to be appointed and then elected. Prior to that time the technical schools were governed by "the school district board of education or a governing board of the area vocational technical school." See § 79-1445.23, R. S. Supp., 1969. The technical schools had authority to levy taxes. See § 79-1445.30, R. S. Supp., 1969. They were also given power to borrow money, issue bonds, and receive state and federal funds. Chapter 79, article 14, R. S. Supp., 1969. A Class IV School District such as Lincoln had no power or authority to operate a technical college although its governing board may have operated in a dual capacity. The powers above-mentioned were delegated to a technical college, not to a school district, and were necessarily exercised by the technical college board as distinguished from the school board. It follows that a school district board functioning in a dual capacity, when sitting solely as a school district board, could not bind the technical college and vice versa when sitting as the governing body of the technical college. For example, if bonds were issued, or a tax levy made, they had to be in the name of the technical college and authorized by the technical college board. In this connection it is noted that the Lincoln technical college operated under a separate tax levy and budget and the members of the school

board convened in separate session when dealing with matters pertaining to the technical college, notwithstanding they followed generally the same operational and personnel policies. It is also noted that the school district board refused, long prior to the negotiated settlement, to reelect certified personnel and subsequently, at the request of the new Southeast Nebraska Technical Community College Board, reappointed all technical college employees on prevailing financial terms except where increments were due.

This record discloses that the negotiated settlement was entered into by the Lincoln School District Board sitting as such. It does not reveal that it was ever entered into by the Lincoln Nebraska Technical Community College Area or by the school district board sitting in its capacity as a technical college board. In 1971 the Legislature adopted a comprehensive act pertaining to technical community colleges. See Laws 1971, L.B. 759, effective August 27, 1971. Prior to the passage of that act under Chapter 79, article 14, R. S. Supp., 1969, the technical colleges could be governed by local school district boards "or a governing board of the area vocational technical school." The school district boards as such were specifically empowered to levy taxes, issue bonds, and generally perform every act which the board of an area vocational training school was authorized to perform. Under the 1971 act these powers were limited to the technical college area boards and it was provided that: "The technical community college board for the Lincoln Nebraska Technical Community College Area shall be the board of education for the Class IV school district * * *." The amendments indicate a legislative intent to create separate governing boards for the technical colleges. The school districts were deprived of all governmental authority in regard to these colleges although the membership of the Lincoln technical college board was to be the same as the membership of the Lincoln Board of Education. This intent on the part of

the Legislature is emphasized by the provision contained in section 79-2627, R. R. S. 1943 (Reissue of 1971), that area and local school district boards might enter into agreements for services, facilities, etc.; and also by the 1974 provision providing for an area technical college board entirely separate from the Lincoln Board of Education. See §§ 79-2604 and 79-2617, R. S. Supp., 1974. By statute the authority to govern and act in behalf of the technical college is conferred on the technical college board, not on a school district board, and the fact that a school district board may act in a dual capacity does not relieve it of the duty to convene as a technical college board and to function as such.

In 16 McQuillin (3d Ed., 1972), Municipal Corporations, Public Education, § 46.09b, p. 691, it is stated: "School directors must act as a board, a legal entity; that is, their action must be at a meeting duly assembled, in the manner prescribed, e.g., after the giving of notice, and there must be a quorum present to enable the board to transact business. It has been aptly announced that a board of education, like any other municipal body, speaks only through and by its record of what was done *when acting as a body in a corporate meeting*; no two members or all of them acting individually or separately can bind the board or make a contract for it." (Emphasis supplied.) See, also, 78 C. J. S., Schools and School Districts, § 122, p. 909; 2 Am. Jur. 2d, Administrative Law, § 227, p. 57.

We conclude that the settlement was not binding upon defendant's predecessor and consequently is not binding upon the defendant. We do not overlook the stipulated provision that plaintiffs were employees of the Lincoln School District. Since the school district and the technical college were separate organizations, operated by separately acting governing bodies, with separate budgets, this portion of the stipulation is contrary to the facts and the law and cannot stand.

The judgment of the District Court is reversed and plaintiffs' petition dismissed.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

CLINTON, J., concurs in the result.

ROBERT L. SIMPSON ET AL., APPELLEES AND CROSS-APPELLANTS, V. ORAN D. SIMPSON ET AL., APPELLANTS AND CROSS-APPELLEES.

232 N. W. 2d 132

Filed August 7, 1975. No. 39860.

1. **Summary Judgments.** 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 a judgment as a matter of law.
2. **Arbitration and Award: Pleadings: Trial.** In the absence of fraud or mistake an arbitration award, whether at common law or under the statute, when regularly made and published, is prima facie binding upon the parties thereto, and the burden of alleging and proving the contrary is upon the party seeking to impeach it.
3. **Arbitration and Award: Trial.** Unless the contrary appears expressly, or is shown, it will be presumed that all matters which were presented to the arbitrators were passed on by them, and that the award is in conformity to the submission in this regard.
4. **Arbitration and Award.** Arbitrators are no more bound to go into particulars and assign reasons for their award, than a jury is for its verdict. The duty is best discharged by simple announcement of the result of their investigations.

Appeal from the District Court for Arthur County: JOHN H. KUNS, Judge. Affirmed.

Firmin Q. Feltz of Feltz & Hays and Arthur R. Johnson, for appellants.

Dale A. Romatzke of Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, for appellees.

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

WHITE, C. J.

The District Court, in this case, granted summary judgment to the plaintiffs, Robert Simpson and his wife, enforcing specific performance of an agreement for the dissolution of a partnership. The defendants, Oran Simpson and his wife, appeal. We affirm the judgment of the District Court.

The facts in this case cover a span of years beginning on April 20, 1957, until October 18, 1969, a period during which Robert Simpson and his brother, Oran Simpson, operated a farm in the Sandhills which they had purchased from their parents, under a partnership agreement using the name of Simpson Land and Cattle Company. On October 18, 1969, the plaintiff and the defendant entered into an "Agreement for Dissolution of Partnership." The agreement stated that each party was to appoint an appraiser and that these two appraisers would appoint a third appraiser. The appraisers were to be familiar with values of ranch property in the Sandhills area and with Sandhills ranching operations. The agreement provided that the decision of a majority of the appraisers *would be final and conclusive.* The agreement provided that the appraisers would value the land so as to make possible an equitable division. None of the land was to be sold, and each party was to be allocated the tract of land upon which he lived, "together with additional land which shall constitute a fair and equitable division." The division of the partnership livestock was to be in kind, none of it to be sold, and the appraisers to divide it between them. The appraisers were to inspect all personal property of the partnership and make an equitable division. The agreement provided that either party had a right to express a desire to own any specific article of the personal property at a price set by the appraisers. If both parties desired the same article, then "the appraisers shall make the best

decision possible," including the sale of the item. The agreement also provided for the appraisers to determine an equitable settlement of money and accounts, referring to the bank balance, funds on hand, accounts payable and receivable, and claims of the partners for money from the partnership.

