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REPORTS OF CASES

DECIDED BETWEEN

JULY 13, 1977 and JANUARY 31, 1978

IN THE

Supreme Court of Nebraska

JANUARY TERM 1977,
SEPTEMBER TERM 1977, and
JANUARY TERM 1978

VOLUME CXCIX

MARVIN L. GREEN

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By Marvin L. Green, Reporter of the Supreme Court

For the benefit of the State of Nebraska

SUPREME COURT

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1977

ERIC L. SCHINKEL, APPELLANT, V. JOYCE L. SCHINKEL, APPELLEE.

255 N. W. 2d 851

Filed July 13, 1977. No. 41061.

1. **Divorce: Parent and Child: Infants.** In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child.
2. _____: _____: _____. The determination of the trial court on the granting or changing of custody of minor children will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

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

Cunningham, Blackburn, VonSeggern & Livingston, for appellant.

Cronin, Shamberg & Wolf, for appellee.

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

MCCOWN, J.

This is an action for dissolution of marriage. The District Court determined that the marriage was irretrievably broken, dissolved the marriage, retained legal custody of the minor child in the court, and granted physical custody of the child to the mother. The District Court also made a division of property and fixed amounts of alimony and child support payments. The husband has appealed and the only issue on appeal involves the custody of the minor child.

The parties were married in 1972, and have one daughter who was born December 5, 1972. The petition here was filed May 16, 1975, and temporary custody of the child was placed in the mother. Trial was held on June 4, 1976, more than a year later. Only the husband and wife testified. Both the husband and wife were employed at the time of trial, and both proposed that their respective mothers could and would care for the child during working hours. A guardian ad litem was appointed for the child but the record does not show any report, recommendation, or pleading by the guardian ad litem.

The husband testified at the temporary custody hearing that his wife was a good mother to the child. He contended at trial that he should have the custody of the child. The basis was that the wife had been seeing another man for a period of over 1 year prior to trial, stays out late on dates with the other man, and sometimes takes the daughter along. The husband contends that this conduct resulted in loss of sleep for the daughter and affected her physical condition. The wife's testimony contradicts the husband's contentions.

The trial court saw and heard the testimony of both the husband and wife. He retained legal custody in the court but left physical custody with the mother. In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child. Lockard v. Lockard, 193 Neb. 400, 227 N. W. 2d 581.

The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, the determination of the court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Allen v. Allen, 198 Neb. 544, 253 N. W. 2d 853. There was no abuse

of discretion here and the evidence supports the determination made.

The judgment of the District Court is affirmed.

AFFIRMED.

DAVID B. LENTZ ET AL., APPELLANTS, V. BETTY SAUNDERS ET AL., APPELLEES, GRAND ISLAND SCHOOL DISTRICT NO. 2 OF HALL COUNTY, NEBRASKA, A PUBLIC CORPORATION, INTERVENER-APPELLEE, SCHOOL DISTRICT NO. 82 OF HALL AND MERRICK COUNTIES, NEBRASKA, A PUBLIC CORPORATION, INTERVENER-APPELLANT.

255 N. W. 2d 853

Filed July 13, 1977. No. 41066.

1. **Statutes.** Specific statutory provisions relating to a particular subject control over general provisions.
2. **Statutes: Schools and School Districts: Political Subdivisions.** The provisions of section 79-420, R. R. S. 1943, which require that dissolution of school districts involving transfer of territory across county lines shall be acted upon jointly by the county superintendents of the counties concerned, are substantially complied with where the order of dissolution is the order of both superintendents and based upon findings by both even though only one superintendent was present at the public hearing.
3. **Legislature: Schools and School Districts: Constitutional Law.** The control of the Legislature over school districts and their powers is plenary, subject only to constitutional provisions.
4. **Constitutional Law: Ex Post Facto: Criminal Law.** The constitutional prohibition against the passage of ex post facto laws applies only to penal or criminal matters.

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

Cunningham, Blackburn, VonSeggern & Livingston, for appellant.

Luebs, Tracy, Dowding, Beltzer & Leininger, for intervener-appellant.

John R. Higgins and Sam Grimminger, for appellees and intervener-appellee.

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

CLINTON, J.

This appeal arises from an order of the county superintendents of Hall and Merrick Counties dissolving School District No. 74 and attaching its territory to neighboring school districts, mostly Grand Island School District No. 2 of Hall County. The individual appellants are electors of the dissolved district. School District No. 82 of Hall and Merrick Counties which intervened in the District Court is also an appellant. The appellees are the county superintendents of schools of the two counties and Grand Island School District No. 2, the latter an intervener.

The principal issue which is determinative of this appeal is the construction of section 79-603, R. R. S. 1943, as amended by Laws 1973, L.B. 148, section 2.

Section 79-603, R. R. S. 1943, as amended by Laws 1973, L.B. 148, provides that the county superintendent shall dissolve and attach to a neighboring district or districts any Class I district which, for 2 consecutive years, contracts for the instruction of all its pupils with a Class II, III, IV, or V district. It provides that the dissolution shall be effected in the manner prescribed by section 79-420, R. R. S. 1943. Among the procedural requirements of section 79-420, R. R. S. 1943, are that dissolutions involving the transfer of territory across county lines shall be acted upon jointly by the county superintendents of the counties concerned.

It is not disputed that district No. 74 contracted for the instruction of all its pupils with a neighboring district for the school years 1973-74 and 1974-75. The order of dissolution was dated August 2, 1975, and was signed by the appellee Betty Saunders, who was county superintendent of Hall County at all times involved, and by Marvin Shreve, who was county superintendent of Merrick County at all times involved until August 1, 1975, as well as by Gerald J. Carnes,

who became county superintendent of schools of Merrick County on August 1, 1975.

The required public hearing on the proposed dissolution was held on July 14, 1975, and notice of hearing was given by publication prior to that time in accordance with the provisions of the statute.

The claims made on this appeal are that the dissolution proceedings are void because: (1) The instruction contract for the 1973-74 school year was signed before the 1973 amendment, at which time another statute, section 79-486, R. R. S. 1943, permitted school districts to contract for 5 years before dissolution and accordingly the amendment of section 79-603, R. R. S. 1943, in 1973 was an ex post facto law and also impaired the "vested" statutory rights of school district No. 74 to contract for 5 years. (2) The dissolution was not accomplished by the joint action of the county superintendents of the two counties as required by the statute. (3) School district No. 74 was in any event entitled to contract for 2 full years, and the order of dissolution was entered before the completion of the 1974-75 school year and was therefore premature and void. In this connection the appellants rely upon our holding in Nelson v. Robertson, 187 Neb. 192, 188 N. W. 2d 720. (4) The Legislature did not intend that section 79-603, R. R. S. 1943, operate retrospectively, thus contracts entered into prior to the 1973 amendment were not to be taken into account in determining whether the district has contracted for 2 years.

For the following reasons we affirm the action of the District Court which affirmed the order of dissolution by the county superintendents. First: Section 79-603, R. R. S. 1943, providing for a 2-year contract period before dissolution, is a specific statute pertaining to Class I districts. Section 79-486, R. R. S. 1943, providing for a 5-year period of contracting before dissolution, is a general statute pertaining to all districts. We here apply the principle that specific

statutory provisions, relating to a particular subject, control over general provisions. Duerfeldt v. State, 184 Neb. 242, 166 N. W. 2d 737. In upholding section 79-603, R. R. S. 1943, against an attack of unconstitutionality, we have earlier said that it is an independent act, complete in itself. Bodenstedt v. Rickers, 189 Neb. 407, 203 N. W. 2d 110.

Second: The findings and order of the county superintendents on their face appear to have been accomplished by the joint action of the two superintendents. The decision and order were apparently prepared prior to August 1, 1975, but signed on August 2, 1975. The order is signed by both of the superintendents who participated in the proceeding and made the decision. The fact that the signatures may have been affixed after the term of one of the superintendents expired is, under the circumstances of this case, immaterial as no person was prejudiced thereby. No contention is made that the electors did not have notice of the meeting, and the record indicates that they were either present or represented thereat. Although the record establishes that the county superintendent of Merrick County was not personally present at the public hearing, it also establishes that the detailed findings upon which the order of dissolution was based were the findings of both superintendents. We hold that the provisions of section 79-420, R. R. S. 1943, which require that dissolution of school districts involving transfer of territory across county lines shall be acted upon jointly by the county superintendents of the counties concerned, are substantially complied with where the order of dissolution is the order of both superintendents and based upon findings by both even though only one superintendent was present at the public hearing.

Third: Section 79-603, R. R. S. 1943, was first enacted in 1969. When enacted it prohibited Class I school districts from contracting for instruction of

all their pupils for more than 2 years. The 1973 amendment of the statute added the provision directing dissolution if such district did so contract for 2 years. Therefore, previous to the 1973 amendment a Class I district had no statutory right to contract except for the 2-year period. Accordingly, when the Legislature amended section 79-603, R. R. S. 1943, it took away no "rights," it simply attached an additional consequence (dissolution if a hardship exemption was not granted) to the exercise of the rights given by the statute. The amendment to section 79-603, R. R. S. 1943, became effective September 2, 1973. The 1973-74 instruction contract was presumably entered into previous to that date although the record is silent on the matter. In any event, the record does not establish that any contract was abrogated by legislative action. The Legislature could, if it wished, have attached the consequences of dissolution to past contracting for instruction. The control of the Legislature over school districts and their powers is plenary. Kosmicki v. Kowalski, 184 Neb. 639, 171 N. W. 2d 172; School Dist. of Gering v. Stannard, 193 Neb. 624, 228 N. W. 2d 600.

Fourth: Reliance of the appellants upon Nelson v. Robertson, *supra,* is misplaced. In that case the dissolution was under the provisions of section 79-486, R. R. S. 1943, and was held to be invalid because the dissolution was to be effective and the district dissolved during the fifth of the contracting years, that is, the school district was to be wiped out during the performance of the last year of contracting. Interpreting the statute, we there held that it did not contemplate dissolution during the year of the performance of a contract. In the present case the dissolution was, by its terms, not to take effect until the beginning of the 1975-76 school year. The proceedings for dissolution, i.e., the public hearing and action, did not take place until July 1975. We think it is a matter of common knowledge that by that time the

1974-75 school year was completed and the instruction contract therefore completely performed.

Fifth: The 1973 amendment was not an ex post facto law. The constitutional prohibition against the passage of ex post facto laws applies only to penal or criminal matters. In re Estate of Rogers, 147 Neb. 1, 22 N. W. 2d 297.

AFFIRMED.

THOMPSON POULTRY, INC., APPELLANT, V. FIRST NATIONAL BANK OF YORK, APPELLEE.

255 N. W. 2d 856

Filed July 13, 1977. No. 41070.

1. **Uniform Commercial Code: Words and Phrases.** A bank money order is essentially the same as a cashier's check. It is a bill of exchange drawn by a bank upon itself and accepted in advance by the act of issuance. It is not subject to countermand by either its purchaser or the issuing bank.
2. _____: _____. A bank money order, purchased for adequate consideration, unlike an ordinary check, stands on its own foundation as an independent, unconditional, and primary obligation of the bank. It is equivalent to a negotiable promissory note of the bank.

Appeal from the District Court for York County: JOHN D. ZEILINGER, JUDGE. Reversed and remanded with directions.

Barlow, Johnson, DeMars & Flodman and Stephen L. Ahl, for appellant.

Ginsburg, Rosenberg, Ginsburg, & Krivosha and Rodney P. Cathcart, for appellee.

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

BOSLAUGH, J.

This is an action on a "Bank Money Order" drawn on the defendant bank and payable to the plain-

tiff. The money order was purchased by S & H Poultry Inc., on February 9, 1973, and delivered to the plaintiff in payment for a load of poultry products. After S & H had received the poultry from the plaintiff it decided to go out of business and returned the poultry to the plaintiff later that same day. When the defendant refused to honor the money order this action was commenced.

The trial court found generally in favor of the defendant and dismissed the action. The plaintiff has appealed.

The plaintiff's theory of the case is that the defendant had no right to stop payment on the money order because the issuance of the money order constituted an acceptance by the defendant and it was bound to pay the instrument according to its tenor.

A bank money order is essentially the same as a cashier's check. First Nat. Bank of Mineola v. Farmers & M. State Bank (Tex. Civ. App.), 417 S. W. 2d 317. It is a bill of exchange drawn by a bank upon itself and accepted in advance by the act of issuance. It is not subject to countermand by either its purchaser or the issuing bank. A bank money order, purchased for adequate consideration, unlike an ordinary check, stands on its own foundation as an independent, unconditional, and primary obligation of the bank. § 3-410, U. C. C.; § 4-303 U. C. C.; Pennsylvania v. Curtiss Nat. Bank, 427 F. 2d 395. It is equivalent to a negotiable promissory note of the bank. TPO Inc. v. Federal Deposit Insurance Corp., 487 F. 2d 131.

The defendant alleged that the plaintiff gave no consideration for the money order and that the plaintiff was seeking to enforce a fraud against the defendant.

The money order in question was paid for by a check issued to the defendant by S & H. In response to a request for admissions the defendant admitted that it received "cash or other valuable considera-

tion" from S & H at the time the money order was issued. The record shows conclusively that the defendant received consideration for the money order.

The plaintiff delivered a load of poultry to S & H at the time the plaintiff received the money order. The poultry was the consideration given by the plaintiff and received by S & H for the money order. The transaction was then complete. The defendant had received consideration from S & H, S & H had the poultry, and the plaintiff had the money order. Later the same day, S & H decided to go out of business. It then returned the poultry to the plaintiff. There is nothing in the record to show that S & H had any right to rescind or revoke its acceptance of the poultry or that the plaintiff was obligated to accept a return of the poultry. S & H was indebted to the plaintiff for prior transactions, and in the absence of an agreement to the contrary, the plaintiff had a right to accept a return of the poultry and credit S & H for the value of the poultry returned to it.

The defendant's theory of fraud was based on an allegation that the plaintiff had agreed to apply money orders only to future purchases. This contention has no support in the record.

The evidence does show that on November 21, 1972, a check issued to the plaintiff by S & H was returned by the defendant for insufficient funds. S & H was indebted to the plaintiff in the amount of $6,700 at that time. The plaintiff then told the defendant that the plaintiff would not sell poultry to S & H in the future unless payment was made by a money order direct to the plaintiff from the bank. S & H executed and delivered promissory notes amounting to $6,700 to the plaintiff for the amount it owed the plaintiff, and, thereafter all sales by the plaintiff to S & H were on a "cash" basis.

There is no evidence the plaintiff agreed to apply money orders only to future purchases, that the defendant had an interest in the poultry purchased by

S & H, or that the proceeds from the sale of the poultry would be used only to pay the indebtedness of S & H to the defendant. The executive vice-president and cashier of the defendant testified only that the plaintiff agreed to give S & H "some time" to pay the indebtedness represented by the promissory notes.

There is evidence that after S & H had decided to go out of business the defendant instructed S & H to either try to get the poultry returned and pick up the money order or sell the poultry the next morning. The plaintiff was not bound by the defendant's instructions to S & H and was not required to accept a return of the poultry or return the money order to S & H.

The evidence will not sustain a finding that the defendant received no consideration for the money order or that the retention of the money order by the plaintiff was a fraud on the defendant.