Pursuant to the agreement for dissolution of partnership, three appraisers were appointed. They made a report on the division. The report divided up the real estate and went into considerable detail in dividing up the personal property of the partnership. The report also allocated partnership funds to the defendant for wages paid to the plaintiff's sons in 1969 and the report also provided that any partnership funds on hand or to be received were to be equally divided between the partners.

A dispute arose on the appraisers' report, and the plaintiff brought this action asking for specific performance of the dissolution agreement in accordance with the appraisers' report. The District Court granted the plaintiffs' motion for summary judgment. The sole question presented for our decision is whether there is a genuine issue as to any material fact so as to entitle the plaintiff to a judgment as a matter of law. Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152.

We summarize the defendant's assignments of error. He argues that there are two distinct factual issues to be decided. First, the defendant contends that the division by the appraisers was inequitable, and secondly, he contends that the appraisers failed to comply with the dissolution agreement.

At the outset we observe that in the "Agreement for Dissolution of Partnership," the arbitration agreement, both parties agree "that the decision of two-thirds (2/3rds) majority of the Board of Appraisers (of three) shall be final and conclusive as to both parties." This type of arbitration agreement has long been held to be valid and enforceable in our state. An arbitration agree-

ment is used as a convenient tool to settle disputes without going to court and to promote the peaceful settlement of disputes. The grounds for impeachment of the agreement and the decision of the arbitrators are necessarily narrow, in order to accomplish the public policy objective of an arbitration agreement. The range of the impeachment inquiry has long been settled in Nebraska. "An award, whether under the statute or common law is, *in the absence of fraud or mistake,* binding upon the parties thereto, and the burden of alleging and proving its invalidity rests upon the party seeking to impeach it." (Emphasis supplied.) Connecticut Fire Ins. Co. v. O'Fallon, 49 Neb. 740, 69 N. W. 118. The general policy of the courts is that an arbitration award should not be set aside as inequitable unless it is grossly excessive and shocks the conscience of the court. See 6 C. J. S., Arbitration and Award, § 90, p. 236.

As we view the record, the District Court's judgment that the record was devoid of any genuine issue of fact as to fraud and mistake in the formation or the execution of the appraisers' report is correct.

We deal in detail with the defendant's contention, realizing that the record must demonstrate that there is no genuine issue of fact in this case. Seeking to impeach the judgment of the appraisers, despite the agreement, the defendant contends that there was a genuine issue of fact as to whether the appraisers complied with the provisions of the dissolution agreement. He then argues that since they did not comply in detail with the arbitration agreement, that he is entitled to, in effect, a full court hearing on the merits on the dissolution of the partnership. It is true the appraisers had only that power which they received in the dissolution agreement, and further they were bound by the provisions of the agreement. As we analyze the extensive argument of the defendant, he argues that the appraisers failed to comply with the dissolution agreement in four respects. First, the defendant alleges that the appraisers neglected

to value the land which was to be divided in kind, with each party receiving a portion of the land upon which his home was situated. Second, he states that there is a genuine issue of fact because the appraisers failed to adjust the partnership accounts for three claims of the defendant, for pasture rent, for a $1,700 difference in checks written by each party on the partnership account, and for $480 due from the partnership for a difference of oil and gas purchased by the parties and charged to the partnership. Third, the appraisers allegedly failed to inspect all the personal property. Fourth, the appraisers failed to sell various articles of personal property which the defendant desired to purchase from the partnership under the terms of the agreement.

In determining if the appraisers failed to comply with the dissolution agreement, the agreement must first be interpreted. In construing an agreement for arbitration, a particular clause or phrase should not be viewed in isolation. Fragmenting a contract for arbitration out of context, and then applying a literal interpretation to the isolated words and phrases thus separated is not permissible. A contractual arbitration agreement is subject to the general rule for the construction of contracts that the entire instrument must be considered as a whole. See, Westbrook v. Masonic Manor, 185 Neb. 660, 178 N. W. 2d 280; Restatement, Contracts, § 228. In addition, the use of words or phrases having a breadth of meaning and application, should be interpreted in light of all the circumstances accompanying the transaction. See Restatement, Contracts, § 228.

The circumstances of this case conclusively show that the two brothers jointly owned their parents' farm, and wanted to dissolve their partnership in 1969. In this somewhat informal situation, the main goal of the dissolution agreement was to divide the property. The appraisers accomplished this goal. The provisions which the defendant contends were violated must be viewed in light of the circumstances surrounding the general

purpose of the dissolution agreement. We observe that the overall purpose and objective of the arbitration agreement setting up the function of the appraisers were simply to divide up the property, for the reason that the two brothers themselves could not agree as to many of the minor details winding up a 12-year performance and arrangement in the partnership agreement. They decided to end their argument, not by going to court, but by providing that a vote of two-thirds of the appraisers should become final and binding on each party. Under the settled law, such an agreement and such a general purpose does not permit a post-appraisal reargument as to whether the arbitrators were precisely correct as to the minute details of the division which the arbitration contract provided for. The fundamental purpose of the arbitration agreement was to accomplish a division of the property, and not to set up the arbitrators' decision as a further and additional ground for court dispute.

The finality of the appraisers' decision and report and their performance thereunder is protected, in the absence of fraud or mistake. There is a legal presumption that the arbitrators followed the arbitration agreement. The burden is on the party challenging the award to show that there was fraud or mistake or nonperformance of their duties, in order to impeach the award. See Sides v. Brendlinger, 14 Neb. 491, 17 N. W. 113.

As we view the record, giving all reasonable inferences to the defendant, in light of the standards that must be met, there is no genuine issue of fact that the appraisers did not substantially comply with their duties under the dissolution agreement or that there was any evidence of fraud or mistake.

The defendant contends that the appraisers did not value the land as required by the dissolution agreement. But the record demonstrates conclusively that the appraisers must have valued the land in order to divide it. The defendant admits that the appraisers viewed all the

real estate before making a division of the land. Moreover, under the terms of the agreement, the appraisers were to be selected on the basis of their thorough understanding of the values of ranch property in the area. What the defendant is really arguing is that their report did not publish or articulate a detailed method of appraisal and conclusions as to all the factors that go into evaluating the property. We observe again that the property had to be divided in kind, preserving to each one of the brothers his homestead. It is inconceivable that the appraisers would not decide on the value of the land before dividing it up. We observe that despite the difficulty of the appraisers' task in achieving a division in kind, the defendant received 48.63 percent of the land area involved. On its face this would appear to be far short of any showing or proof of any genuine issue of fact that the award was grossly inadequate. We point out again that the legal presumption, unless the contrary appears, is that arbitrators decide all matters submitted to them. Sides v. Brendlinger, *supra*; In re Arbitration of Johnson, 87 Neb. 375, 127 N. W. 133. Arbitrators are not bound to go into the particulars and to articulate and assign reasons or detailed computations in their award, any more than a jury is required to do so in rendering a verdict. The duty is best discharged by simple announcement of the result of their investigations. In 5 Am. Jur. 2d, Arbitration and Award, § 126, p. 614, the following general rule is stated: "Arbitrators need not disclose the facts or reasons behind their award unless the arbitration agreement or submission, or an applicable statute, requires them to do so. Otherwise, they are no more bound to go into particulars, or to give reasons for their award, than a jury is for its verdict. When acting within the scope of their authority, being the chosen judges of the parties and a law unto themselves, they may award according to their notions of justice and without assigning any reason." And, in In re Arbitration of Johnson, *supra,* passing on

the same point, this court observed: "Special findings were not required by the terms of the submission. * * * In this condition of the record the general finding will be held sufficient." The only requirement, in this case, was that the award be reduced to writing which was undisputedly complied with by the appraisers in their written report. We reject the contention of the defendant, although ably argued, which is to the effect that the absence of findings and reasons for the appraisers' award is per se proof of the failure to consider and pass on the matters which were submitted to them for determination.

The defendant contends that the appraisers did not properly adjust the partnership accounts, more specifically, the defendant's claim for pasture rent, an alleged $1,700 difference in checks written by each party on the partnership account, and $480 allegedly due from the partnership for a difference of gas and oil purchased by the parties and charged to the partnership. Again, while the appraisers' report did not compute in writing or give a detailed analysis of their division, there is no evidence to indicate that the appraisers neglected or did not consider such claims. It appears from the record that the appraisers obviously either set off the conflicting claims of the parties or did not recognize the defendant's claim as legitimate. The appraisers were merely performing their duty, and there is a presumption in their favor that they considered all matters submitted to them. There is no merit to this contention.

The defendant argues that the dissolution agreement requires that the appraisers personally inspect every individual piece of personal property, including tools, owned by the partnership. As we read the entire agreement, the inspection of every individual piece of personal property, probably consisting of hundreds or thousands of items, was not the goal of the parties. Moreover, in the defendant's answers to the plaintiff's requests for admissions, the defendant admitted that the

appraisers "went to and inspected the property owned by the partnership, together with all of the real estate involved in this action on several occasions." In the light of this admission, and giving it its fair interpretation, the defendant cannot now argue, from hindsight, that the appraisers did not inspect all the property and did not perform their duties.

Finally, the defendant contends that the appraisers violated the dissolution agreement by not permitting the defendant to purchase certain personal property which belonged to the partnership. However, the appraisers had no duty under the contract to permit such action on the part of either party. The dissolution agreement is permissive, and merely states that "either of these parties may, if they wish, express a desire to own any separate article at the price set thereon by the appraisers." This language clearly does not compel the appraisers to sell any of the partnership's personal property to either one of the parties.

Other contentions of the defendant have been examined and are without merit. In the light of our determination herein it is unnecessary for us to pass upon or decide the procedural question asserted on cross-appeal.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LESTER GALE WEIAND, APPELLANT.
232 N. W. 2d 28

Filed August 7, 1975. No. 39891.

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

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

T. Clement Gaughan and Robert I. Eberly, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

WHITE, C. J.

In this case, the only assignment of error is the excessiveness of the defendant's sentence, which was for a term of 3 years in the Nebraska Penal and Correctional Complex on a charge of having in his possession a falsely altered check. The plea of guilty was entered as a plea bargain in which the county attorney agreed to drop a similar charge if the defendant would plead guilty to this one. The defendant was given credit for 117 days spent in custody in the county jail awaiting trial. This sentence is to be served consecutive to a present unexpired sentence. The defendant was also fined $5 and ordered to pay the costs.

After accepting a check for $170.48, a bartender called the police to report that there was a very visible erasure where the name of the payee Dean Frovarp appeared. A call to the payor indicated that the check had originally been made out to another person. Six days later, the defendant was arrested for speeding. He had in his possession an Illinois driver's license in the name of Dean Frovarp. When an array of photographs, including one of the defendant, was shown to the bartender, he identified the defendant as the one who had passed the altered check. The defendant was on parole at the time this incident occurred. He had been on and off drugs from the day he got out of the penitentiary on parole. He asserts that he has no recollection of the incident involving the complaint. The possible sentence for the felony offense of possession of a falsely altered instrument is 1 to 20 years in the Nebraska Penal and

Correctional Complex and a fine not exceeding $500. § 28-601(2), R. S. Supp., 1974.

It is obvious that under the applicable rule there was an entire absence of any abuse of discretion by the District Court in imposing the sentence that it did under the circumstances revealed by the record.

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

AFFIRMED.

EVELYN SUE RICHARDS, APPELLEE AND CROSS-APPELLANT, V. OMAHA PUBLIC SCHOOLS, APPELLANT AND CROSS-APPELLEE.
232 N. W. 2d 29

Filed August 7, 1975. No. 39893.

1. **Employer and Employee: Fair Employment Practices.** Discrimination by an employer against any individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's sex is an unlawful employment practice under the Nebraska Fair Employment Practice Act.
2. ———: ———. A maternity leave policy which requires that an employee's leave begin a fixed period before the expected date of birth is an unlawful employment practice.
3. ———: ———. A classification based on pregnancy is not a classification based on sex.
4. **Schools and School Districts.** Continuity of instruction is a significant and legitimate educational goal.
5. **Schools and School Districts: Fair Employment Practices.** A maternity leave policy which requires that the leave for teachers begin at the start of a semester is not an unlawful employment practice.
6. ———: ———. A sick leave policy which provides no benefits for disability occurring while the employee is on leave of absence for any purpose, including maternity, is not an unlawful employment practice.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Affirmed in part, and in part reversed and remanded with directions.

Alex M. Clarke and Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellant.

Crosby, Guenzel, Davis, Kessner & Kuester and Steven G. Seglin, for appellee.

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

PER CURIAM.

This case involves a controversy under the Nebraska Fair Employment Practice Act. The complainant, Evelyn Sue Richards, was employed by the respondent, Omaha Public Schools, as a home economics teacher at Bancroft Junior High in Omaha, Nebraska.

On May 24, 1972, the complainant notified the respondent that she was pregnant but would like to continue her teaching duties until the end of October 1972. The complainant had been advised by her physician that the birth would occur on or about December 7, 1972.

The respondent advised the complainant she would be granted a leave of absence for maternity but would not be allowed to teach during the fall semester. The complainant then filed a charge of employment discrimination with the Nebraska Equal Opportunity Commission alleging that the respondent had discriminated against her because of her sex.

Under the Nebraska act it is an unlawful employment practice for an employer to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's sex. § 48-1104, R. R. S. 1943.

After an unsuccessful conciliation conference, the matter was referred to a hearing examiner and an evidentiary hearing was held. Following this hearing there was a review hearing before the commission. The commission found that the maternity leave policy and sick leave policy of the respondent constituted unlawful employment practices. The complainant was awarded

back pay for the 2-month period during the fall semester during which she was not allowed to teach; sick leave pay for 16.5 days; and she was credited with 156.5 duty days. The respondent then filed this action under section 48-1120, R. R. S. 1943, to review the decision and order of the commission.

The trial court affirmed the order of the commission so far as the maternity leave policy of the respondent was concerned but vacated that part of the order relating to sick leave. The respondent has appealed and the complainant has cross-appealed.

The issues presented by the appeal and cross-appeal are essentially questions of law. There is little or no dispute in the record concerning any material fact.