The judgment of the District Court is reversed and the cause remanded with directions to enter judgment for the plaintiff in accordance with the prayer of the amended petition.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF PIONEER AIRWAYS, INC., DENVER, COLORADO, FOR AUTHORITY TO OPERATE IN NEBRASKA AS A CLASS "C" AIR CARRIER. PIONEER AIRWAYS, INC., A NEBRASKA CORPORATION, APPELLEE, V. CITY OF KEARNEY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, IMPLEADED WITH CITY OF MCCOOK, NEBRASKA, ET AL., APPELLEES, COLUMBUS AIRPORT AUTHORITY ET AL., INTERVENERS-APPELLEES. IN RE APPLICATION OF STAR AVIATION CORP., DENVER, COLORADO, FOR AUTHORITY TO OPERATE AS A CLASS "C" AIR CARRIER IN NEBRASKA INTRASTATE AIR TRANSPORTATION. STAR AVIATION CORP., DENVER, COLORADO, APPELLEE, V. CITY OF KEARNEY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, IMPLEADED WITH PIONEER AIRWAYS, INC., APPELLEE.

256 N. W. 2d 324

Filed July 13, 1977. Nos. 41076, 41173.

1. **Interstate Commerce: Intrastate Commerce.** The power of Congress over interstate commerce extends to those intrastate activities which so affect interstate commerce or the exercise of the power of Congress over it as to make appropriate the attainment of a legitimate aim of Congress.
2. _____: _____. The power of Congress to regulate interstate commerce is not limited by the fact that intrastate transactions have become so interwoven therewith that the effective control of interstate commerce by Congress incidentally controls intrastate commerce.
3. **Interstate Commerce: Intrastate Commerce: Air Carriers.** Congress has preempted the field of interstate air transportation in regard to the routes and points to be served by commuter air carriers to the exclusion of conflicting regulation by the states.
4. **Interstate Commerce: Intrastate Commerce: Public Service Commissions: Air Carriers.** The Nebraska Public Service Commission lacks jurisdiction over commuter air carriers engaged in interstate commerce, since the federal government has preempted the field.

Appeals from the Nebraska Public Service Commission. Reversed and remanded with directions to dismiss.

Michael E. Kelley, for appellant.

A. J. Swanson of Peterson, Bowman, Coffman &

Larsen and H. Edward Kluver, for appellee Pioneer Airways, Inc.

Noyes W. Rogers and Michael Johnson, for interveners-appellees.

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

WHITE, C. THOMAS, J.

Pioneer Airways, Inc., and Star Aviation Corp. each filed applications seeking authority from the Nebraska Public Service Commission to operate an air carrier service between Denver, Colorado, and points in Nebraska. Pioneer sought to operate its service between Denver and Omaha with intermediate stops at Chadron, Alliance, Sidney, McCook, Kearney, Hastings, Columbus, and Lincoln. Star sought to operate its service between Denver and Columbus, with intermediate stops at McCook, Hastings, and Kearney. The appellant City of Kearney protested each application and filed a special appearance challenging the jurisdiction of the Nebraska Public Service Commission to issue the requested certificates of authority. The City of Kearney maintains that the Commission lacks jurisdiction under Nebraska's statutes, that the Commission lacks jurisdiction due to its own rules and regulations, and further that the field has been preempted by the federal government.

On first impression, the case would seem to be controlled by Frontier Airlines, Inc. v. Nebraska Department of Aeronautics, 175 Neb. 501, 122 N. W. 2d 476 (1963). In that case, Frontier Airlines sought a disclaimer of jurisdiction by the then Nebraska State Railway Commission, now the Public Service Commission, of any attempt to assert jurisdiction over the matter of discontinuance of service over applicant's segment No. 13. That segment extended between Omaha, Nebraska, and Casper, Wyoming,

with intermediate points of Lincoln, Columbus, Norfolk, Ainsworth, Valentine, and Chadron in Nebraska and Douglas and Lusk in Wyoming. We held: "It appears that Congress has pre-empted the field of interstate air transportation in regard to the routes and points to be served by interstate air carriers to the exclusion of conflicting regulation by the states. * * *

"It follows that the Nebraska State Railway Commission lacks authority to compel a carrier licensed by the Civil Aeronautics Board to continue operations over a segment which that board has authorized to be discontinued, since the federal authority is paramount in this area and the conflicting directive of the state's agency interferes with the national policy."

The decision was grounded upon the finding that Title 49 U. S. C., section 1301 et seq., the statutes creating a federal scheme of regulating air traffic, preempted the field of aviation in interstate commerce. Although several of the flights in the segment were wholly intrastate, it was found that even the regulation of those flights was preempted. We said: "The power of Congress over interstate commerce extends to those intrastate activities which so affect interstate commerce or the exercise of the power of Congress over it as to make appropriate the attainment of a legitimate end (aim) of Congress." We also said that the power of Congress " 'to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective control of interstate commerce by the Federal Congress incidentally controls intrastate commerce.' "

In the Frontier case, Frontier Airlines was operating under a certificate of public convenience and necessity issued by the Civil Aeronautics Board subject in full to the regulatory requirements of that agency and issued pursuant to Title 49 U. S. C., section 1301 et seq. Section 1386 of that Title allows the

C. A. B. to exempt certain air carriers from many of the regulatory requirements as provided pursuant to Title 49 U. S. C., section 1301 et seq. Both Star Aviation Corp. and Pioneers Airways, Inc., are within the class of air carriers as exempted by Title 49 U. S. C., section 1386. Specifically, under the regulations adopted by the C. A. B. pursuant to section 1386, both of the appellees are classified as "air taxi operators" and are exempt from several provisions of the Federal Aviation Act. See 14 C. F. R., §§ 298.1 to 298.11. Air taxi operators are required to register with the Board and to renew the registration biannually. See 14 C. F. R., § 298.21. An air taxi operation must not use "large aircraft" and must maintain liability insurance. See 14 C. F. R., § 298.3. Both Star and Pioneer would be subject to further regulation under 14 C. F. R., Part 298, because they are classified as a "commuter air carrier" under 14 C. F. R., section 298.2. A commuter air carrier is designated as any air taxi operator which "performs at least five round trips per week between two or more points and publishes flight schedules which specify the times, days of the week and places between which such flights are performed." 14 C. F. R., § 298.2. A commuter air carrier is required to file reports with respect to such matters as points served, traffic carried, and schedules. 14 C. F. R., sections 298.60 and 298.61. Thus, although the Board has granted an exemption to the applicants which covers many of the provisions of Title 49 U. S. C., section 1301 et seq., it is clear that such exemption must be specifically applied for, granted by the Board, and renewed annually. Even with the exemption, air taxi operators are still subject to various reporting requirements and economic conditions.

Appellees now contend that Congress has not preempted the field of regulation as to the exempted air taxi operators of which Star and Pioneer are classified. Appellees note that there is a considerable dis-

tinction between an air carrier operating pursuant to a certificate of public convenience and necessity and an air carrier operating as an air taxi operator. It is pointed out that a certified air carrier may only operate over routes and with conditions as determined by the Board, while an exempted air taxi operator may go in and out of business at will. Thus, it is argued that Congress has not preempted the field as to air taxi operators and that the Public Service Commission may enter the field under the provisions of section 75-201, R. R. S. 1943, which provides: "Any * * * corporation * * * who undertakes to transport passengers or property for the general public in intrastate commerce by any airborne vehicle is hereby declared to be a common carrier and subject to commission regulation."

Appellees concede that the Public Service Commission can have no jurisdiction of flights of Star or Pioneer which originate in one state and terminate in another state. However, it is argued that the Commission does have jurisdiction over those portions of flights of Star and Pioneer which originate and terminate in Nebraska. Under Title 49 U. S. C., section 1386, an air carrier may be exempted only when full regulation would work an undue burden upon the air carrier or class of air carriers. It is not indicated that Congress intended to abandon the field of regulation of air taxi operators. Because the service offered by Star and Pioneer is identical with that of Frontier in the Frontier case, it is clear that Congress can regulate the proposed flights of Star and Pioneer. As in the earlier case, the intrastate segments of the proposed flights of Star and Pioneer have become so interwoven with the interstate segments that the effective control of the interstate segments by Congress incidentally controls the intrastate segments. Only the difference in classification suggests that Congress has abandoned the field and left it open to regulation by the Commission. As

noted earlier in the opinion, an exemption under Title 49 U. S. C., section 1386 is at best a partial exemption with the Board maintaining sufficiently strong controls to monitor the activities of these groups. It is the ruling of the Board that full regulation would work an undue burden upon the exempted groups. Such a determination does not show that Congress intended to abandon the field but instead shows an intention that such field should not be fully regulated. Thus, it is clear that any assertion of jurisdiction by the Commission would be an intrusion into a field in which Congress has asserted jurisdiction.

Since the Commission has assumed jurisdiction beyond its limits, the orders are reversed and the causes remanded to the Commission with directions to dismiss the applications.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. BEVERLY ANN SCHWARTZ, APPELLANT.

255 N. W. 2d 859

Filed July 13, 1977. No. 41079.

1. **Criminal Law: Jurors: Due Process.** A defendant is not denied a fair trial because persons who are 19 and 20 years of age and over 70 years of age are excluded from serving on the jury.
2. **Criminal Law: Instructions: Trial.** An instruction which directs the jury to apply community standards without specifying what community is not erroneous.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

James Tyler, Arthur M. Schwartz, and Neil Ayervais, for appellant.

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

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

BOSLAUGH, J.

The defendant, Beverly Ann Schwartz, was convicted on three counts of selling obscene motion picture films. The films which the defendant sold were entitled "Smokers, Blue Monday," "The Masturbater," and "Wet and Warm, A Debauchery Film." No contention is made that the films were not obscene.

The defendant was fined $1,000 and sentenced to imprisonment in the county jail for 30 days on each count, the sentences to run concurrently. She has appealed and contends that section 25-1601, R. R. S. 1943, is unconstitutional and that the trial court erred in failing to properly define "contemporary community standards" in the instructions to the jury.

Section 25-1601, R. R. S. 1943, provides that jurors shall be selected from persons who are "over the age of twenty-one years and under the age of seventy years." The defendant contends that the exclusion of persons from 18 to 21 years of age and over 70 years of age from the jury prevented her from having a fair trial because the jury was not a representative cross-section of the community.

In State v. Foster, 196 Neb. 332, 242 N. W. 2d 876, we considered a similar contention in regard to the exclusion of 19 and 20 year old persons from grand jury service. We held in that case that persons who are 19 and 20 years of age did not constitute a cognizable class and their exclusion from jury service was not arbitrary. We think that case is controlling here and that the defendant's contention is without merit.

Instruction No. 11 given to the jury was as follows: "In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the contemporary community standards of the intended and probable recipient group is, and in determining the contemporary community standards of said group you may consider the divergent ages, the educated and uneducated, the religious and irreligious

men and women, and, of course, any other characteristics which go to make up the 'average person' of the intended and probable recipient group. * * * In this connection you may consider the contemporary standards of the community in books, magazines, literature, movies, stage plays, religion, social conduct, and so forth."

The defendant argues that the instruction was erroneous because the trial court did not define "community" as encompassing the State of Nebraska. The defendant cites Jenkins v. Georgia, 418 U. S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642, and concedes that the Jenkins case held that an instruction which directs the jury to apply community standards without specifying what community does not violate the Constitution of the United States. In State v. Little Art Corp., 189 Neb. 681, 204 N. W. 2d 574, we held such an instruction was not erroneous under Nebraska law. Furthermore, as in the Little Art Corp. case, the materials in question here would affront any standard.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DEAN MILLER, APPELLANT.

255 N. W. 2d 860

Filed July 13, 1977. No. 41087.

1. **Criminal Law: Courts: Sentences: Presentence Reports.** In considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment, and includes the observation of the sentencing judge as to demeanor, attitude, and all the facts and circumstances surrounding the life of the defendant.
2. **Criminal Law: Courts: Evidence: Presentence Reports.** A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed, and the judge may consider probation officer reports, police reports, affi-

davits, and other information, including his own personal observations.

3. **Criminal Law: Courts: Sentences: Probation and Parole.** The action of a trial court in denying probation and imposing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Affirmed.

Ryan, Scoville & Uhlir, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

SPENCER, J.

This is an appeal by Dean Miller from a sentence on a guilty plea to one count of receiving stolen property. Pursuant to a plea bargain, two other counts were dismissed, and the prosecutor recommended probation. The court refused to accept that recommendation and sentenced defendant to 2 to 4 years in the Nebraska Penal and Correctional Complex. Defendant sets out eight assignments of error. They may be condensed as follows: (1) The court erred in seeking to coerce the defendant as a condition of probation to confess to other criminal conduct; (2) the court erred in not making a matter of record exactly what conditions he was imposing on the defendant; and (3) defendant was deprived of effective assistance of counsel at critical stages in the proceedings. We affirm.

On August 5, 1976, defendant appeared for arraignment before the District Judge of the Eighth Judicial District. He was represented by two private counsel. Defense counsel informed the court defendant would enter a plea of guilty to a charge of receiving stolen property. The trial court read defendant the penalty for that crime. Defendant indicated he

knew the minimum and maximum penalty, and reaffirmed his desire to plead guilty. Before accepting the plea, the trial court fully advised defendant of his constitutional rights and inquired of him whether he understood them and waived them. Defendant answered in the affirmative and once again indicated he wished to plead guilty.

The trial court then inquired whether there was a plea bargain involved. The county attorney told the court that in exchange for a plea of guilty to one count of receiving stolen property, he had agreed to give consideration to dismissing two other charges; and also, pending a favorable presentence report, he would not object to probation. The county attorney stated both parties understood probation was discretionary with the court. Defense counsel affirmed the county attorney's statement.

The court advised defendant it had no part in the plea bargain, was not bound by it, and asked defendant if that was his understanding. Defendant replied in the affirmative. The trial judge then advised defendant if he plead guilty, he could very well receive the maximum sentence under the statute, and asked him if he still wished to plead guilty. Defendant replied in the affirmative. The judge then asked defendant if he was in fact guilty of receiving stolen property. Defendant answered in the affirmative. Defendant then told the court that he had received a shotgun which was the basis of the charge to which he was pleading guilty, and two bicycles which were covered in the other two counts which were subsequently dismissed by the prosecution.

When asked if he knew the property was stolen, his reply was, "I didn't know for sure, sir. I didn't ask." The judge then advised defendant he would not accept his plea. Defense counsel requested a consultation with defendant. This was granted and held out of the hearing of the trial judge.

When the same question was again propounded by

the trial court, defendant stated he assumed they were stolen from the circumstances. The court then stated that before he could accept the plea, he would have to know whether or not at the time defendant purchased the stolen property he knew it was stolen. Defendant answered he did know it was stolen and that the items were brought to his house where he purchased them. He was then asked if these were the only items he had ever purchased from that particular seller. He answered in the affirmative. He was then asked if he had ever purchased any items of stolen property from anyone else. He answered, "No, sir." The court then accepted the guilty plea and continued the matter for further proceedings, pending the completion of a presentence report.

At the sentencing hearing, the judge stated for the record he had furnished a copy of the presentence report to the attorneys and asked defendant's counsel if they had had an opportunity to review the report with their client. They replied in the affirmative. The county attorney then advised the court that 24 guns found in the defendant's home had been confiscated by the police, and requested the court to take jurisdiction of them pending further disposition. The court did so, and asked defendant and his counsel if there was any objection. All replied in the negative.