The maternity leave policy of the respondent, which was in force in May 1972, provided that the leave should begin at mid-pregnancy and the employee would not be allowed to return to work for a full year after the birth except in cases approved by the superintendent.

Effective September 1, 1972, the respondent's maternity leave policy was changed to provide that the leave would normally commence with the beginning of the sixth month of pregnancy but the actual starting date was to be at the discretion of the superintendent based upon the ability of the employee to perform her duties, the health and safety of the employee, "and in the case of teachers, the continuity of classroom instruction."

The policy was changed again, effective October 2, 1972, by eliminating the provision concerning the sixth month of pregnancy as the normal date of leave commencement.

A maternity leave policy which requires that the leave begin a fixed period before the expected date of birth violates the due process clause of the Fourteenth Amendment to the Constitution of the United States. Cleveland Board of Education v. LaFleur, 414 U. S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52. To the extent that the respondent's maternity leave policy in effect in May

1972, required the leave to begin at mid-pregnancy, it was invalid. However, in this case the complainant was paid for the months of June, July, and August in 1972 and she was allowed to return to her employment at the beginning of the second semester in February 1973. Thus, the real issue here, so far as the respondent's maternity leave policy is concerned, is whether the respondent could refuse to allow the complainant to teach during the first 2 months of the fall semester in 1972.

The complainant's theory of the case, stated briefly, is that disability resulting from pregnancy must be afforded the same treatment as disability resulting from an illness. The complainant contends that any employment policy which differentiates between disability resulting from pregnancy and disability resulting from an illness results in a discrimination because of sex.

This issue has been described as the most difficult and troublesome one in the area of sex discrimination. Most of the cases which have considered this issue support the complainant's analysis of the question. These decisions for the most part are by the lower and intermediate federal courts and are based on the "guidelines" promulgated by the federal Equal Employment Opportunity Commission (EEOC). Under these guidelines the disability caused by pregnancy is a temporary disability which must be treated the same as any other temporary disability under sick leave plans including the commencement and duration of leave. See 29 C. F. R., § 1604.10.

The guidelines constitute an administrative interpretation of the federal act. The United States Supreme Court has held that the guidelines are entitled to "great deference" where the act itself and the legislative history of the act supports the commission's construction. Griggs v. Duke Power Co., 401 U. S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158. However, in a recent case two dissenting opinions suggested that the authoritative nature of the guidelines is limited. See Albemarle Paper Co.

v. Moody, June 25, 1975, 43 Law Week 4880.

There is little in the way of legislative history to serve as a basis for determining whether the guidelines express the will of Congress in regard to pregnancy and sex discrimination. The word "sex" was added by a floor amendment one day before the bill was passed by the House of Representatives. See Miller, "Sex Discrimination and Title VII of the Civil Rights Act of 1964," 51 Minn. L. Rev. 877. However, in a related area the legislative history of the Equal Rights Amendment indicates that Congress apparently felt the amendment did not prohibit legislation dealing with a physical characteristic unique to one sex, so-called single-sex-characteristic laws. See Comment, Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination, 75 Col. L. Rev. 441.

Wetzel v. Liberty Mutual Ins. Co., 511 F. 2d 199, is typical of the cases which have held that employment policies which treat pregnancy separately from other disabilities are sexually discriminatory. In the Wetzel case the employer allowed pregnant employees to take a maternity leave of absence of 6 months from the date the leave commenced or 3 months from the date of delivery, whichever came first but no time limitation applied to leaves of absence for other temporary disabilities. The employer's income protection plan provided benefits for disabilities caused by illness but provided no benefit for pregnancy-related disabilities. Relying upon the EEOC guidelines, the court held the employment policies were sexually discriminatory. The court stated: "Since pregnancy is a disability common only to women, to treat it differently by applying a separate leave policy is sex discrimination." Certiorari was granted in the Wetzel case on May 27, 1975, 421 U. S. 987, 95 S. Ct. 1989, 44 L. Ed. 2d 476.

The holding in the Wetzel case may be contrasted with the decision in Geduldig v. Aiello, 417 U. S. 484, 94 S. Ct. 2485, 41 L. Ed. 2d 256. In the Geduldig case

the Supreme Court of the United States held that a California statutory disability insurance system which excluded normal pregnancies from coverage did not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Although not decided under the Civil Rights Act, the decision considered the effect of a classification which excluded pregnancy. In a footnote to the majority opinion the court observed that while only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. For an interesting comment on the Geduldig case and its implications see 75 Col. L. Rev. 441.

The respondent makes a similar contention here. The respondent points out that a maternity leave is treated the same as any other leave of absence and sick leave benefits are not extended to any employee who becomes disabled while on a leave of absence granted for any purpose. Under the written policy of the respondent an employee may be granted a leave of absence for 1 year at a time for illness, maternity, professional improvement, or military duty. The classification is based not on pregnancy alone because all leaves of absence are treated the same.

However, it should be noted that a classification based on pregnancy is not a classification based on sex. Such a classification distinguishes between pregnant women and all other men and women. Geduldig v. Aiello, *supra*.

The respondent also contends that its refusal to permit the complainant to teach during the first 2 months of the fall semester in 1972 was reasonably necessary to the normal operation of its schools. The letter to the complainant advising her that she would not be allowed to teach during the fall semester stated that continuity of classroom instruction had been considered.

Much of the respondent's evidence was devoted to the matter of continuity of instruction. Dr. Ronald F. An-

derson, the assistant superintendent in charge of personal services for the respondent, testified at length concerning the operation of the school system and the meaning and importance of continuity of instruction.

Dr. Anderson pointed out that the schools are operated for the benefit of the school children and school policies are determined with the educational welfare of the children as the primary consideration. Teachers are employed on a yearly basis with the expectation that they will serve for at least 1 year. In addition to presenting the subject matter to the students, the teachers are expected to develop a rapport and a positive relationship with the students which is an important part of the educational program.

Continuity of instruction means more than having a qualified person available to substitute on a temporary basis for the regular teacher. The planning for a course of instruction is usually on a yearly basis and weekly lesson plans are designed to fit into the long-range plan. It is also desirable that a continuous appraisal be made of the progress and achievement of the students. In order to carry out the policy of continuous instruction the respondent attempts to avoid personnel changes during the year. Where necessary, changes are made at a semester break if possible.

The importance of continuity of instruction was recognized in Cleveland Board of Education v. LaFleur, *supra*. In that case the United States Supreme Court noted that continuity of instruction is a significant and legitimate educational goal. In approving the policy that did not permit teachers on maternity leave to return until the beginning of the semester following delivery, the majority opinion stated this policy served the interest of the schools in avoiding unnecessary changes in classroom personnel during any one school term. The concurring opinion of Mr. Justice Powell stated that school boards have a legitimate and important interest in fostering continuity of teaching. In speaking of con-

tinuity of teaching, the opinion stated the boards are referring in part to their valid interest in reducing the number of times a new teacher is assigned to a given class. It is particularly appropriate to avoid teacher turnover in the middle of a semester, since continuity in teaching approach as well as teacher-pupil relationships are otherwise impaired.

The respondent argues that continuity of instruction constitutes a valid business purpose or "business necessity" in the operation of the school system. A classification based on sex may be lawful if it is necessary for the conduct of the business. This doctrine is incorporated, at least in part, in the Nebraska act. A classification based on sex is lawful if it is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise. § 48-1108, R. R. S. 1943.

While continuity of instruction may not be a "business necessity" in the sense that the term has been used generally, it is an important consideration in determining whether the respondent's policies discriminated against the complainant on the basis of her sex. We conclude that they did not.

That part of the judgment of the District Court which affirmed the order of the Nebraska Equal Opportunity Commission is reversed; the judgment is otherwise affirmed and the cause is remanded to the District Court with directions to enter a judgment in conformity with this opinion.

AFFIRMED IN PART, AND IN PART
REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JAMES L. SUTTLE, APPELLANT.
232 N. W. 2d 33

Filed August 7, 1975. No. 39902.

Criminal Law: Sentences. In the absence of an abuse of discre-

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

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

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

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

WHITE, C. J.

The sole issue presented in this case is whether the sentence, on a charge of conspiracy, for a period of 2 years in the Nebraska Penal and Correctional Complex, is excessive.

The defendant was arraigned on a charge of conspiracy, and in the presence of his attorney, on September 23, 1974, entered a plea of guilty pursuant to a plea bargain. Sentence was deferred pending receipt of a presentence investigation report. Allocution was had on November 14, 1974, at which time, the defendant, in the presence of his counsel in open court, was sentenced as above stated. Credit was given for 46 days spent in custody awaiting trial.

We test the sentence to see if there was an abuse of discretion under the applicable rule. See State v. Wade, 193 Neb. 365, 227 N. W. 2d 400. The presentence investigation report, to which the defendant took no exception, reveals that the sentence was the result of a plea agreement in which the defendant agreed to enter a plea of guilty and make restitution provided the State would amend the original charge of forgery to a charge of conspiracy, and provided further that the State would dismiss another felony complaint pending against him in the trial court. The factual basis for the plea reveals a serious offense. Prior to the conspiracy with

which he was charged, the defendant had taken or otherwise procured the purse of one Connie Kay Eppler from her apartment. The purse contained a checkbook, several forms of identification, and a bank withdrawal slip. Subsequent to obtaining the purse the defendant asked a Sandra K. Jenkins to sign the withdrawal slip as Connie Kay Eppler and present it to the drive-in teller at the bank. She carried out her part of the agreement and in the presence of the defendant the drive-in teller at the bank paid out to Sandra K. Jenkins $2,200. Miss Jenkins received a portion of the money and the defendant received a portion also. Subsequently both were apprehended at different times and places.

The presentence investigation report also details other matters which support the District Court's decision, which need not be repeated here.

It is manifest that there was no abuse of discretion under the applicable rule, and the judgment and sentence of the District Court are correct and are affirmed.

AFFIRMED.

ALLIANCE TRACTOR & IMPLEMENT COMPANY, A CORPORATION, DOING BUSINESS AS CROWN MANUFACTURING COMPANY, APPELLANT, V. LUKENS TOOL & DIE COMPANY, A CORPORATION, APPELLEE.

233 N. W. 2d 299

Filed September 25, 1975. No. 39651.

Contracts: Specific Performance: Warranty. Substantial performance is shown when the following circumstances are established by the evidence: (1) The party made an honest endeavor in good faith to perform his part of the contract. (2) The results of the endeavor are beneficial to the other party. (3) Such benefits are retained by the other party. If any one of the circumstances is not established, the performance is not substantial, and the party has no right of recovery.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded for a new trial.

Wright & Simmons, for appellant.

James R. Hancock, for appellee.

Heard before SPENCER, CLINTON, and BRODKEY, JJ., and FLORY and WHITE, District Judges.

WHITE, District Judge.

This is an action for specific performance of a contract to construct a machine to manufacture hay rake teeth.

At the close of the evidence the plaintiff moved to amend the petition to include a cause of action for breach of warranty. The defendant cross-petitioned, alleging that the contract was substantially performed and alternatively that the machine, subject of the contract, had been accepted by the plaintiff's failure to object, and that the machine had been so modified by the plaintiff and his agents as to waive further performance by the defendant. The defendant prayed for judgment for the balance of the contract price of $10,000 and for the fair and reasonable value of the services and materials expended above the contract price.

The plaintiff appeals to this court assigning error in three categories: (1) The court erred in finding that the contract had been substantially performed by defendant. (2) The court erred in finding that the plaintiff had waived a strict compliance with the contract by reason of the modifications admittedly made on the machine. (3) The court erred in finding and awarding damages to the defendant. We reverse and remand for a new trial.

On June 29, 1971, the plaintiff entered an agreement with the defendant for the defendant "to design, procure, tool and supervise" the installation of certain equipment in a building at the Alliance Airport.

"The equipment referred to herein shall be for the purpose of manufacturing rake teeth." "Lukens agrees to supervise the initial production of rake teeth produced by the equipment referred to herein to the extent that the rake teeth produced have the quality of tempering, uniformity and design of *not less* than the rake teeth currently being produced by International Harvester Company under Part No. 813000M."

" * * * the equipment * * * must render to users of the rake teeth *no less* degree of usability and performance than the rake teeth currently being produced by International Harvester Company under Part No. 813000M."

"The technology, manufacturing sequence and equipment provided for herein shall have capabilities to manufacture the rake teeth referred to herein at the average rate of 100 per hour during a period of 100 hours when operated by three well-trained and skilled men."

"Delivery and installation of the herein described equipment shall be on or before December 1, 1971."

"Lukens' estimate of the cost of the machines and services provided for herein is $21,000.00 to $25,000.00 using available new and used equipment. This estimate does not include electrical work, plumbing and labor costs at the Alliance Airport building."

The contract then provided for certain periodic payments and provided that after $12,000 was paid, the remainder was due and payable upon delivery of the machines.

The plaintiff paid the defendant $15,000 on the contract and acknowledges if the machine as delivered conformed to the specifications contained in the contract, it would be indebted to the defendant in the amount of $10,000.

The equipment was not delivered on the December 1, 1971, date, as provided in the contract, but was delivered on March 29, 1972.

It would serve no purpose to summarize the extended evidence as to the difficulties encountered by plaintiff and defendant in an attempt to make the machine operate in a satisfactory manner after the same was delivered to the plaintiff. Suffice to say that from a fair reading of the evidence, it must be determined that, as the plaintiff contends, the machine operated at its longest continuous period, a period of not to exceed 5 hours and never reached the production of 100 rake teeth per hour for 100 hours. The testimony conflicts very sharply as to the area of whether the teeth so produced during the limited periods of production ever complied with the terms specified in the

contract. However, all such teeth manufactured were in fact sold. The machine broke down repeatedly.

Essentially, the defendant contends:

(1) That the defendant substantially performed the contract.

(2) That buyer failing to reject the goods, accepted them.

(3) That plaintiff engaged one James Campbell, who so modified the machine that plaintiff waived any previous defects.