Defendant predicates this appeal on his contention that the court erred in seeking to coerce him as a condition of probation to confess to other criminal conduct. At the sentencing hearing the court, after reviewing defendant's background and his consideration of the matter of punishment, stated: "If this Court could find a way to explain to each and every one of those young people, Mr. Miller, that you have made an indelible print on by your actions, this Court would set you free. I suppose there is a percentage of people that the threat of punishment is a deterrent. When you stood before this Court on the

5th day of August, Mr. Miller, I handed you the keys. The Court feels, not particularly from what a convicted felon says, feels that you chose, for whatever reason this Court does not know, not to use those keys. The sentence this Court is going to pass upon you, Mr. Miller, is for the reason that it feels sincerely that you still do not know that it is necessary, it is mandatory, that people understand the rule of law and this Court is very disappointed that you do not stand here in that position before this Court."

This is the portion of the statement which defendant contends indicates the trial court was trying to pressure him to confess to other crimes. There is no support in the record for this conclusion. The record does not implicitly or explicitly state defendant's confession to other crimes was a condition to probation. In fact, defendant was not given an opportunity to do so after the judge made the above statement.

It is obvious to us that while the trial judge could have been more explicit, defendant could not mistake his meaning. He was explaining to defendant that he had lied to the court at the time his guilty plea was accepted. He was further suggesting defendant did not understand the gravity of the offense, and the court did not believe defendant had a sincere desire for rehabilitation. The judge in effect told him he was not a suitable prospect for effective probation.

Defendant, who was 33 years of age, for 5 years had been a teacher and coach in the South Sioux City community school system. He was graduated from college in 1966, with a B.A. degree, minoring in biology and majoring in physical education. He has been employed in the teaching profession since that date. The presentence report indicates that defendant's conduct, at least during recent times, has been far from exemplary.

Two searches of defendant's home pursuant to search warrants produced a .410 gauge shotgun, a

sawed-off shotgun, a clock radio, and numerous credit cards, together with the guns referred to heretofore.

Defendant's explanation of the credit cards found in his home, belonging to other parties, does, to say the least, test credulity. Defendant told the probation officer he found a billfold on the street near the Sears store in Sioux City, Iowa, with several of the cards but with no other identification. Some of the credit cards were in a billfold he claimed he found in his car. These were in the name of a person who allegedly had been in his car. He said he found two of the credit cards on the sink in the restroom of a bar. On June 11, 1976, while he was putting away wrestling equipment in a storage area at the South Sioux City school, he found several credit cards bearing the name of a teacher in the school system. The teacher, who was known to him, and the individual whom he said had been in his car, had both reported their billfolds, containing the credit cards, had been stolen. When questioned as to why he did not return the cards when he knew some of the individuals, he stated he did not know.

When questioned about the 24 guns found in his home, defendant identified some of them as having belonged to his father. Some guns he identified as having been purchased from individuals, pawnshops, or stores. However, there were eight or nine on which he could give no explanation.

The report contains the statement of the individual who admittedly sold the defendant the three items on which he was charged. This individual reported he had also sold defendant other stolen articles, including guns. This same young man reported he had sold defendant approximately 100 stolen citizens band radios which allegedly defendant had disposed of to other parties. A standard polygraph test indicated this individual could be telling the truth. The trial judge, however, stated at the sentencing hear-

ing that he had given very little credence to the report of this individual's activities. Except for possibly corroborative purposes, it was not necessary to do so. There was other damaging information, particularly the possession of stolen credit cards bearing the names of individuals known to him. This was sufficient to indicate to the trial judge that defendant had been less than candid with him.

Defendant argues the trial court erred in not specifically setting forth the reason for denying him probation. In considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment, and includes the observation of the sentencing judge as to demeanor, attitude, and all the facts and circumstances surrounding the life of the defendant. State v. Wade, 193 Neb. 365, 227 N. W. 2d 400 (1975). Actually, the court did specifically tell the defendant the reason the court was denying probation and imposing a sentence of 2 to 4 years. The trial court told him: "This community, Mr. Miller, entrusted you with its most valuable asset that it has, the teaching of our youth. * * *

"The reports to our probation officer vary from superb to as low as you can get on the totem pole. * * *

" * * * your actions, show a course of conduct that not only this community, but no community could possibly stand. You have struck at the very core of this community. * * *

"The sentence this Court is going to pass upon you, Mr. Miller, is for the reason that it feels sincerely that you still do not know that is necessary, it is mandatory, that people understand the rule of law and this Court is very disappointed that you do not stand here in that position before this Court."

Defendant, who was represented by different counsel on appeal, argues he was deprived of his Sixth Amendment right to effective representation

because his counsel failed to protect him at critical stages in the proceeding with respect to errors committed by the court. Here, he argues counsel should have requested the court to explain exactly what he meant by his statement, "I handed you the keys." What we have heretofore said disposes of this contention. As the trial court told defendant, he was represented by two competent counsel. The record does not indicate otherwise.

Defendant impliedly attacks the presentence report. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Holzapfl, 192 Neb. 672, 223 N. W. 2d 670 (1974).

The trial judge furnished defendant's counsel with copies of the presentence report. He also made certain they had discussed it with their client before proceeding with the sentencing hearing. Defendant did not object to the report as being inaccurate or unreliable, although one of his attorneys did call attention to what he thought might be a discrepancy and suggested that one could pass a lie detector test if he thought he was telling the truth even though he might be inaccurate. There is no merit to defendant's claim of ineffective assistance of counsel.

For the reasons mentioned, there is no merit to defendant's assignments of error. We have often said the action of a trial court in denying probation and imposing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion. We find no abuse of discretion herein. The judgment is affirmed.

AFFIRMED.

WELCOME WAGON INTERNATIONAL, INC., A CORPORATION, APPELLANT, V. HOSTESSES, INC., A CORPORATION, ET AL., APPELLEES.

255 N. W. 2d 865

Filed July 13, 1977. No. 41089.

Contracts: Employer and Employee. A contract to restrict a laborer from engaging in an occupation if valid at all must be restricted to the area in which the personal service was performed.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, JUDGE. Affirmed.

Stanley C. Goodwin of Cunningham Law Office, for appellant.

Ronald D. Mousel for Mousel & Burger, for appellees.

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

WHITE, C. THOMAS, J.

The plaintiff Welcome Wagon International, Inc., engages in the business of soliciting businessmen in a local community to participate in a program whereby their employee, the hostess, calls upon newcomers to a community and promotes the products of the local businessmen who in turn pay Welcome Wagon for each contact of a newcomer within the community. The defendant, Jo Ann Smolczyk, was employed by the plaintiff Welcome Wagon beginning in April 1969 and continuing through October 1974 in the capacity of a hostess in McCook, Nebraska. Plaintiff and defendant entered into a contract of employment which was dated March 27, 1973, and April 9, 1973, in which the defendant agreed that she would not for 5 years after the termination of her employment directly or indirectly compete with her employer in McCook or in any other city in the State of Nebraska or United States in which Welcome Wagon, the employer, is now operating or where it has signified an intent to operate. After the defend-

ant left the employ of Welcome Wagon, she caused to be incorporated the defendant Hostesses, Inc., which began in January of 1975 to render the same or similar services to local businessmen as were rendered by Welcome Wagon by their former employee Jo Ann Smolczyk.

The action was filed in the District Court to enjoin the defendants Hostesses, Inc., and Jo Ann Smolczyk from competing with the plaintiff in McCook, Nebraska, or in any other city in which the plaintiff was operating.

There is no evidence in the record that the defendant Jo Ann Smolczyk, during the term of her employment with the plaintiff, ever engaged in any personal service for the plaintiff in any city other than McCook, Nebraska. Quite apart from the question of whether the 5-year term would in itself be reasonable, the case is governed by Brewer v. Tracy, 198 Neb. 503, 253 N. W. 2d 319, where we said: "We further hold that a contract to restrict a laborer from engaging in an occupation, if valid at all, must be restricted to the area in which the personal service was performed." The trial court was clearly right in its determination that the restraint on the exercise of the defendant Jo Ann Smolczyk's occupation was not reasonable nor necessary nor appropriate to afford fair protection to the plaintiff in whose favor the restriction was made. See, Securities Acceptance Corp. v. Brown, 171 Neb. 406, 106 N. W. 2d 456; Farmers Underwriters Assn. v. Eckel, 185 Neb. 531, 177 N. W. 2d 274.

The judgment of the District Court is affirmed.

AFFIRMED.

DAN L. BAILEY, APPELLEE, V. PAUL A. MAHR ET AL., APPELLEES, IMPLEADED WITH WAYNE E. SHANKS ET AL., APPELLANTS.

255 N. W. 2d 866

Filed July 13, 1977. No. 41091.

1. **Appeal and Error.** Prejudice must appear from the record to entitle a party alleging error to a reversal on appeal.
2. **Equity: Appeal and Error: Witnesses: Evidence.** Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.
3. **Adverse Possession: Quiet Title: Property.** In order to establish title by adverse possession, such possession must not only have been actual, open, and continuous, but it must have been accompanied by an intention to hold land as the owner of it and it must have been under a claim of ownership.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Affirmed.

Norris G. Leamer, for appellants.

Smith, Smith & Boyd, for appellee Bailey.

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

WHITE, C. J.

This is a partition proceeding initiated by the plaintiff-appellee, owner of an interest in six tracts of real estate located in South Sioux City, Nebraska. Tracts IV and V were consolidated as one tract and generally conceded to be one and the same. The plaintiff, in his petition, asked that ownership of the tracts be determined and that the tracts be divided or sold according to law.

None of the defendants-appellants were initially named as defendants in this case. Several of the original defendants to this action suggested in their answers that others, including appellants, be interpleaded or added as defendants, which was subse-

quently done. The defendants filed an answer of general denial, claiming title to tract IV by adverse possession and alleging that tract V was insufficiently described. Several pretrial conferences were held. At one of these conferences, with all parties present or represented by counsel, it was agreed that there was no material issue of fact as to tracts I, II, III and VI, and that trial would thus be limited to tracts IV and V. The case was tried, so limited, to the District Court. The District Court held for the plaintiff and against defendants. The defendants filed a motion for a new trial which was overruled and they now appeal. We affirm the judgment entered by the District Court.

The defendants' first alleged error concerns the service of process by publication on certain unknown defendants, these being the heirs of Myrtle and Ernest Pinney. The appellants contend that the service of process was not in strict conformity with the statutory language of section 25-526, R. R. S. 1943.

The record reveals that Ernest Pinney and Myrtle Pinney had been the contract sellers on tract VI. An unpaid balance of $51.23 remained on the contract. They were both deceased, and died testate. They had only one heir, a daughter, Pauline Storm, who was designated by name in the service by publication.

Defendants' claim is without merit. They have no standing to challenge the sufficiency of the service by publication as to the unknown defendants. Defendants' sole interest in this suit concerns tracts IV and V. Defendants were properly served, they filed a voluntary appearance, and the District Court had competent jurisdiction over them. Defendants fail to demonstrate how they might have been prejudiced by the alleged error in the service by publication. Prejudice must appear from the record to entitle a party alleging error to a reversal on appeal. See Staskiewicz v. State, 144 Neb. 581, 14 N. W. 2d 184 (1944).

Defendants next contend that the District Court committed error in finding title to tract IV and V in plaintiff and several other defendants and in determining that defendants had no proprietary interest in tracts IV and V.

Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Campbell v. Buckler, 192 Neb. 336, 220 N. W. 2d 248 (1974); Sinnett v. Hie Food Products, Inc., 185 Neb. 221, 174 N. W. 2d 720 (1970).

Plaintiff's claim to an interest in tracts IV and V is based upon the following facts in the record. Plaintiff's father, Jack H. L. Bailey, and several of the defendants purchased several tracts of land in South Sioux City, Nebraska, for investment purposes. Plaintiff's father and these defendants were equal owners of this real estate, holding the land as tenants in common. Tracts IV and V were purchased in July 1963 and placed in the name of the plaintiff's father. Plaintiff's father received a deed to tracts IV and V from the record titleholders. Plaintiff's father died in 1968, and his interest in the real estate descended to his four children in equal shares.

Raymond B. Johansen, one of the original defendants and coowners of this real estate, testified that the owners of the real estate collected rents from the properties, paid taxes, and paid other assessments on the properties, including tracts IV and V. He testified that this was done for the benefit of himself and his coowners. Johansen also testified that when tracts IV and V were purchased, there were some unoccupied buildings thereon, and that these were burned down by the South Sioux City fire department after first obtaining the permission of Johansen and the other coowners. Johansen further testified that tracts IV and V, at the time they were purchased, were full of holes, and that these were filled

in at the direction of himself and Paul Mahr, another original defendant and coowner. Johansen stated that he drove past the lots six to eight times per year to inspect them. He stated that defendants Nora Entriken or Wayne Shanks never interfered with the destruction of the buildings on the land or the filling of holes.

The plaintiff made a prime facie case for ownership, along with certain other defendants, of tracts IV and V. The plaintiff and his coowners held title under a duly recorded deed supported by chain of title. They have exercised incidents of ownership consistent with their record title.

Defendants-appellants' claim that title to tracts IV and V is not in plaintiff and the other defendants, but is instead in defendant Wayne Shanks, rests upon the following facts.

On March 28, 1962, defendant Shanks received a quitclaim deed from his father and mother, which purported to convey to him all the grantors' interest to the west 70 feet of Lot 7. Tracts IV and V are legally described as Lots 7 and 6, Block 28, Covington Annex to South Sioux City. Neither defendant Shanks, nor his father and mother, were previous record titleholders of this property.

In 1962, Nora Entriken filed an affidavit alleging therein that she was the owner and in possession of Lot 7, Block 28, Covington Annex to South Sioux City and that "she has resided upon said real estate with her family and occupied the same as her home, without interruption, since the year 1912 * * *" and that she was claiming the same to be hers. The record shows that Nora Entriken was 80 years old at the time of trial and lived in a small house which was located, not on Lot 7 as stated in her affidavit, but rather upon the platted city street next to Lot 7. There was evidence that she maintained for a long time a garden upon part of Lot 7. She also had an outhouse which, according to her son's testimony,

was located 15 feet from her house, thus placing it on the street as well.

In April 1976, during the pendency of this action, defendant Shanks received a quitclaim deed from Nora Entriken, conveying all her interests in Lots 6 and 7, Block 28, Covington Annex to South Sioux City to him subject to a life estate.

Despite the deed he received in 1962 from his father and mother, Shanks testified that over the years he helped Nora Entriken plow and maintain her garden, that it was he and not plaintiff or the other defendants who gave permission to dump dirt on these lots, and that he never claimed any interest in the property until he received the quitclaim deed from Nora Entriken.

In order to establish title by adverse possession, such possession must not only have been actual, open, and continuous, but it must have been accompanied by an intention to hold land as the owner of it and it must have been under a claim of ownership. Shirk v. Schmunk, 192 Neb. 25, 218 N. W. 2d 433.

Based upon the above review of the evidence, it is clear that Nora Entriken had no interest in Lots 7 or 6, which she could have conveyed to defendant Shanks. Her sole activity thereon was the maintenance of a garden on Lot 7. The District Court was correct in rejecting defendant's claim and in finding title to be in plaintiff and the other defendants.

Other assignments of error raised by defendants have been examined and are found to be without merit.

The judgment and decree of the District Court are correct and are affirmed.

AFFIRMED.

HERMAN J. MERTEN ET AL., APPELLANTS, V. CLYDE S. PEDERSEN, DOING BUSINESS AS ACE HOUSE MOVING CO., ET AL., APPELLEES.

255 N. W. 2d 869

Filed July 13, 1977. No. 41099.