With reference to the defendant's first contention, the evidence indicated that the longest the equipment ever operated on any day without a major breakdown was from 8:30 a.m. to 1:15 p.m., or a period of somewhat less than 5 hours on a day when 580 teeth were produced. There is no evidence in the record from which the court could infer that the plaintiff waived compliance with that portion of the contract which required the defendant to construct a machine that would produce 100 rake teeth per hour for 100 hours. Evidence indicates the rake tooth manufactured did not conform in one specific area to the specifications. The most important appears to be that of the end bend. The International Harvester tooth had a sharp 90° bend and a straight end. The tooth manufactured by the machine produced by the defendant had a round bend which, according to the evidence of the principal purchaser of the teeth, would not fit as tightly into the clamp where they were attached to the rake frame.

Substantial performance is shown when the following circumstances are established by the evidence: (1) The party made an honest endeavor in good faith to perform his part of the contract. (2) The results of the endeavor are beneficial to the other party. (3) Such benefits are retained by the other party. If any one of the circumstances is not established, the performance is not substantial, and the party has no right

of recovery. The other party should receive at least approximately what he bargained for. Rickertsen v. Carskadon, 172 Neb. 46, 108 N. W. 2d 392. The plaintiff has a machine not yet operable, and of no benefit to him until it is so. We find no substantial performance.

The equipment when delivered to the plaintiff was not in operating order. The furnace would not perform properly and had to be reconstructed. The machine needed to be braced to prevent jam-ups. All of the efforts of the parties were directed in an attempt to make the machine operate. There is no suggestion in the record that the plaintiff at any time accepted the machine as manufactured or that he ever failed or neglected to attempt to improve the machine so that the same would operate up to the specifications in the contract. We find there was no waiver.

At the time, or shortly after, the machine was delivered to the plaintiff, and it continued to break down, one James Campbell was recommended to the plaintiff by the defendant Lukens to render advice, and to enable the plant to get into operation. The evidence disclosed that although Campbell was paid by the plaintiff, he consulted about 90 percent of the time with the defendant, and that the defendant knew what he was doing. The plaintiff's president admittedly was not a mechanical engineer and did not know how to make the hay rake tooth machine operate. Campbell was represented by the defendant as having experience in similar lines, and that he was capable of doing so. Campbell recommended a number of modifications of the machine in an attempt to make it operate. The defendant was informed of these modifications, and the plaintiff consented.

Defendant asserts that since Campbell was paid by the plaintiff he was the plaintiff's employee, and since the machine was modified by an employee of the plaintiff that Lukens was therefore excused from further

duty to perform his contract. With this we cannot agree. After recommending Campbell to the plaintiff as a person who would get the machine in operating order to perform his own contract, the defendant, Lukens, is not now in a position to claim that the modification suggested and executed by the man he recommended to the plaintiff relieved him from his own obligation to fulfill his contract.

The appellant asserts other errors which are not necessary to discuss since this matter will be retried.

REVERSED AND REMANDED FOR A NEW TRIAL.

GEORGE P. ROSE, APPELLEE, V. JOHN S. REINHART ET AL., APPELLANTS.
233 N. W. 2d 302

Filed September 25, 1975. No. 39674.

1. **Malicious Prosecution: Trial.** To maintain an action for malicious prosecution, plaintiff must prove want of probable cause.
2. **Malicious Prosecution: Probable Cause.** Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty.
3. **Malicious Prosecution: Probable Cause: Trial.** In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant. This rule applies even though some of the facts supporting probable cause were disputed in the evidence on behalf of the plaintiff.
4. **Trial.** If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom it is made, it is the duty of the court, on motion for judgment notwithstanding the verdict timely made, to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for a directed verdict.

Appeal from the District Court for Sarpy County: BETTY PETERSON SHARP, Judge. Reversed and remanded with directions.

William J. Brennan, Jr., and C. L. Robinson of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellants.

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

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

STUART, District Judge.

The plaintiff, George P. Rose, brought suit against the defendants and others to recover damages for malicious prosecution. The case was submitted to a jury, which returned a verdict for the plaintiff against defendants, John S. Reinhart and the First National Bank of Bellevue, in the amount of $28,000. Upon the overruling of their motion for judgment notwithstanding the verdict, the defendants perfected an appeal to this court.

Although there was considerable disputed evidence, uncontested evidence showing probable cause was that on July 28, 1969, the plaintiff issued a check, hereinafter called "the check," to one Tony Martinez drawn on the Center Bank of Omaha, Nebraska, in the amount of $215.50. The check was cashed by Martinez at the banking house of defendant First National Bank of Bellevue and was processed in ordinary banking channels, and payment was refused by the Center Bank on August 1, 1969. Notice of such refusal was sent to the plaintiff. In addition plaintiff admitted he received an oral notice from the Center Bank of such nonpayment on August 5, 1969. The check was returned to the First National Bank of Bellevue on August 5, 1969, marked "Insufficient Funds." The First National Bank of Bellevue again forwarded the check to the Center Bank through normal banking channels, where payment was refused the second time on August 8, 1969, and plaintiff was again sent written notice of such nonpayment. The check was returned the second time to the First Na-

tional Bank of Bellevue on August 12, 1969. The check was then brought to the attention of the defendant John S. Reinhart, the president of defendant First National Bank of Bellevue, who verbally called plaintiff's attention to its nonpayment. The check was then sent directly to the Center Bank and was held there for 30 days on a collection basis until on September 24, 1969, it was again returned unpaid to the First National Bank of Bellevue. On October 8, 1969, defendant John S. Reinhart instructed a bank employee to file a criminal complaint against the plaintiff, charging him with uttering an insufficient fund check with intent to defraud, knowing at the time of such uttering that he had not sufficient funds in or credit with such bank for the payment of such check in full upon its presentation. Such complaint was filed in Sarpy County, a warrant was issued, and the plaintiff was arrested. This criminal case was later dismissed based on lack of venue in that the check was delivered to Tony Martinez in Douglas County rather than in Sarpy County.

Plaintiff testified he thought there were about 20 other checks that were presented to the Center Bank during August and September of 1969 which did not clear his account in that bank. He testified these checks were smaller checks in the amount of $150 to $200 and totaled in the vicinity of $700 to $800. The records of the Center Bank show that during July payment was refused on 16 checks drawn by plaintiff because of insufficient funds, and in August payment was similarly refused on 23 checks.

During all this time plaintiff also had a checking account in the First National Bank of Bellevue, had money borrowed from it, and because of this loan, plaintiff had some conferences with defendant John S. Reinhart. At this time Reinhart was aware of four of these checks written by plaintiff on the Center Bank upon which payment had been refused in addition to the check.

It is unnecessary to further summarize the evidence other than to note that there was evidence from which a jury could conclude that the prosecution of plaintiff was brought with malice and may have been brought as a result of other transactions between the parties both within and without normal banking business.

"The existence or lack of probable cause is the very gist of an action for malicious prosecution. The question to be decided is whether there is sufficient uncontradicted evidence to show the existence of probable cause at the time the complaint was filed." Jones v. Brockman, 190 Neb. 15, 205 N. W. 2d 657.

"Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty." Diers v. Mallon, 46 Neb. 121, 64 N. W. 722. See, also, Brumbaugh v. Frontier Refining Co., 173 Neb. 375, 113 N. W. 2d 497.

" 'Want of probable cause for instituting proceedings is an essential and indispensable element of an action for the malicious prosecution of either a civil or a criminal action, no matter what the results thereof; in fact, want of probable cause for the prosecution of the original proceeding by defendant has been described as the gist of the action. The very foundation of the action is that the previous legal proceeding was resorted to or was pursued causelessly.

" 'Where it appears that there was probable cause to institute the original proceeding, such fact constitutes a complete and absolute defense or bar to an action of malicious prosecution, irrespective of the motive in instituting the prosecution, or of a conspiracy.' This is the rule throughout the United States." Brumbaugh v. Frontier Refining Co., *supra,* quoting 54 C. J. S., Malicious Prosecution, § 18, p. 970.

In the Brumbaugh case we quoted with approval Bronnenkant v. Kucera, 141 Neb. 408, 3 N. W. 2d 913, as follows: " 'In a malicious prosecution case, the nec-

essary elements for the plaintiff to establish are: * * * (4) the absence of probable cause for such proceeding. * * * If any one of these elements is lacking, the result is fatal to the action.' Kersenbrock v. Security State Bank, 120 Neb. 561, 234 N. W. 419. 'Want of probable cause is an indispensable element of an action for malicious prosecution.' Clausen v. Omaha Loan & Bldg. Ass'n, 131 Neb. 666, 269 N. W. 517."

In this case we hold that the question of probable cause is one of law for the court. "It can not matter that some or many of the facts bearing on the issue as to probable cause are in dispute, if there are still enough established and undisputed to determine the question in point of law." Bechel v. Pacific Express Co., 65 Neb. 826, 91 N. W. 853. See, also, Brumbaugh v. Frontier Refining Co., *supra*.

"If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for a directed verdict." Brumbaugh v. Frontier Refining Co., *supra*.

The facts show that the plaintiff was making a practice of issuing checks upon a bank account in which there were insufficient funds to pay the checks in full upon their presentation and that the defendants were aware of such practice. This is probable cause as a matter of law and therefore the judgment must be reversed and the cause remanded with directions to sustain the defendant's motion for judgment notwithstanding the verdict and to dismiss the plaintiff's cause of action.

In view of this conclusion, it is unnecessary to discuss the other errors assigned by the defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. GEORGE H. WILLIAMS, ALSO KNOWN AS BILL KNIGHT, APPELLANT.
233 N. W. 2d 772

Filed October 9, 1975. No. 39827.

1. **Appeal and Error: Time.** Section 25-1912, R. R. S. 1943, requires that an appeal from a final order be taken within 1 month.
2. **Appeal and Error: Probation and Parole: Motions, Rules, and Orders.** An order placing a defendant on probation is a final and appealable order.
3. **Criminal Law: Sentences: Probation and Parole: Motion, Rules, and Orders.** An order by a District Court purporting to suspend a sentence legally pronounced in a criminal action for the purpose of placing a defendant on probation is a nullity.
4. **Criminal Law: Sentences: Probation and Parole.** If the court finds that the probationer did violate a condition of his probation, it may revoke the probation and impose on the offender such new sentence as might have been imposed originally for the crime of which he was convicted.
5. ———: ———: ———. Section 29-2261, R. S. Supp., 1974, contemplates that when imposing sentence a judge should consider, among other things, the offender's history of delinquency or criminality. Offenses committed while on probation are a part of such a history.

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

George H. Williams, pro se.

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and KUNS, Retired District Judge.

NEWTON, J.

The defendant entered a plea of guilty to two counts of forgery and on November 3, 1972, was placed on probation. No appeal was taken from that sentence. On March 6, 1974, the order of probation was revoked following further criminal activities and the defendant

was sentenced to two concurrent terms of 6 to 18 years. He appeals and assigns as error the involuntariness of his original guilty plea and the illegality of the sentence due to the court having considered offenses committed subsequent to the entry of the order of probation. We affirm the judgment of the District Court.

Section 25-1912, R. R. S. 1943, requires that an appeal from a final order be taken within 1 month. An order placing a defendant on probation is a final and appealable order. See State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66. No appeal having been taken from the order of probation, the question of the voluntariness of the original guilty pleas cannot be considered.

Defendant asserts that he should have received his sentences immediately following his conviction on the forgery charges and that thereafter the sentences should have been suspended and probation granted. This procedure may be proper in some jurisdictions but does not conform with the Nebraska law. An order by a District Court purporting to suspend a sentence legally pronounced in a criminal action for the purpose of placing a defendant on probation is a nullity. See, Moore v. State, 125 Neb. 565, 251 N. W. 117; State v. Carpenter, 186 Neb. 605, 185 N. W. 2d 663.

Section 29-2268, R. S. Supp., 1974, provides: "(1) If the court finds that the probationer did violate a condition of his probation, it may revoke the probation and impose on the offender such new sentence as might have been imposed originally for the crime of which he was convicted." The sentences were such as might have been imposed at the time of defendant's conviction and are in full compliance with the law. Section 29-2261, R. S. Supp., 1974, contemplates that when imposing sentence a judge should consider, among other things, the offender's history of delinquency or criminality. Offenses committed while on probation are a part of such a history. "In passing sentence, it is proper for the trial court to take into consideration other offenses that have

been committed by the accused." State v. Welton, 190 Neb. 600, 210 N. W. 2d 925.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD W. CARR, APPELLANT.

233 N. W. 2d 773

Filed October 9, 1975. No. 39887.

1. **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.
2. ———: ———. It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively.

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

T. Clement Gaughan and Paul M. Conley, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and KUNS, Retired District Judge.

SPENCER, J.

Defendant, Richard W. Carr, pled guilty to two counts of burglary. He was sentenced to terms of 3 to 5 years in the Nebraska Penal and Correctional Complex on each of the two counts. The sentences were to run concurrently but were made consecutive to the term then being served by said defendant. Defendant appeals, alleging the court erred in failing to make the sentences

concurrent with the one now being served by him, and that said sentences are excessive. We affirm.

Defendant, who is only 20 years of age, has a very extensive record. As a juvenile he was involved in several auto thefts and burglaries. He is presently serving a 2 to 4 year sentence in the Nebraska Penal and Correctional Complex for a Jefferson County burglary. While being held in the county jail in Jefferson County, he attempted escape on three separate occasions and literally tore up the jail. It was necessary that he be transferred to the Nebraska Penal and Correctional Complex as a safekeeper pending the processing of the burglary charge. At the time of the Jefferson County burglary the defendant was out on bond on the charges involved in this prosecution. During the pendency of the present charges the record indicates that he also was fined in the Jefferson County court on a charge of possession of marijuana.