1. **Property: Contractors: Negligence.** The general rule is that one who causes work to be done is not liable for injuries that result to an adjoining owner from carelessness in the performance of the work by the employees of an independent contractor to whom he has left the work without reserving to himself any control over the execution of it.
2. **Courts: Trial: Evidence: Witnesses.** In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact.
3. **Verdicts: Evidence: Appeal and Error.** A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong.
4. **Verdicts: Damages: Appeal and Error.** The verdict of a jury will not be set aside on appeal as inadequate unless it is so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Ralph R. Bremers, for appellant.

J. Michael Coffey of Emil F. Sodoro Law Office, for appellee Pedersen.

Terrence D. O'Hare of Boland, Mullin & Walsh, for appellees Skipton.

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

MCCOWN, J.

Plaintiffs, Herman J. and Rose M. Merten, commenced this action in the District Court for Douglas County for damage to a house owned by plaintiffs. The damage was allegedly caused by piling dirt against a wall of the house. The defendants were the adjoining landowners, James D. and Janice E.

Skipton, and Clyde S. Pedersen, an independent contractor employed by the Skiptons to excavate a basement under their house. At the conclusion of plaintiffs' evidence, the District Court granted a motion to dismiss as to the Skiptons. At the conclusion of all the evidence, the jury returned a verdict for the plaintiffs and against the defendant Pedersen in the amount of $50. The District Court entered judgment on the verdict and plaintiffs have appealed.

The Mertens were the owners of a house located at 2614 D Street in Omaha, Nebraska. The defendants, James and Janice Skipton, owned and lived in the house on an adjoining lot at 2618 D Street. The Merten house had not been occupied since 1964, except for a period from July 1970 to November 1971, when it was rented. Herman Merten conceded that the house was not in condition to rent at the time of the incidents involved here in the fall of 1973. The Merten house was built about 1900. A stucco exterior was first applied in 1943, and had not been renewed since then.

The Skipton home did not have a basement and in 1973 the Skiptons contracted with the defendant, Clyde S. Pedersen, doing business as Ace Moving Company, to dig a basement under their house. Pedersen had control of the work and supervised it. Since the distance between the Skipton house and the lot line was about 5 feet, it was necessary to place some of the dirt from the excavation on the Merten property. Mrs. Skipton obtained permission from Herman Merten to place dirt on the Merten property. In the process of the excavation part of the dirt was placed on the Merten property, some of it against the west wall of the Merten house. The dirt remained there for 12 to 14 days while the basement was being completed. The dirt was then removed and the yard restored. Herman Merten conceded that the lawn was better than it had been before the occurrence. On complaint by the Mertens,

defendants Skipton also replaced a basement window which had been broken.

The evidence was directly conflicting as to the cause of the damage, the cost of repair, and the value of the Merten house before and after the incident. The Mertens and their witnesses asserted that the damage to the wall, principally cracks in the stucco, was caused solely by the dirt which was piled against it, and estimates of the damage varied from $3,000 to $5,000. The Mertens individually testified that their house was worth $14,000 to $14,500 before the damage and only $9,000 or $10,000 afterwards. Defendant Pedersen's witnesses, on the other hand, testified that the condition of the wall was no different than the condition of the other walls of the Merten house and introduced photographs in evidence. A stucco contractor testified that the cracks were not caused by the dirt, and that it would cost approximately $200 to repair all the cracks on the west wall of the Merten house. A real estate appraiser testified that the house was worth $3,400 to $3,600 before the alleged damage was done, and that if the wall were repaired, the repair would increase the value by $75 to $125.

The Skiptons were dismissed as defendants on motion at the conclusion of the plaintiffs' evidence. At the close of trial, the case was submitted to the jury and the jury returned a verdict in favor of the plaintiffs and against the defendant, Clyde S. Pedersen, in the sum of $50. The plaintiffs have appealed.

Plaintiffs contend that the trial court erred in sustaining the motion to dismiss the defendants Skipton, and that the verdict of the jury was grossly inadequate.

It is undisputed in this case that the defendant Pedersen was an independent contractor and directed and supervised the work being done. The Skiptons employed the independent contractor to excavate the basement and retained no control over the work being done. There is no testimony that the Skiptons

knew or should have known that the dirt might be piled against the Merten house, or that such piling might cause damage. It is a general rule that one who causes work to be done is not liable for injuries that result to an adjoining owner from carelessness in the performance of the work by the employees of an independent contractor to whom he has left the work without reserving to himself any control over the execution of it. 1 Am. Jur. 2d, Adjoining Landowners, § 21, p. 704. While there are exceptions to the general rule, they are not applicable here. See Annotation, Liability of employer for injury to adjoining realty resulting from excavation work by independent contractor on his premises, 33 A. L. R. 2d 111. See, also, Restatement, Agency 2d, § 250, p. 549.

The plaintiffs contend that the verdict of the jury was grossly inadequate and was clearly the result of passion or prejudice. We disagree. The evidence here was in direct conflict as to the cause and extent of damage, the cost of repair, and the value of the house before and after the occurrence involved here. In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. Snay v. Snarr, 195 Neb. 375, 238 N. W. 2d 234. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Moser v. Jeffrey, 194 Neb. 132, 231 N. W. 2d 106. The verdict of a jury will not be set aside on appeal as inadequate unless it is so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake. Abbott v. Northwestern Bell Tel. Co., 197 Neb. 11, 246 N. W. 2d 647.

The evidence here is sufficient to support the jury verdict and the verdict is not clearly wrong or unreasonable. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY J. JAVINS, APPELLANT.

255 N. W. 2d 872

Filed July 13, 1977. No. 41111.

1. **Criminal Law: Sentences: Probation and Parole.** A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary.
2. **Criminal Law: Sentences.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded with directions.

George D. McArthur, for appellant.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for appellee.

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

WHITE, C. THOMAS, J.

The defendant plead guilty in the District Court to a violation of section 28-4,125 (1) (a), R. R. S. 1943, for unlawfully and knowingly delivering a controlled substance, to wit, marijuana. After a presentence investigation, the court sentenced the defendant to a term of from 1 to 2 years in the Nebraska Penal and Correctional Complex with credit of 6 days previously spent in the county jail. The defendant appeals.

The defendant assigns error in two general categories.

The record shows that on September 15, 1976, the judge stated to the defendant and counsel: "The presentence investigation report will probably not be ready for my examination for a week or two and when I receive the report and have an opportunity to inspect it I will notify your (defendant's) attorney and set up a date for your appearance here on sen-

tencing * * *." The record further shows that a sentencing hearing was set for October 4, 1976, and was rescheduled for October 13, 1976. Defendant's counsel was notified of the date set for sentencing and of the rescheduled date. Trial counsel for the defendant furnished an affidavit to the trial court that he did not examine the contents of the presentence investigation report prior to sentencing and had no opportunity therefore to comment on any errors in the report. The answer to the defendant's contention is stated in State v. Keller, 195 Neb. 209, 237 N. W. 2d 410: "The obvious answer is that no request was made for an inspection of the report." The defendant cannot assert error in the failure to inspect a presentence investigation report when no demand was made for such inspection prior to sentence.

The second assignment of error is that the sentence is excessive. The presentence investigation report reveals that the defendant and one Steve Walton were roommates at Kearney State College in Kearney, Nebraska. On two separate occasions a cooperating individual went to their room and negotiated for a purchase of marijuana. On November 4, 1975, $150 was paid directly to Walton in the presence of Javins for 12 lids of marijuana. On November 11, 1975, the cooperating individual entered the Walton and Javins' room and purchased 4 lids of marijuana for $50 from Javins directly. Walton was present during the buy. Certain statements of Javins suggested to the cooperating individual that Javins and Walton were involved in dealing large amounts of marijuana in pound quantities and that they could secure any drug that the cooperating individual wished to purchase, especially marijuana and LSD. The presentence investigation report also disclosed that the defendant is in good physical health, is regularly employed, and has no prior criminal record or traffic offenses.

We note that the maximum sentence for a conviction of the crime for which the defendant is charged

is 10 years in the Nebraska Penal and Correctional Complex. Our attention has been directed to the case and transcript of State v. Walton in the District Court for Buffalo County which has been included in the transcript of the Javins case. The defendant offered the case to this court as a related case and requested this court to take judicial notice of that case. We agree to do so.

The record discloses that on February 1, 1977, the defendant Walton was present in court and the county attorney moved the court to dismiss the felony information of distributing marijuana and requested permission of the court to file an amended information charging possession of marijuana of less than 1 pound, a misdemeanor. The court granted such permission. Walton thereupon plead guilty and was sentenced by the court to a term of 7 days in the county jail and ordered to pay a fine of $500 and costs of prosecution. The county attorney sought and obtained permission of the court for the dismissal of the felony charge as required by section 29-1606, R. R. S. 1943. State v. Sanchell, 191 Neb. 505, 216 N. W. 2d 504. The trial court was aware of the differing treatment of the defendant and Walton.

We thus have a situation where two defendants appear to be equally involved in a scheme to distribute marijuana. The presentence investigation report of the defendant Javins discloses an absolutely clear record with all the indicia of probation. His sentence extends 1 to 2 years in the penal complex while Walton, his codefendant, received 7 days in the county jail and a fine of $500. The record is silent as to why the defendants received different treatments or why the court permitted the county attorney to withdraw the felony count and substitute the misdemeanor count as to Walton. There is nothing in the record to suggest that the defendant Javins would not be a fit subject for probation. We said in State v. Shonkwiler, 187 Neb. 747, 194 N. W. 2d 172: " 'A

sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary.' ABA Standards Relating to Sentencing Alternatives and Procedures, Standard 2.3 (c)."

This court has often said that it will not normally disturb a sentence on appeal imposed within the statutory limits absent an abuse of discretion. See State v. Westerlund, 197 Neb. 664, 250 N. W. 2d 627. Nevertheless, where the defendant under review is shown to have no criminal record and the strong possibilities of rehabilitation, and where a codefendant whose record, although not before us, could not conceivably be any more favorable than that of the defendant, a sentence to the penal complex as opposed to a reduction in charges and a relatively mild sentence in the county jail indicates that an abuse of discretion occurred.

The sentence will be and the same is hereby vacated and the cause remanded to the District Court for resentencing. On resentence, the trial court is directed to set forth its reasons for differing dispositions in the event that the defendant is resentenced to a term in the penal complex.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. FLOYD JAMES YARBROUGH, APPELLANT.

255 N. W. 2d 874

Filed July 13, 1977. No. 41129.

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

W. O. Baldwin and L. J. Koenig, for appellant.

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

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

BOSLAUGH, J.

The defendant was originally charged with first degree murder for killing Cathy J. Parker while engaged in a sexual assault in the first degree or in an attempt at such an assault. To this charge the defendant pleaded not guilty and not guilty by reason of insanity.

After the case had been set for trial the defendant and the county attorney entered into a plea bargain in which the charge was reduced to second degree murder in return for the defendant's agreement to plead guilty. The defendant's guilty plea was accepted and he was sentenced to imprisonment for 50 years. The defendant has appealed and contends the sentence is excessive.

The defendant is 23 years of age and single. He has an eighth grade education. Psychological tests indicate he has average intelligence. His employment record is poor. His criminal record consists of misdemeanor offenses except for a conviction for burglary in 1975.

On February 6, 1976, the defendant spent the evening in a bar in Fairbury, Nebraska, with the victim and four other companions. The defendant had been smoking marijuana during the day and consumed a large amount of beer and some whiskey during the evening.

After the group left the bar they took the defendant and the victim to her home. The other four persons in the group returned to Lincoln, Nebraska. The defendant and the victim went to the Onyx Hotel in Fairbury where the victim's body was discovered on the morning of February 7, 1976.

The record is clear that the defendant killed the victim by strangling her sometime after they arrived at the hotel. The defendant admits he killed the vic-

tim, had sexual intercourse with her, spent the night in the room with her, and then had sexual intercourse again in the morning before leaving Fairbury. The evidence further shows that the defendant was competent to stand trial and was not insane. As noted by the trial court at the time of sentencing, the evidence in this case would sustain a finding of guilty of first degree murder.

As defense counsel points out, the defendant's life seems to have been ill-fated from the moment of birth. The defendant had an unhappy and sometimes tragic childhood. This history, however, furnishes no justification or reason for leniency in determining the disposition which should be made in this case.

The defendant committed a brutal and vicious crime. The psychiatric evidence indicates he has a chronic sociopathic personality. Whether the defendant can ever be rehabilitated appears doubtful. The protection of society requires that he be incarcerated for a substantial period of time. We find no basis in the record to justify any reduction in the sentence imposed.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANTHONY COSTELLO, APPELLANT.

256 N. W. 2d 97

Filed July 13, 1977. No. 41149.

1. **Criminal Law: Statutes: Trial: Indictments and Informations: Time.** Under section 29-1207, R. R. S. 1943, every person indicted or informed against for any offense shall be brought to trial within 6 months, and in felony cases the 6-month period commences to run from the date the indictment is returned or the information filed, and not from the time the complaint is filed in county court.
2. **Criminal Law: Statutes: Constitutional Law: Indictments and Informations: Trial: Time.** The constitutional right to a speedy

trial and the statutory implementation of that right under section 29-1207, R. R. S. 1943, exist independently of each other. Any unreasonable delay occurring prior to the filing of an information will be considered, in conjunction with statutory requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial.

3. **Criminal Law: Courts: Trial: Jurisdiction.** The power of a court to try an accused is not impaired by the fact that officers used unlawful force or deception to bring him from another jurisdiction to the place of trial.
4. **Criminal Law: Trial: Judges: Motions, Rules, and Orders.** A trial judge's overruling of a motion for change of judge on the ground of his bias and prejudice will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
5. **Criminal Law: Trial: Indictments and Informations.** The District Court, before trial, may in its discretion permit amendment of a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the amended information does not charge a crime other than the one on which the accused has his preliminary examination.
6. **Criminal Law: Records: Appeal and Error: Prosecuting Attorneys.** A contention that a mistrial should have been granted because the prosecutor argued law before the jury cannot be reviewed on appeal where the remarks of the prosecutor were not recorded in the bill of exceptions.
7. **Criminal Law: Jurors: Prosecuting Attorneys: Trial.** It is the duty of the prosecuting attorney to conduct the trial in a fair and impartial manner and not to inflame the prejudices or excite the passions of the jury against the accused.
8. **Criminal Law: Prosecuting Attorneys: Trial.** Whether or not inflammatory remarks by a prosecutor are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case.
9. **Criminal Law: Statutes: Evidence.** Under section 27-1003, R. R. S. 1943, a duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original, or in the circumstances it would be unfair to admit the duplicate in lieu of the original.
10. **Criminal Law: Evidence.** Evidence of other crimes than that with which the accused is charged is generally not admissible in a criminal prosecution, but such evidence is admissible to show motive, intent, or guilty knowledge; or if it establishes a course of conduct, scheme, design, or intent.
11. **Criminal Law: New Trial: Evidence.** A new trial on the ground of newly discovered evidence may be granted when the evidence is competent, material, and credible, and so potent that, by strength-

ening evidence already offered, a new trial would probably result in a different verdict.

12. **Criminal Law: Evidence: Sentences.** The trial court is entitled to consider all relevant evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed.

13. **Criminal Law: Sentences.** A sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion on the part of the sentencing judge.

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

Clyde F. Starrett, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

BRODKEY, J.

In an information filed in the District Court for Red Willow County on March 1, 1976, Anthony Costello, the defendant and appellant herein, was charged with delivering a bank check with intent to defraud at a time when he knew he did not have sufficient funds in his bank account for the payment of the check. Trial before a jury commenced on July 26, 1976, and the defendant was found guilty as charged. The defendant was sentenced to a term of imprisonment for not less than 3 nor more than 5 years. Defendant has appealed to this court from his conviction and sentence, assigning as error numerous alleged violations of his constitutional rights, erroneous rulings on the admissibility of evidence at trial, failure to grant him a new trial on the ground of newly discovered evidence, and excessiveness of his sentence. We affirm the judgment and sentence of the District Court.

The relevant facts are as follows. On October 23, 1975, a complaint was filed in the county court of

Red Willow County charging that the defendant had on October 7, 1975, delivered to Vogue Clothing Company a bank check for the payment of money in the amount of $79.68 upon the First Wisconsin National Bank of Oshkosh, Wisconsin; and that at the time of delivering the check the defendant knew he did not have sufficient funds in such bank for payment of the check. A warrant was issued for defendant's arrest on October 23, 1975.

Defendant was arrested in Florida on December 1, 1975, by sheriffs of Lee County, Florida. He was returned to Nebraska on February 17, 1976, by a Florida sheriff, and was promptly arraigned. A bond of $10,000, with permission to post 10 percent of that figure, was set and continued throughout the proceedings below. An information similar to the complaint filed in county court was filed in the District Court on March 1, 1976. The information, however, alleged that the defendant had delivered the insufficient fund check on October 23, 1975, rather than on October 7, 1975, as had been alleged in the complaint. This discrepancy was apparently due to the State using the date the complaint was filed rather than the date referred to in the complaint when it drafted the information. The State was permitted to amend the information to reflect the correct date of October 7, 1975, on the day before the trial commenced.

Prior to trial, defendant moved to dismiss the information on the grounds that he had been denied a speedy trial and that his removal from Florida to Nebraska constituted a denial of due process. He also moved to disqualify the trial judge on the ground of bias. These motions were overruled. After opening statements were made at the trial, defendant moved for mistrial on the grounds that the prosecutor had improperly argued law before the jury in his opening statement, and had referred to the defendant as a "paper hanger" and a "bad check artist." This motion was overruled.

The evidence at trial showed that the defendant had written a check to Vogue Clothing Company of McCook, Nebraska, on October 7, 1975. The check was in payment for clothing the defendant had purchased at that store, and was a personal check written on defendant's account at the First Wisconsin National Bank of Oshkosh, hereinafter referred to as the "Wisconsin bank." The check was processed through normal banking channels, and was returned to Vogue Clothing Company by the Wisconsin bank, unpaid. An employee and the owner of Vogue Clothing Company identified the defendant as the person who wrote the check and presented it to them. The check was identified and received in evidence.

Jerrold L. Kamp, operations officer for the Wisconsin bank, testified that he had returned the check because of insufficient funds. He further testified in regard to the status of the defendant's account at the Wisconsin bank from June 25, 1975, to October 15, 1975. The defendant's account became overdrawn in the amount of $148.58 as of August 7, 1975, for the following reasons: At the end of July 1975, the defendant had deposited three checks in a total amount of $2,950 in his Wisconsin bank account, all written upon another personal account the defendant had in a North Carolina bank. These three checks were unpaid by the North Carolina bank due to insufficient or uncollected funds. At the same time the defendant was purporting to deposit funds in the Wisconsin bank by drawing checks on his account in the North Carolina bank, he was purporting to deposit funds in the North Carolina bank by drawing a check on his account in the Wisconsin bank. Neither bank paid the checks written on the accounts, and the lack of deposits in the Wisconsin bank resulted in the overdrawn balance of $148.58 in defendant's account. Copies of the three checks referred to were admitted in evidence over defendant's objection.

Kamp also testified that the defendant had made

no more deposits after the purported ones described above, but that the Wisconsin bank had to return, unpaid, a large number of checks which the defendant had written on his account from late July 1975, to November 1975. Copies of these checks were admitted into evidence over defendant's objection. At the close of the State's evidence, defendant's motion to dismiss the information on grounds similar to those he raises in his assignments of error in this appeal was overruled. The defendant rested without presenting a defense.

Approximately 2 months after trial, defendant moved for a new trial on the ground of newly discovered evidence. The new evidence upon which defendant relied was a laboratory report prepared for the State prior to trial by a documents examiner. The examiner had compared the signature on the check to Vogue Clothing Company with that on photocopied materials bearing the defendant's signature, and concluded that the defendant had written the check to Vogue Clothing Company. At the conclusion of the report, the examiner stated that it would be necessary to examine the originals of the documents he had used in his analysis before he appeared in court. The trial court overruled defendant's motion. The defendant was sentenced to a term of imprisonment for not less than 3 nor more than 5 years.

Defendant discusses 10 assignments of error in his brief. In the following discussion, we will consolidate those which are related.

Defendant first contends that he was denied a speedy trial in violation of the Sixth Amendment to the Constitution of the United States and Article I, section 11, of the Constitution of Nebraska. In this case the defendant was arrested in Florida on December 1, 1975, and returned to Nebraska and arraigned on February 17, 1976; the information was filed on March 1, 1976; and trial commenced on July 26, 1976.

Section 29-1207, R. R. S. 1943, provides that every person indicted or informed against for any offense shall be brought to trial within 6 months, and that such "six-month period shall commence to run from the date the indictment is returned or the information filed." In State v. Born, 190 Neb. 767, 212 N. W. 2d 581 (1973), this court held that in felony cases the 6-month period commences to run from the date the indictment is returned or the information filed and not from the time the complaint is filed in county court. It is obvious in this case that less than 6 months had elapsed from the time of the filing of the information and the commencement of trial. Therefore there was no violation of section 29-1207, R. R. S. 1943, in this case.

The constitutional right to a speedy trial and the statutory implementation of that right under section 29-1207, R. R. S. 1943, however, exist independently of each other. "The fact that the statute does not apply to proceedings or delay occurring prior to the filing of an information in a felony case in no way lessens the duty of the State to provide the defendant with a speedy trial as required by the Constitution. In considering the constitutional right to a speedy trial, the extent of any delay, the reasons for the delay, and prejudice, if any, to the defendant, are all relevant factors to be considered by the court." State v. Born, *supra*. See, also, Barker v. Wingo, 407 U. S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Any unreasonable delay occurring prior to the filing of an information will be considered, in conjunction with statutory requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial. State v. Born, *supra*.

A consideration of the factors listed above indicate that the defendant was not denied a speedy trial in this case. The defendant was not turned over to Nebraska authorities until February 17, 1976. The information was filed within a 2-week period, and the

trial court sought to bring the case to trial at an early date. At one stage of the proceedings defendant was granted a 30-day continuance at his request. The length of the delay from the time of arraignment to the time of trial, even including the 30-day continuance requested by the defendant, was approximately 5 months. There was no attempt by the prosecution to delay the proceedings. Part of the delay was due to the trial court taking precautions to assure that the defendant was adequately represented by counsel. Defendant has made no showing that he was prejudiced by the delay. In such circumstances, there was no denial of his right to a speedy trial. State v. Born, *supra*; Barker v. Wingo, *supra*.

Defendant next contends that his removal from Florida to Nebraska was illegal, and constituted a violation of due process such that the District Court had no jurisdiction over him. In summary, defendant contends that he was not arrested on a proper Governor's warrant, that the arresting officers in Florida violated his constitutional rights, and that the provisions of the Uniform Criminal Extradition Act, sections 29-729 to 29-758, R. R. S. 1943, were not complied with after his arrest. Defendant's contentions, even if accepted as true, are not dispositive of the issue. The "power of a court to try an accused is not impaired by the fact that officers used unlawful force or deception to bring him from another jurisdiction to the trial." Maddox v. Sigler, 181 Neb. 690, 150 N. W. 2d 251 (1967). There is no prohibition in the Constitution of the United States or of the State of Nebraska which exempts an offender, unlawfully brought into this state, from trial and punishment for any offense against the laws of this state. State v. Nicholson, 183 Neb. 834, 164 N. W. 2d 652 (1969); Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124 (1946). See, also Frisbie v. Collins, 342 U. S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952). Defendant relies on United States v. Toscanino, 500 F. 2d 267 (2d Cir.,

1974), where the court held that due process prevents the exercise of jurisdiction over a defendant when he is brought before the court under extreme and shocking duress, such as where he has been kidnapped from a foreign country and removed to this country by means of bribery and torture, and in violation of international treaties and the federal kidnapping act. No such situation is present in this case, and defendant's contention that the District Court had no jurisdiction over him is without merit.

Defendant argues that the trial judge should have disqualified himself in this case because he was biased against the defendant. Defendant cites three factors as evidence of the alleged bias: The judge continued a bail bond in the amount of $10,000, with permission to post 10 percent of that figure, although the defendant was accused of writing only a $79.68 insufficient fund check; the judge overruled defendant's motion to dismiss prior to trial; and the judge sentenced the defendant to a prison term of 3 to 5 years. This assignment of error is frivolous. The factors relied on by the defendant do not even suggest bias on the part of the trial judge. A reading of the record indicates that the trial judge conducted the proceedings below in a completely fair and impartial manner, and does not raise even an inference of bias. A trial judge's overruling of a motion for change of judge on the ground of his bias and prejudice will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. State v. Davis, 198 Neb. 823, 255 N. W. 2d 434 (1977); 46 Am. Jur. 2d, Judges, § 222, p. 244.

Defendant's contention that it was error to permit the State to amend the information on the day before trial to change the date of the alleged crime from October 23, 1975, to October 7, 1975, is also without merit. The District Court, before trial, may in its discretion permit amendment of a criminal information, provided the amendment does not change the

nature or identity of the offense charged, and the amended information does not charge a crime other than the one on which the accused has his preliminary examination. State v. Gascoigen, 191 Neb. 15, 213 N. W. 2d 452 (1973). The amendment in this case was made before trial, and was to correct the error made in drafting the information, as previously described. The amendment did not change the nature or the identity of the crime charged. At the preliminary hearing, the correct date of October 7, 1975, was referred to, and the original complaint set forth the correct date. Defendant has made no showing that he was prejudiced by the amendment, and in fact did not even request a continuance at the time amendment was permitted. It was not error to permit the amendment.

Defendant contends that it was error to overrule his motion for a mistrial made on the grounds that the prosecutor, in his opening statement, presented argument on the law to the jury and referred to the defendant as a "bad check artist" and a "paper hanger." The prosecutor's opening statement was not recorded in the bill of exceptions. Arguments by counsel made after the statement, however, were recorded, and they indicate that the prosecutor did refer to the defendant as a "bad check artist" and a "paper hanger." The record does not show the precise nature or extent of the alleged argument of law made by the prosecutor before the jury.

This court is unable to review the contention that a mistrial should have been granted because the prosecutor argued law before the jury. Where argument of counsel at trial is not recorded, there is no basis upon which the ruling of the trial court on the motion for a mistrial can be reviewed in this court. State v. Howell, 196 Neb. 832, 246 N. W. 2d 479 (1976); State v. Sanders, 195 Neb. 789, 241 N. W. 2d 117 (1976). The only evidence contained in the bill of exceptions in regard to the nature or extent of the prosecutor's

argument before the jury is a statement by defendant's counsel that the prosecutor had argued what the law should be in regard to checks, and that there should be punishment for various types of check crimes. On such an incomplete record, it is impossible for this court to review the contention that conduct of the prosecutor was prejudicial to the defendant such that a mistrial should have been granted.

This court can review defendant's contention that his motion for a mistrial should have been granted because the prosecutor referred to the defendant as a "bad check artist" and a "paper hanger" in his opening statement. Although the references were not recorded at the time they were made, the bill of exceptions shows that the prosecutor, immediately after the opening statement, admitted he had made them.

It is clearly the "duty of the prosecuting attorney to conduct the trial in a fair and impartial manner and to not inflame the prejudices or excite the passions of the jury against the accused." State v. Davis, 185 Neb. 433, 176 N. W. 2d 657 (1970). See, also, Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151 (1955). Whether misconduct on the part of a prosecuting attorney is prejudicial to the defendant depends largely upon the facts of each particular case. Froding v. State, 125 Neb. 322, 250 N. W. 91 (1933). If the prosecutor has not conducted the trial in a fair and impartial manner, the conviction will be set aside. State v. Casados, 188 Neb. 91, 195 N. W. 2d 210 (1972).

In State v. Casados, *supra*, on which defendant relies, the accused was charged with child stealing. During argument before the jury, the prosecutor referred to the accused as a "despicable" person, and argued that the evidence showed the accused was the most lowly person the jury would have occasion to judge. The prosecutor also argued that the evidence showed that accused was a "pimp." This court held that such argument by the prosecutor was

prejudicial, and reversed the accused's conviction, noting that the remarks of the prosecutor had nothing to do with the offense with which the accused was charged. The court also stated, however, that often inflammatory remarks by a prosecutor are not considered sufficiently prejudicial to constitute error; and that each case must be determined on its own facts.

In Johnson v. United States, 484 F. 2d 309 (8th Cir., 1973), cert. den., 414 U. S. 1039, 94 S. Ct. 539, 38 L. Ed. 2d 329 (1973), the defendant was charged with distributing heroin, and the prosecutor referred to the defendant as a "pusher" in his argument to the jury. The court found that the statement was neither so inflammatory nor so misleading as to require a mistrial, noting that the word "pusher" has a common meaning, and that there was ample evidence that the defendant had distributed heroin.

The Johnson case is closely analogous to the present case, and we do not believe that the references made by the prosecutor were so inflammatory or prejudicial as to require a mistrial. Unlike the statements in State v. Casados, *supra,* the statements in this case were not directed toward an offense other than the crime charged, and were not nearly so inflammatory. Although such expressions as "bad check artist" and "paper hanger" should clearly not be used by prosecuting attorneys, their use in the present case cannot be said to be prejudicial where the evidence was overwhelming that the defendant had written an insufficient fund check. It was not reversible error for the trial court to overrule defendant's motion for a mistrial. Johnson v. United States, *supra.*

We now examine the issue of whether it was error for the trial court to admit in evidence photocopies of checks which were part of the Wisconsin bank's records in regard to the defendant's account in that bank. Three of the checks were written by the de-

fendant on his account in the North Carolina bank, and were deposited in the Wisconsin bank. As previously stated, these checks were not honored by the North Carolina bank. The remaining checks were ones written by the defendant to various persons or business enterprises between the end of July 1975, and November 1975; and returned to the payees by the Wisconsin bank because defendant had insufficient funds in his account.

Defendant objects to the admission in evidence of the photocopies of checks on two grounds. First, he contends that their authenticity was questioned, and that the originals should have been introduced; and, second, he argues that the checks were inadmissible because they were evidence of crimes other than the one with which he was charged in the information.

The first contention is groundless. The photocopies in this case were identified by a Wisconsin bank officer as part of the business records of that bank. The originals were not available because they had been returned to the payees or the defendant pursuant to normal banking procedure. Section 27-1002, R. R. S. 1943, provides generally that to prove the content of a writing, the original writing is required. Section 27-1003, R. R. S. 1943, however, provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." This court has previously held that a photocopy of a check made and retained by a bank is admissible in evidence where the original is returned to the maker by the bank. State v. Novak, 181 Neb. 90, 147 N. W. 2d 156 (1966).