Section 28-532, R. R. S. 1943, under which defendant was sentenced herein, provides for a penalty of imprisonment for not more than 10 nor less than 1 year. Defendant pled guilty to two counts of burglary after a plea bargain by which the county attorney dismissed another count then pending against him. The sentences on these two counts were made concurrent, so for all practical purposes defendant received one sentence. Defendant's sentences are well within the statutory limits. 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. Atwater (1975), 193 Neb. 669, 228 N. W. 2d 876. On the record, the sentences are not excessive and the court did not abuse its discretion.

Defendant complains that the sentence imposed herein should have been made to run concurrently with his Jefferson County sentence. It is within the discretion of

the District Court to direct that sentences imposed for separate crimes be served consecutively. State v. Rodman (1974), 192 Neb. 403, 222 N. W. 2d 109. In this instance, the crime for which defendant is now serving time in the Penal Complex was committed while the defendant was free on bond, pending trial of the present offenses. To make these sentences concurrent to the one now being served would condone such conduct. The District Court did not abuse its discretion in making the present sentences consecutive to the one now being served.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES M. CLARK, APPELLANT.

233 N. W. 2d 898

Filed October 9, 1975. No. 39907.

1. **Criminal Law: Trial: Appeal and Error: Records.** Error is not presumed and the burden is upon the party complaining of the action of the lower court to show by the record that it was erroneous.

2. **Criminal Law: Trial: Appeal and Error: Records: Evidence.** It is the duty of the appellant to prosecute the appeal by seeing that the record of the evidence in the county court is properly presented in the District Court. Where no record of the evidence in the lower court is presented to the reviewing court, it is presumed the evidence sustained the findings of the court.

3. **Criminal Law: Appeal and Error: Courts: Records.** Criminal misdemeanor appeals from the county court are specifically covered by section 29-613, R. S. Supp., 1974, and are restricted to the record made in the lower court.

4. **Criminal Law: Sentences.** In the absence of an abuse of discretion a sentence imposed within the statutory limits will not be disturbed on appeal.

Appeal from the District Court for Johnson County: WILLIAM F. COLWELL, Judge. Affirmed.

Richard Douglas McClain, for appellant.

Paul L. Douglas, Attorney General, and Jerold V. Fennell, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and KUNS, Retired District Judge.

SPENCER, J.

James M. Clark, defendant-appellant, appeals from an order of the District Court for Johnson County affirming his conviction on a charge of assault and battery and the imposition of a 30-day jail sentence by the Johnson County court.

We condense defendant's assignments of error as follows: (1) The District Court did not consider the appeal de novo, and abused its discretion in affirming sentence; (2) the sentence is excessive and inconsistent with a plea bargain; and (3) the District Court erred in affirming the county court judgment because the county attorney at no stage moved to affirm the judgment, and in refusing to permit an amendment of the record in this court to reflect that fact. We affirm.

The charge here stems from an incident which took place at Sterling, Nebraska, on August 12, 1974. After a scuffle in a tavern owned by Marvin Cress, defendant was taken outside by the town constable. Defendant, who had failed to cool off, went back to the tavern, kicked the door open, and struck Cress who was then using the telephone to call the sheriff. Cress sustained a broken nose. A state trooper arrived on the scene when defendant was starting to leave in his car. Defendant was told to wait until the trooper had a chance to check out the situation. However, he got in his car and drove off. He was followed by the trooper and the town constable. When he was in the country he either

voluntarily stopped or was stopped by the trooper, who ticketed him for careless driving.

Defendant was charged with assault and battery, careless driving, and malicious destruction of property in excess of $100. Pursuant to a plea bargain, defendant pled guilty to an amended charge of destruction of property of less than $100 and to careless driving. The court accepted the plea, placed Clark on probation for 1 year, and ordered him to make restitution.

There was no plea bargain with respect to the assault and battery charge. Clark was permitted to plead nolo contendere. The county judge accepted the plea and continued the matter 3 weeks for sentencing. The defendant was subsequently sentenced to 30 days in the county jail. He perfected an appeal to the District Court from which this appeal was taken.

Defendant's third assignment of error will be considered first. Clark contends that the District Court erred in affirming the judgment when the matter was not properly before it, in that the county attorney had failed to move the District Court for affirmation of the conviction. There is a question as to whether defendant's counsel had moved to dismiss for this reason. If such a motion was made, it was oral and was made at a time when the court reporter was not present in the courtroom. The trial judge had no firm recollection of the motion. Defendant's witnesses testified that it had been made. The county attorney testified that it had not been made while he was present in the courtroom. In any event, it is immaterial whether the motion was made or not.

While it may be customary in some counties for the prosecutor to move in the District Court to affirm the judgment, the county attorney had no affirmative duties, statutory or otherwise, to do so. It is the duty of the appellant to prosecute the appeal. As we said in Riggert v. King (1974), 192 Neb. 607, 223 N. W. 2d 155: "Error is not presumed and the burden is upon the

party complaining of the action of the lower court to show by the record that it was erroneous." It is the duty of the appellant to prosecute the appeal by seeing that the record of the evidence in the county court is properly presented in the District Court. Where no record of the evidence in the lower court is presented to the reviewing court, it is presumed the evidence sustained the findings of the court. The judgment then must be affirmed if the pleadings support the judgment.

Clark's first assignment of error is that the District Court failed to exercise independent judgment in conducting a trial de novo on the record. He premises this on the statement by the court: "Now, the Court proceeds to impose sentence, and I'll call your attention that the District Court is no forum to second guess County Judges." He contends that by this statement the District Judge abdicated his responsibility to conduct a trial de novo on the record. The District Court made a more detailed statement regarding the role of the District Court in a review of a criminal conviction in the county court. The District Judge stated: "THE COURT: Stand up, Mr. Clark. The Court having considered the record, the Bill of Exceptions, makes a further finding that the judgment of the County Court should be now affirmed. There is no showing that the court abused it's (sic) discretion.

"It is not the purpose of appeals to separately consider and impose sentence in these cases. The Court considers them on the basis of whether or not there has been an abuse of discretion, and, I find none."

Section 24-541, R. S. Supp., 1974, covers all appeals for which no specific provision is made. Criminal misdemeanor appeals from the county court are specifically covered by section 29-613, R. S. Supp., 1974, and are restricted to the record made in the lower court. This section provides: "The district court shall hear and determine any cause brought by appeal from a county or municipal court upon the record, and may affirm,

modify, or vacate the judgment, or may remand the case to the county or municipal court for a new trial."

Defendant's principal assignment of error is that the sentence is excessive and inconsistent with the plea bargain. First, there was no plea bargain on the assault and battery charge. The record clearly demonstrates that the plea bargain was specifically limited and did not include the assault and battery charge. Secondly, there is no abuse of discretion herein. Our law is well settled that, in the absence of an abuse of discretion, a sentence imposed within the statutory limits will not be disturbed on appeal. State v. Suttle (1975), *ante* p. 470, 232 N. W. 2d 33. The record reflects evidence which would indicate the defendant himself initially provoked the altercation and after he had been ordered by the town marshall to leave the tavern he returned to it, busted the door open, and broke the nose of the owner of the building. In light of the injury inflicted, the defendant could have been sentenced to 6 months rather than 30 days.

The judgment of the District Court is affirmed.

AFFIRMED.