In this case there is no genuine question raised at trial as to the authenticity of the original checks received by the Wisconsin bank. Defendant objected to the admission in evidence of the photocopies on

the ground that they were incompetent, irrelevant, and immaterial, not on the ground that the authenticity of the originals was questionable. Contrary to defendant's contention, the photocopies are legible such that the signatures of the drawer and payee, and the amount and date of each check are discernible. The officer of the Wisconsin bank testified to the fact that the photocopies are accurate representations of the originals, and he had personally reviewed the originals before they were photocopied and returned unpaid. Under the circumstances of the case, it was not unfair to admit the duplicates in lieu of the originals.

The second issue is whether the checks should have been excluded because they were evidence of crimes other than the one with which defendant was charged in the information. As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. State v. Brown, 190 Neb. 96, 206 N. W. 2d 331 (1973). Such evidence is admissible, however, to show motive, intent, or guilty knowledge; or if it establishes a course of conduct, scheme, design, or intent. State v. Moore, 197 Neb. 294, 249 N. W. 2d 200 (1976); § 27-404, R. R. S. 1943.

In the present case, the checks received as evidence clearly fall within the exception to the general rule. The State was required to prove not only that the defendant had delivered a check to Vogue Clothing Company with intent to defraud, but also that at the time he knew that he did not have sufficient funds in the bank upon which the check was drawn. § 28-1213, R. R. S. 1943; State v. Martin, 177 Neb. 209, 128 N. W. 2d 583 (1964). The three checks by which defendant purported to make deposits in the Wisconsin bank were documentary evidence in support of the Wisconsin bank officer's testimony that the defendant had made no deposits in his account after the end of July 1975; and that the account became

overdrawn as of August 7, 1975. Such evidence was clearly relevant to the issue of guilty knowledge on the part of the defendant that he had no funds in his account. The defendant's checks which were returned unpaid by the Wisconsin bank shortly before and after the date of the crime charged were evidence of defendant's knowledge that he had no funds in his account; and were relevant to the issue of intent to defraud, an element of the crime charged under section 28-1213, R. R. S. 1943. The fact that the defendant continued to write checks on his account after it was overdrawn showed a course of conduct relevant to the crime charged. The decision to receive evidence which may show that the defendant has committed crimes other than the one charged in the information, where such evidence shows intent, motive, knowledge, or a course of conduct is one left largely to the discretion of the trial court, and there was no abuse of discretion in this case. State v. Moore, *supra.*

Defendant next contends that his motion for new trial on the ground of newly discovered evidence should have been granted. Section 29-2101, R. R. S. 1943, provides that a new trial may be granted for the reason of "newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial." A new trial on the ground of newly discovered evidence may be granted when the evidence is competent, material, and credible, and so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. Seger, 191 Neb. 760, 217 N. W. 2d 828 (1974); Duffey v. State, 124 Neb. 23, 245 N. W. 1 (1932).

The laboratory report which defendant contends is newly discovered evidence has already been described. The report was not newly discovered evidence sufficient to support a motion for new trial on

that ground. It was not so potent as to probably result in a different verdict, and in fact supported the view that the defendant was guilty. It does not show, as the defendant suggests, that the State's evidence was not good. The State did not attempt to use the report or have its author testify at trial. With due diligence, the defendant could have secured evidence in regard to the authenticity of his signature on the check to Vogue Clothing Company prior to trial, had he wished to do so. The District Court was correct in overruling defendant's motion for new trial on the gound of newly discovered evidence. State v. Seger, *supra.*

The final contention of the defendant is that his sentence is excessive. Defendant was sentenced to a term of imprisonment for not less than 3 nor more than 5 years. He was given credit for the 292 days he was incarcerated after his arrest to the time of his sentence. Section 28-1213, R. R. S. 1943, provides that a person found guilty of delivering an insufficient fund check of more than $75 may be imprisoned not exceeding 10 years. Defendant's basic argument is that the insufficient fund check he delivered was for only $79.68, and that a sentence of 3 to 5 years imprisonment is excessive in light of the amount of the check in this case.

The defendant ignores his prior record and relevant factors properly considered in imposing a sentence. The defendant has operated under 14 different aliases. The State of Arizona, Montana, Kansas, and Oklahoma have issued arrest warrants for, or instituted charges against, the defendant for writing insufficient fund checks. In Wisconsin a criminal prosecution is pending against the defendant for issuing a worthless check. The charges in Arizona include the allegation that the defendant opened an account in an Arizona bank upon closed accounts in Illinois and Colorado banks, and then wrote checks on the Arizona bank account. At the time the defend-

ant was arrested, a large number of check blanks from numerous banks in different states were found.

Defendant's record includes grand larceny in the first degree, writing insufficient fund checks, and rape. He was sentenced to 10 to 20 years imprisonment upon his conviction of grand larceny in New York, and, when he was paroled, he violated the conditions of parole on more than one occasion.

The circumstances relevant to sentencing obviously did not consist of only one isolated event in regard to a small check. Defendant was engaged in an attempt to "float" nonexistent funds between banks, and then write checks before it was discovered that he had no funds in any bank. The amount of the check involved in a prosecution for delivering an insufficient fund check is a relevant factor in regard to sentencing, but the trial court is entitled to consider all relevant evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed. State v. Holzapfel, 192 Neb. 672, 223 N. W. 2d 670 (1974). We have repeatedly held that a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion on the part of the sentencing judge. State v. Tweedy, 196 Neb. 253, 242 N. W. 2d 631 (1976). In light of the circumstances of this case and the defendant's prior record, the trial court did not abuse its discretion in imposing the sentence it did.

We have carefully examined all the defendant's assignments of error, and they are without merit. The judgment and sentence of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BERNITA L. ANDREWS, APPELLANT.

255 N. W. 2d 875

Filed July 13, 1977. No. 41153.

1. **Criminal Law: Witnesses: Evidence: Juries.** It is not the province of this court on appeal to pass on the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence in a criminal case. These matters are for the jury.
2. **Criminal Law: Juries: Evidence: Verdicts.** The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Affirmed.

P. J. Heaton, Jr., for appellant.

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

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

CLINTON, J.

The defendant, Bernita L. Andrews, was charged with second degree murder in the killing of her husband, Donald R. Andrews, and upon trial by jury a verdict of guilty of manslaughter was returned. She was sentenced to a term of 1 year imprisonment. The defendant did not deny that she shot and killed her husband. She offered a defense of justification by reason of self-defense and defense of her 12-year-old son under the provisions of sections 28-836 and 28-837, R. R. S. 1943. The error assigned on the appeal to this court is that the trial court should have directed a verdict of acquittal because the undisputed facts established the defense of justification under the above statutes. No attack is made upon the instructions by which the defense of justification was submitted to the jury. We affirm.

Under the evidence, the ultimate question which the jury was called upon to decide was whether the

defendant reasonably believed, from the circumstances as shown by the evidence as they then appeared to the defendant, that the use of deadly force was immediately necessary to protect herself or her son from death or severe or serious bodily harm at the hands of Andrews. The jury was instructed on the defense of justification in accordance with the pertinent portions of NJI No. 14.33, Nebraska Jury Instructions, 1975 Pocket Part. This instruction placed on the State the burden of proving beyond a reasonable doubt that the use of deadly force was not justified.

A careful reading of the record leads us to the conclusion that a jury question was presented and that it was for the jury to determine whether the use of deadly force was justifiable.

A detailed recital of the evidence would serve no useful purpose and we therefore summarize. The shooting arose out of a domestic quarrel which occurred after the defendant, Andrews, and the defendant's daughter had spent an evening at various bars in the city of Sidney. Andrews had become very intoxicated. Witnesses described him as staggering drunk and a blood sample taken after death indicated an alcoholic content of 0.42 of 1 percent, which alcoholic content expert testimony indicated would render most persons unconscious. Andrews returned to the residence of the parties on foot previous to the return of the defendant. The defendant's 12-year-old son was babysitting at the residence with the daughter's children. He testified that when Andrews came home Andrews struck him because of a remark made by the boy. Leaving the home the boy reported the matter to his mother. Then she went to the home of the parties with her daughter. At that time Andrews was lying on the bed in the bedroom used by Andrews and the defendant. The defendant confronted Andrews with the boy's accusations. A somewhat extended argument

covering matters other than the striking of the boy developed. Andrews apparently became angry.

The evidence would permit the jury to find that before the argument reached its peak, and while Andrews was still lying on the bed, the defendant removed a loaded .22 caliber rifle from its location in the bedroom and placed it behind the door of the boy's bedroom immediately off the kitchen. Her son, on his own initiative, then took the gun from the location in which it was placed by his mother and put it in the closet of his room. As the quarrel developed and Andrews rose from the bed, defendant went to the kitchen, followed by Andrews. The defendant reached for the gun, and not finding it in the location where she had placed it, directed her son to get the gun, which he did. [The defendant's version of the placing of the gun was that she had not placed the gun behind the door, but that she had given the gun to her son and told him to hide it.] At the time the defendant received the gun from her son pursuant to her instructions, Andrews was then in the living room, approaching the kitchen, and the defendant and her son were in the kitchen. The defendant testified that she ordered Andrews to stop, and that when he did not, she fired a shot. When Andrews did not fall, but kept coming, she testified that she thought the shot had missed him so she fired another shot and Andrews collapsed. The autopsy showed that both shots had struck him in the chest, one passing entirely through his body. The shots were the cause of death.

The evidence would permit the jury to find that Andrews was so intoxicated that he was not likely to have caused serious harm, and that the claimed belief of the defendant that the use of deadly force was immediately necessary was not true. It would also permit the jury to find that while Andrews was moving toward the defendant he was gesticulating and mumbling, but not making threats of death or ser-

ious bodily harm, which the daughter testified that he was making. The daughter testified that he said, referring to the son, "he was going to stop that little bastard from causing any more trouble, if he had to kill him to do it." This latter testimony was seriously impeached. The witness admitted that a previous written statement given to law enforcement officers shortly after the incident mentioned no such threat and that she had first mentioned the matter to defense counsel only 2 weeks before trial and almost 10 months after the homicide.

The defendant testified as to her reasons for believing that Andrews intended to do her or her son harm, including the fact that he had struck her with his fists and that he had on two recent previous occasions shot at her with the same gun she used to shoot him, one which she had earlier given him as a present. Both previous shootings allegedly occured at extremely close range; one while she lay in bed and he stood nearby and one while she stood at the side of the car in which he was seated, and fired at her feet.

It was for the jurors to determine the truth of all the testimony, the import of the same, and whether, under the facts which they found to be true, the defendant was justified in her claimed belief that the immediate use of deadly force was necessary to save either herself or her son from death or serious bodily harm at the hands of Andrews. It is not the province of this court on appeal to pass on the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence. These matters are for the jury. State v. Bohannon, 187 Neb. 594, 193 N. W. 2d 153; State v. Lacy, 195 Neb. 299, 237 N. W. 2d 650. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Lacy, *supra;* State v. Fowler, 193 Neb. 420, 227 N. W. 2d 589.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GREG GOLTER, WILLIAM GOLTER, AND ALAN GOLTER, APPELLANTS.

255 N. W. 2d 878

Filed July 13, 1977. No. 41190.

Appeals from the District Court for Knox County: MERRITT C. WARREN, Judge. Affirmed.

John Stevens Berry of Friedman & Berry, for appellants.

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

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

BOSLAUGH, J.

The defendants were charged jointly with assault with intent to inflict great bodily injury. Upon trial to the court the defendants were found guilty of assault and battery. They have appealed and contend the evidence was not sufficient to sustain the judgment and the sentences imposed were excessive and disproportionate.

The charge arose out of a fight in a bar in Niobrara, Nebraska, on December 28, 1975. On the evening of December 27, 1975, the defendant, Greg Golter, had been involved in a scuffle with Chad Wilson in a bar in Monowi, Nebraska. In that scuffle Greg's glasses had been broken. On the following day Greg, accompanied by Russell Bahr, John Howe, and the other two defendants, went to Niobrara, Nebraska, to obtain an apology from Wilson and payment for the glasses.

After arriving in Niobrara the defendants went to the Cornhusker Bar. Greg called Wilson and arranged for him to come to the bar. After arriving at the bar Wilson sat down in a booth with Greg and they had a conversation. The evidence is in sharp conflict as to what happened after that.

The State's evidence tended to show that while Wilson was seated in the booth talking to Greg, one of the other men approached Wilson from behind, pulled him from the booth, and began to beat him. The other defendants joined in the fight during which Wilson was beaten with fists, struck with a pool cue, and then kicked repeatedly after he had fallen to the floor. When the bartender, Hazella May, attempted to call the police, Greg held her arms and prevented her from doing so.

When the defendants left the bar Wilson was lying face down in a pool of blood. He had a fractured nose, a fractured jaw, and a fractured skull. He had a 5-inch laceration over the right temple, a 2-inch laceration behind the left ear, and numerous other bruises and lacerations. Wilson was hospitalized for 3 days after the fight.

The defendants' evidence was to the effect that the fight started when the defendant Alan Golter came to the booth where Wilson and Greg were sitting. According to their evidence, Wilson struck at Alan and then wrestled with Alan, attempting to force him to the floor. Bahr came to the aid of Alan, striking at Wilson with a pool cue but hitting Alan by mistake. The defendant William Golter pulled Alan away from Wilson, who then fell to the floor after he had been struck by Bahr. While the fight was in progress, Greg was near the bar trying to calm Mrs. May who was hysterical. John Howe was not involved.

The evidence presented a question of fact as to what happened and the extent to which each defendant participated in the beating, as either a principal or an aider and abettor. The record fully supports the finding of the trial court that each defendant was guilty of assault and battery.

Although Bahr was charged separately, his case was consolidated for trial with this case. Bahr did not testify at the trial and he has not appealed.

Howe was a resident of Texas. A warrant was issued for his arrest but he was never found.

Bahr and Alan Golter were sentenced to 3 months imprisonment in the county jail. Greg Golter was sentenced to 45 days imprisonment in the county jail. William Golter was fined $250.

The three defendants are brothers. Alan is 29 years of age. Greg is 26 years of age. William is 24 years of age. Alan and William are farmers who farm with their father. Greg is a registered nurse employed at a hospital in Lincoln, Nebraska.

The defendants have no significant criminal record. Alan has had a number of traffic offenses and William has been found guilty of possession of less than 1 pound of marijuana.

The record shows that all the defendants participated in a vicious and brutal assault upon the victim Wilson. The trial court found that the fight started when Alan grabbed Wilson from the rear. Bahr then came to the aid of Alan and struck or attempted to strike Wilson with the pool cue. Bahr admitted at the sentencing hearing that he had struck Wilson in the nose with his fist and had kicked him after he was down. He also stated that Alan had kicked Wilson in the head a couple of times and had jumped up and down on his back. The evidence established that Bahr and Alan did most of the beating and deserved the greatest sentences.

Greg was the instigator. He arranged for Wilson to come to the bar so that Greg could obtain an apology and reparation for the event of the night before. While the fight was in progress he restrained Mrs. May so that she was unable to call the police until the beating was over. At the sentencing hearing, Greg admitted that he had hit Wilson. Thus, Greg was both an active participant in the beating as well as an aider and abettor. Since he did not directly participate in the violence to the extent that Bahr

and Alan did, it is reasonable that he should receive a lesser sentence.

William's participation in the fight appears to have been the effort to pull Alan away from Wilson. Under those circumstances a sentence of only a fine was reasonable.

We find no merit in the defendants' contentions that the sentences were excessive and disproportionate.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARK W. THOMPSON, APPELLANT.

255 N. W. 2d 880

Filed July 13, 1977. No. 41205.

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

T. Clement Gaughan and George R. Sornberger, for appellant.

Paul L. Douglas, Attorney General, and Melvin K. Kammerlohr, for appellee.

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

BOSLAUGH, J.

The defendant was charged with first degree murder in the death of Thomas E. Smith, Jr. After the case had been set for trial the State obtained leave to file an amended information charging second degree murder to which the defendant pleaded guilty. After an evidentiary hearing under section 29-2027, R. R. S. 1943, to determine the degree of the crime, the trial court found the defendant guilty of second degree murder and accepted the plea of guilty. A

presentence investigation was made and the defendant was sentenced to life imprisonment.

The defendant has appealed and contends the sentence imposed was excessive.

The defendant is 26 years of age, and married but separated from his wife. He has completed 2 years of college and was employed at the time of the offense. He is partially disabled as a result of an injury to his right knee while serving in Viet Nam.

The defendant had attended a party at the home of his sister, Rosie Hicks, on the evening of April 9, 1976. During the evening an argument developed, a fight broke out, and several guests subdued the defendant by getting him down on the floor. The defendant was scratched and bruised in the fight. According to the defendant, a guest named Wally Morris made some threats that he would kill the defendant the next time he saw him.

The defendant worked until noon the following day. He commenced drinking and smoking marijuana during the afternoon. He purchased a .22 caliber semiautomatic rifle and some ammunition and then returned to his apartment. At about 8 p.m. Betty Mae Thompson, his niece and sister by adoption, came to see him. She said that he was crying and upset over what had happened at the party the night before; that the defendant said he was going to kill her mom and her cousin, Pam Thompson, and showed her the rifle he had purchased; and that he wanted to talk to Stanley Proctor, a friend of his. She then went to Proctor's apartment and induced him to go see the defendant.

Proctor stated that he found the defendant crying and that the defendant said he had to go over to his sister's house to talk to her. The defendant and Proctor then went to Mrs. Hicks' house.

The defendant walked into his sister's house carrying the loaded rifle. There were a number of people in the house including Mrs. Hicks, Thomas E. Smith,

Jr., the victim, and other members of the family. The defendant pointed the gun at Mrs. Hicks and said he wanted to talk to her about what had happened the night before. He also pointed the rifle at several other persons in the room including Pamela Thompson and Mary Virgil, a friend of the victim. Smith, who was also known as "Tony," pushed or knocked the defendant against the wall in an effort to disarm him. Proctor intervened and pulled Tony away from the defendant who regained his footing and the rifle. Tony and the defendant then had a brief conversation. Tony had started to leave the room when the defendant shot him. The bullet struck Tony in the chest near his right shoulder severing his trachea and several arteries. Tony ran out of the house, fell to the ground, and died.

The foregoing is a brief summary of the evidence as to what happened at the time of the killing. There is conflict in the testimony of the various witnesses as to the details of what happened, but there is no dispute about the essential facts.

The defendant admitted the killing but attempted to claim self-defense. The evidence is clear that Tony was unarmed, the defendant was in no danger at the time he shot Tony, and the killing was a deliberate act. There is no merit to the claim of self-defense. The evidence fully supports the finding that the defendant was guilty of second degree murder.

The defendant contends there are mitigating factors in the case which require the sentence be reduced to a term of years. These factors include the absence of a prior criminal record, the defendant's military service, his employment record, and his continuing efforts to obtain an education. These, of course, are factors which weigh in favor of the defendant.

The circumstances of the crime itself, however, weigh heavily against the accused. He demonstrated a violent nature during the party on the night pre-

ceding the killing. On the following day he purchased the gun and ammunition which he took to his sister's house where he pointed the loaded rifle at several members of the family. Then, with no justification whatever, he deliberately killed Tony, who had been his friend for many years. Under these circumstances we are unable to say that the trial court abused its discretion in imposing the maximum sentence.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ADDIE DONALD, APPELLANT.

256 N. W. 2d 107

Filed July 20, 1977. Nos. 40939, 40940.

1. **Criminal Law: Statutes: Evidence: Waiver: Time.** If a defendant waives his right to have physical evidence suppressed by failing to make a timely motion to suppress under the provisions of section 29-822, R. R. S. 1943, he cannot avoid the consequence of his waiver and secure the results of an order of suppression by the expedient of a late motion to suppress testimony.
2. **Criminal Law: Searches and Seizures: Evidence: Waiver: Time.** A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial and where the exceptions thereto have no application.
3. **Criminal Law: Searches and Seizures: Stop and Check: Evidence: Arrest: Probable Cause.** The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of routine investigation, and any incriminating evidence which comes to that officer's attention during this period of detention may become a reasonable basis for effecting a valid arrest.
4. **Criminal Law: Constitutional Law: Searches and Seizures: Probable Cause: Arrest.** Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same. Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient

in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.

5. **Criminal Law: Constitutional Law: Searches and Seizures.** General proscription of the Fourth Amendment is against unreasonable, not warrantless, searches.
6. **Criminal Law: Constitutional Law: Due Process: Trial: Prosecuting Attorneys.** A comment to the jury by a prosecutor in a state criminal trial upon a defendant's failure to testify as to matters which he can reasonably be expected to deny or explain because of facts within his knowledge or by the court that the defendant's silence under those circumstances evidences guilt violates the self-incriminating clause of the Fifth Amendment to the Constitution of the United States as made applicable to the states by the Fourteenth Amendment.
7. **Criminal Law: Constitutional Law: Appeal and Error.** Before a constitutional error can be held to be harmless the court must be able to declare its belief that it was harmless beyond a reasonable doubt.
8. **Criminal Law: Trial: Appeal and Error: Statutes.** No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case for error as to any matter of procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred. § 29-2308, R. R. S. 1943.

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

Thomas M. Kenney and Bennett G. Hornstein, for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellee.

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

CLINTON, J.

The defendant was convicted by a jury of the crime of receiving stolen property. At the time of the commission of that crime he was on probation for another felony conviction. He is also charged with violation of his probation. By stipulation, it was agreed that evidence from the trial on the charge of receiving stolen property could be consid-

ered in determining the violation of the terms of the probation. On June 16, 1976, the defendant was sentenced to serve 3 years in the Nebraska Penal and Correctional Complex on the conviction of receiving stolen property, said sentence to be served consecutively to a sentence of 1 to 3 years on a charge of writing a forged instrument, the charge on which he had been on probation. On this appeal the first error assigned is that the trial court erred in refusing to suppress certain physical evidence seized in the search of a trunk of a car on February 25, 1976. The second and remaining assignment is that the trial court erred in overruling the defendant's motion for a mistrial because of alleged comments of the prosecutor in his closing argument to the jury about the defendant's failure to explain his possession of the stolen goods in the trunk of the motor vehicle.

The first assignment of error must fail for three reasons: (1) The motion to suppress was not timely filed and the objection to the alleged unlawful seizure was therefore waived. (2) The evidence supports the conclusion the search was made at the defendant's consent. (3) The evidence supports the conclusion and finding that probable cause for such search existed.

The record before us does not disclose that any written motion to suppress the evidence was ever filed in this case in accordance with the provisions of section 29-822, R. R. S. 1943. An oral motion to suppress was made on the first day of trial. The statute referred to provides that the motion must be filed in the District Court "where a felony is charged . . . and must be filed at least ten days before the trial or at the time of arraignment, whichever is the later." The statute further provides: "Unless claims of unlawful search and seizure are raised by motion before trial as herein provided, all objections to use of the property as evidence on the ground that it was obtained by an unlawful search and seizure shall be

deemed waived." The statute also contains exceptions as follows: (1) "unless otherwise permitted by the court for good cause shown," and (2) "the court may entertain such motions to suppress after the commencement of trial where the defendant is surprised by the possession of such evidence by the state, and also may in its discretion then entertain the motion where the defendant was not aware of the grounds for the motion before commencement of the trial." Here the record shows the defendant was present when the search was made and observed the seizure of the property. No attempt was made at trial to show good cause why a late filing of the motion should have been permitted.

When the oral motion was made on the first day of trial, objection was made by the State that the motion was untimely. The court overruled the motion. The defendant, through counsel, expressly waived a continuance. During the course of trial, and during the testimony of the officer who made the seizure of the property and the arrest, an unrecorded discussion "in an undertone, and out of the hearing of those present, and not reported by the Court Reporter" took place between the judge and respective counsel. The following is shown by the record to have occurred. "[DEFENSE COUNSEL]: Your Honor, may I approach the Court Reporter to make my objection? THE COURT: You may. (WHEREUPON, [defense counsel], . . . approached the Court Reporter, and in an undertone and out of the hearing of those present, made the following record.)

"[DEFENSE COUNSEL]: I would like the record to reflect that a previous motion to suppress was made by the defendant in this particular case, and in lieu of holding a separate hearing, the Court is going to use the testimony of this witness to determine the question of search and seizures, and the defendant is not waiving any of his right thereto and will have a ruling on it by the Judge with regards to that partic-

ular motion." Nothing appears in the record to show that the statement of defense counsel just referred to was agreed to by the State, nor that the trial judge had acceded to its stated purposes.

"If a defendant waives his right to have physical evidence suppressed by failing to make a timely motion to suppress under the provisions of section 29-822, R. R. S. 1943, he cannot avoid the consequence of his waiver and secure the results of an order of suppression by the expedient of a late motion to suppress testimony. . . ." State v. Bartlett, 194 Neb. 502, 233 N. W. 2d 904. "A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial and where the exceptions thereto have no application." State v. Stowell, 190 Neb. 615, 211 N. W. 2d 130.

The substance of the testimony of the officer who made the search and the arrest was that on the day in question, while cruising his district, he received a call, "to check the beauty shop at 1823 North 33rd Street for a possible robbery in progress." He had been informed that the report had come to the police department from the 911 operator and that the operator had "locked in" on the phone from which the report had come. The officer drove to the address indicated and parked his car in the street adjacent to the beauty shop. He entered the beauty parlor and talked to the son of the proprietor, the only person then present, and was informed that no robbery was in progress. At that time he noted a car parked nearby with two occupants in it. During the minute or two he was in the shop, one Donald Wright entered. Wright was talkative. He told the officer that something might be going on across the street, then left.

The officer communicated with police headquarters by hand radio while still in the shop and was told that the 911 operator was still "locked in" on the

number from which the call had come. The officer then left the shop and went to a nearby telephone booth. The receiver was off the hook and the 911 operator was on the line. The officer drew the conclusion [and to us it seems a reasonable one] that it was the phone from which the report of the robbery in progress had come. In the meantime the car which the officer had earlier observed parked nearby was driven away.

The officer then got in his car, drove away a short distance, and parked in an alley where he could observe both the beauty shop and an adjacent liquor store. He knew that there were doorways connecting the two shops. After a few minutes the car he had earlier observed returned and parked adjacent to the beauty shop. Donald Wright, to whom he had talked earlier and who was a passenger in the car, got out and went into the beauty shop through the front entrance. The driver of the car, later determined to be the defendant, got out of the automobile and stood by its trunk. A moment later Wright appeared at the doorway of one of the two shops (the record is unclear as to which), and signaled to the driver, who then opened the trunk of the car. Wright then came out of the liquor store carrying two green carrying cases, the exact nature of which the officer could not determine from his point of observation. The cases were placed in the trunk of the car, the trunk lid was then closed, and the two parties got in and began to drive away.

The officer called other cruisers in the vicinity and the car was stopped about a block from the shop. The driver on request got out of the car. He had no identification. The officer informed the defendant of all that he had observed and also related to the driver the report that had been received by the 911 operator, and then told the defendant that he wanted to make inquiry concerning the objects which had been placed in the trunk. The officer testified that

after he had determined that the defendant had no identification on his person and after the conversation above referred to had taken place, he asked the defendant to open the trunk. He stated that the defendant agreed and did open the trunk. The officer then observed a movie projector and a dictating machine. Defendant then stated that he owned them and that he used them in his work. Earlier the officer had determined that the car did not belong to either of the occupants. After the trunk was opened the officer took down the serial numbers of the two machines. He then immediately called the station and was quickly informed that the machines were reported to have been stolen.

The record otherwise shows that these machines and others had been earlier stolen from the place where the defendant was employed.

The area where these events took place is a high crime area.

A reasonable conclusion from the foregoing is that Donald Wright's entry into the beauty shop while the officer was there was an attempt at diversion. The officer stated he suspected that some criminal activity was going on although he was not sure what. He also stated that he knew that Donald Wright was suspected by the police of other crimes.

After the officer learned that the items were stolen the defendant was arrested.

At trial when the two machines were offered in evidence, objection was made that the foundation was insufficient. The objection was overruled.

The defendant later, out of the presence of the jury, but apparently pursuant to some understanding not made completely clear by the record, took the stand and testified to the circumstances surrounding the stop, search, and arrest. His version of the conversation which took place at that time contradicted that of the officer. He testified that the officer said: ". . . would you open your trunk or do

we have to open it for you." He stated he feared police harassment and that was the reason he opened the trunk. Following this testimony the trial judge said: "The ruling of the Court will stand on the search; it was justified under the circumstances."

The evidence if believed by the trial judge was sufficient to enable the trial judge to determine (1) that probable cause for the search existed, and (2) that, although the trial judge made no specific finding on the point, the search was made with consent.

The applicable rules of law are these. "The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of routine investigation, and any incriminating evidence which comes to that officer's attention during this period of detention may become a reasonable basis for effecting a valid arrest." State v. Irwin, 191 Neb. 169, 214 N. W. 2d 595. See, also, Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889; Adams v. Williams, 407 U. S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612. "Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same. . . . Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." State v. Dussault, 193 Neb. 122, 225 N. W. 2d 558. "General proscription of Fourth Amendment is against unreasonable, not warrantless, searches." Brewer v. Wolff, 529 F. 2d 787. See, also, Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543.

With reference to the assignment that the trial court erred in denying the defendant's motion for a mistrial because of the prosecutor's comments upon

the defendant's failure to testify, the record discloses that during the course of the final argument the prosecutor, after pointing out the evidence which tended to show that the defendant had previously pawned a recorder, an additional item which apparently had been stolen from the defendant's employer, went on to say: "He was driving down the street, you've got stolen property in the trunk — the property which came from your employer, you've got a Police car in front of you and a Police car in back of you.

"You've got a man sitting here who the Officer just saw put the stuff in the trunk.

"You're caught.

"You're either going to flat lay it all out, open the trunk and show it to them or you're going to go back there — with a certain — you want to talk about how certain people react.

"Well, here's things from his employer who he has in his car.

"Now, wouldn't that be a good way to get out of it.

"They are from my employer — I didn't steal them.

"They're here —." At that point defense counsel interrupted and moved for a mistrial. The prosecutor sought permission from the court to complete that portion of his argument. The court refused, cautioned the prosecutor that the argument was bordering on something not proper argument, and told him to get off the subject.

Obviously both the defense counsel and the trial judge interpreted the remarks as a comment on the defendant's failure to take the stand and testify on his own behalf. However, the court overruled the motion for a mistrial.

We cannot, from an examination of the record, be sure that the prosecutor was intending to comment upon the accused's failure to take the stand for the reason that the prosecutor did not complete that

phase of his argument because of the court's ruling. Viewing the cold record, the point of the argument may have been an attempt to show that the remark made by the defendant at the time of the search [testified to by the arresting officer], that the machines belonged to him and that he used them in his work, was in fact an admission of guilt because, if the possession was innocent, the more likely and reasonable explanation the defendant would have given at that time would have been to the effect that the items belonged to his employer and he used them in his job.

It is, of course, constitutional error for a prosecutor or a judge to comment on the failure of an accused to testify. Bruntz v. State, 137 Neb. 565, 290 N. W. 420; Griffin v. California, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106.

We do not interpret the prosecutor's comments to the jury as an attack, by implication, upon the defendant for failing to testify in his own defense. Rather, those comments appear to us to have been intended as a refutation of the defendant's explanation relating to the stolen items in the trunk, as testified to earlier by the police officer.

In any event, we have no hesitancy in coming to the conclusion that the error, if any, was harmless beyond a reasonable doubt and did not contribute to the defendant's conviction. Chapman v. California, 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705. In arriving at this conclusion we consider the strength of the evidence against the defendant. The defendant's employer discovered items were missing in January 1976, while the defendant was employed by an organization called GOARC, which owned the property. The cartons containing the machines were on the shelves in their usual locations, but were found to be empty. Inquiry was then made of all employees, including the defendant, as to where the items might be and whether it was possible that they

had been checked out by someone without the necessary paper work. No affirmative response was received from anyone, including the defendant. As already noted, part of the evidence against the defendant (to show knowledge, intent, and design) was evidence that he was the person who had pawned another missing item. The owner of the pawn shop did not make an eyewitness identification of defendant, but identified as accurate the signature on the pawn ticket as that of the person who pawned the articles. He also confirmed the physical description that appeared on the pawn ticket of the person pawning the machine. A handwriting expert identified the signature of the pawn ticket as that of the defendant. The circumstances of the finding of the items in the defendant's possession cannot in any way be equated with one of innocence. This appears to be a case where the injunction of section 29-2308, R. R. S. 1943, applies, to wit: "No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case . . . for error as to any matter of . . . procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occured."

AFFIRMED.

WHITE, C. THOMAS, J., dissenting.

In State v. Brooks, 189 Neb. 592, 204 N. W. 2d 86, this court held that an inadvertent statement relating to defendant's failure to testify will not justify a reversal of a conviction where the evidence of guilt is overwhelming, citing Bruntz v. State, 137 Neb. 565, 290 N. W. 420.

The comment by the prosecutor appears to have been planned and intentional. It is impossible to conceive of an experienced prosecutor being unaware of the doctrine of Griffin v. California, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106.

I severely doubt that comments of a prosecutor of

an accused's failure to testify can ever be harmless error. I dissent for the reasons set forth in the dissent of McCown, J., in State v. Brooks, *supra*.

McCOWN, J., joins in this dissent.

JOHN MADDOX AND CAROL MADDOX, BY THEIR GUARDIAN, J. MICHAEL FITZGERALD, APPELLEES AND CROSS-APPELLANTS, V. FIRST WESTROADS BANK A CORPORATION, APPELLANT AND CROSS-APPELLEE, IMPLEADED WITH CENTER BANK, A CORPORATION, APPELLEE AND CROSS-APPELLEE.

256 N. W. 2d 647

Filed July 20, 1977. No. 41074.

1. **Uniform Commercial Code: Banks and Banking: Forgery.** A bank is bound to know the genuine signature of its customers, and may not charge a customer's account without receiving a valid order to do so. § 4-401, U. C. C. It may not properly charge a customer's account on the basis of a forged withdrawal slip.
2. **Uniform Commercial Code: Banks and Banking: Forgery: Checks, Drafts, and Notes: Negotiable Instruments.** Under section 3-419, U. C. C., the payee or true owner of a check which is cashed bearing a forged endorsement may recover from a drawee bank which has paid the check.
3. _____: _____: _____: _____: _____. Under section 4-207, U. C. C., when a collecting bank receives a check bearing a forged endorsement and processes it through banking channels, the warranties set forth in section 4-207 apply, and the fact that the drawee bank has paid the check does not bar it from recovery under the warranties of the collecting bank on the ground that final payment has been made.
4. _____: _____: _____: _____: _____. When a bank delivers a cashier's check made payable to its customer to a purported agent of the customer, who forges the name of the payee as endorser thereof, section 3-405, U. C. C., does not operate to validate or make such endorsement effective.
5. **Uniform Commercial Code: Banks and Banking: Forgery: Negotiable Instruments.** Under sections 1-201 and 3-302, U. C. C., a collecting bank receiving a check bearing a forged endorsement is not a holder in due course of the item.
6. **Uniform Commercial Code: Banks and Banking: Forgery: Checks, Drafts, and Notes: Negligence: Negotiable Instruments.** Under section 3-406, U. C. C., a drawer is precluded from recovery

against a bank which pays a check bearing a forged endorsement only where the drawer's negligent conduct contributes to the forgery, and not merely to the unwarranted issuance of the check.

7. **New Trial: Evidence: Time.** A party moving for a new trial on the ground of newly discovered evidence must show that the evidence came to him since the trial and was not equally available to him previous to the trial, and was not simply discovered by exercise of belated diligence. Newly discovered evidence is not sufficient reason for a new trial of a cause if diligence before the trial would have produced notice or knowledge of the alleged recently discovered evidence.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed in part, and in part reversed and remanded with directions.

William J. Tighe, for appellant.

J. Michael Fitzgerald of Matthews, Kelley, Cannon & Carpenter, for appellees Maddox.

Ronald H. Stave and J. Michael Coffey of Emil F. Sodoro Law Office, for appellee Center Bank.

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

BRODKEY, J.

In a petition filed in the District Court for Douglas County on June 18, 1975, John and Carol Maddox, hereinafter called plaintiffs, by their guardian, sought damages against defendants First Westroads Bank and Center Bank on the grounds that the defendants had unlawfully permitted improper charges to be made against savings accounts held by plaintiffs in Westroads; and that the depletion of the savings accounts was the result of forgery. In their petition and amended petition plaintiffs alleged that Westroads had improperly charged and closed their savings accounts at Westroads upon presentation of withdrawal slips bearing the forged signatures of their guardian; that Westroads had issued two cashier's checks, payable to their guardian, in closing the accounts; and that the cashier's checks

were deposited in Center Bank, and presented to and paid by Westroads, upon the forged endorsements of their guardian. Plaintiffs alleged that improper charges to their accounts at Westroads and forgeries of their guardian's signatures on the withdrawal slips and cashier's checks made defendants liable to them in the amount of $18,364.22, plus interest.

In their answers, both defendants denied the forgeries, and each alleged that any damages plaintiffs may have suffered were not proximately caused by it. The defendants filed cross-claims against each other, each alleging that any loss sustained by plaintiffs was due to the negligence of the other bank. Both defendants disclaimed liability to each other under provisions of the Uniform Commercial Code.

This case was submitted to the trial court upon motions for summary judgment filed by all three parties. The trial court entered summary judgment in favor of plaintiffs against Westroads. It dismissed plaintiffs' claims against Center Bank, and entered judgment in favor of Center Bank on Westroad's cross-claim, except for any proceeds from the cashier's checks which remained in Center Bank. Westroads has appealed from the judgments of the trial court, and plaintiffs have cross-appealed from the dismissal of their claim against Center Bank. We affirm the judgment in favor of plaintiffs against Westroads, and reverse the judgment in favor of Center Bank on Westroads' cross-claim.

The evidence presented in this case by the parties in support of their motions for summary judgment consisted of affidavits, a stipulation of facts, and documentary evidence. There was no dispute of relevant facts at the time the motions were submitted, and the facts are as follows.

Richard Maddox died in May 1973, leaving life insurance policies in which plaintiffs were named as beneficiaries. "Barbara Jean Maddox" was appointed guardian of the plaintiffs on May 31, 1973.

On October 22, 1973, Joseph Savin, representing himself as the attorney for Barbara, opened two savings accounts at Westroads. The accounts were opened in the name of "Barbara J. Maddox," as guardian of each of the plaintiffs. Savin deposited an insurance check in the amount of $7,500 in each account, the checks bearing the typewritten endorsement of Barbara as guardian of each plaintiff. On November 14, 1973, the additional sum of $1,500 was deposited in each account. It is admitted that Westroads never obtained a signature card from Barbara at any time relevant to this case.

On May 6, 1974, Savin presented to Westroads two withdrawal slips which bore the forged signatures of Barbara, stating that he wished to withdraw all the funds in plaintiffs' accounts. Westroads issued two cashier's checks, payable to Barbara as guardian of each of the plaintiffs. The total amount of the two checks was $18,364.22, which was also the total amount of funds in the savings accounts. On the line for the name of the remitter on each check, the words "To Close Account" were typed. The two checks were given to Savin. Westroads admits that its employees made no comparison of the signatures on the withdrawal slips with signatures of Barbara on any signature cards when the money was withdrawn from the accounts.

On May 7, 1974, Savin presented the Westroads checks to Center Bank. The checks were endorsed "Pay to the Order of JOSEPH SAVIN, Trustee," and bore the forged signature of Barbara, as guardian of each plaintiff. Beneath Barbara's forged signature was the signature of Joseph Savin, as trustee for Barbara, guardian of plaintiffs. Savin also purchased two Center Bank savings certificates payable to himself as trustee for Barbara, guardian of plaintiffs. The initial deposits and purchase price of the savings certificates at Center Bank totalled $18,364.22, which was also the total amount of the Westroads

cashier's checks. Center Bank endorsed the Westroads cashier's checks, stamping them "P.E.G." (prior endorsement guaranteed), and presented them to Westroads through normal banking channels. Westroads honored the checks.

During the period from May 10, 1974, to November 5, 1974, Savin withdrew $8,300 from the accounts in Center Bank and redeemed the Center Bank savings certificates for more than $10,000, depleting almost the entire amount of funds initially placed in Center Bank.

After the judgments were rendered in this case, Westroads filed a motion to set aside the judgments and for new trial on the ground of newly discovered evidence. A hearing was had on this motion, and the following facts were adduced.

In 1973, Savin rented office space from an Omaha law firm which was handling a wrongful death action in regard to the death of Richard Maddox. Savin was handling guardianship matters for Barbara. In 1974, James Miller, a member of the law firm which rented office space to Savin, received a bill in connection with the guardianship funds of the plaintiffs. Savin was no longer available for consultation, and Miller's investigation led to the discovery that Savin had withdrawn the guardianship funds from Westroads. On March 24, 1975, Miller wrote a letter to the president of Westroads, stating that he had found materials concerning the guardianship in a file his law firm had maintained in regard to the wrongful death action it had handled. The letter stated that the file contained copies of the Westroads cashier's checks, and that Miller's inquiry would continue. This letter was received by Westroads prior to trial, and was given to its attorneys. Westroads did not request to see the guardianship materials in the file, nor did Miller deny Westroads access to the file.

After the judgments were rendered in this case, the president of Westroads discussed the case with

Miller; and an examination of the file in Miller's possession led to discovery of a copy of a purported authorization signed by "Barbara Jean Maddox," which authorization was dated February 27, 1974, addressed to Westroads, and stated that Savin had the authority to withdraw funds from the guardianship accounts. A copy of a letter from Savin to Barbara, dated February 25, 1974, and requesting authorization to withdraw funds from the guardianship accounts, was also discovered. Westroads contended that the authorization was newly discovered evidence which warranted the granting of a new trial. The trial court overruled the motion of Westroads.

On appeal, Westroads contends that the judgments against it were not sustained by the evidence and contrary to law; that the trial court misconstrued the provisions of the Uniform Commercial Code; and that the trial court erred in overruling its motion for a new trial on the ground of newly discovered evidence. In their cross-appeal, plaintiffs contend that it was error to dismiss their claim against Center Bank, although they concede that if the judgment in their favor against Westroads is upheld, they have no right to recover from Center Bank.

This case involves the interpretation of provisions of Articles 3 and 4 of the Uniform Commercial Code, and certain definitions in the Code are relevant as an introduction to the following discussion. Plaintiffs, by their guardian, Barbara, were "customers" who maintained "accounts" at Westroads. § 4-104, U. C. C. Westroads, in issuing the cashier's checks, was both the "drawer" and "drawee" of the checks, as a cashier's check is simply a bill of exchange or draft drawn by a bank upon itself. Brady on Bank Checks, § 1.6, p. 10 (4th Ed., 1969). Barbara was the "payee" on the cashier's checks, as the checks were made payable to her order. See § 3-110, U. C. C. Westroads was the "payor bank" and Center Bank

was a "depositary bank" and a "collecting bank" under section 4-105, U. C. C.

We first consider the issue of whether the trial court erred in entering judgment in favor of plaintiffs against Westroads. The foundation of the relationship between a bank and its customer is the bank's agreement to pay out the customer's money only on his or her order, and the bank's relation to its depositor is that of debtor and creditor. White & Summers, Uniform Commercial Code, § 17-1, p. 551 (1972); Glass v. Nebraska State Bank, 175 Neb. 673, 122 N. W. 2d 882 (1963). Section 4-401, U. C. C., provides that a bank may charge against a customer's account any item which is "properly payable" from that account.

In the present case, Westroads was indebted to plaintiffs in the amount of the deposits made in their accounts. Westroads proceeded to charge and close plaintiffs' accounts upon receipt of the forged deposit slips and issuance of the cashier's checks. The process was completed when Westroads paid the cashier's checks. Westroads seeks to avoid liability to plaintiffs by arguing that it was not negligent in closing the accounts by issuing cashier's checks payable to the customers and delivering the checks to an agent of the customers, even though the withdrawal slips bore the forged signature of its customers' guardian.

Such an argument is without merit, as Westroads' liability to plaintiffs rests on several grounds. First, Westroads charged plaintiffs' accounts without receiving a valid order to do so. It is elementary that a bank is held bound to know the genuine signature of its customers. United States Fidelity & Guaranty Co. v. First Nat. Bank of Omaha, 129 Neb. 102, 260 N. W. 798 (1935). A bank may not permit withdrawal of funds from a savings account absent an order of its depositor. Where a savings bank grants withdrawal payments to a person not representing himself to be

the depositor and who obtains payment upon the strength of an order purported to be signed by the depositor, the same rules should apply as are applicable to banks with respect to forged checks. 10 Am. Jur. 2d, Banks, § 529, p. 505. Those rules provide that a bank paying a forged check may not charge the amount of the check against the account of the person whose name is forged. See, Brady on Bank Checks, § 15.2, p. 284 (Supp., 1977); Comments to § § 3-417 and 3-418, U. C. C.; United States Fidelity & Guaranty Co. v. First Nat. Bank of Omaha, *supra*. Therefore Westroads could not properly charge plaintiffs' accounts on the basis of the forged withdrawal slips.

The fact that Westroads made the cashier's checks payable to plaintiffs' guardian does not permit it to escape liability to plaintiffs. The payee or true owner of a check which bears a forged endorsement may recover from a drawee bank which has paid the check on the forged endorsement under section 3-419, U. C. C. That section provides that an instrument is converted when it is paid on a forged endorsement, and that the measure of the drawee's liability is the face amount of the instrument. The payee or owner of a cashier's check may clearly recover from the bank which issues the cashier's check and pays it over a forged endorsement of the payee. See, Twellman v. Lindell Trust Co., 534 S. W. 2d 83 (Mo. App., 1976); Myers v. First National Bank of Scotia, 345 N. Y. S. 2d 204, 42 App. Div. 2d 657 (1973); Taylor v. Equitable Trust Co., 269 Md. 149, 304 A. 2d 838 (1973); Jerman v. Bank of America, 7 Cal. App. 3d 882, 87 Cal. Rptr. 88 (1970).

It can be seen that Westroads could not properly charge plaintiffs' accounts either by means of the forged withdrawal slips or by payment of the cashier's checks, which bore forged endorsements of plaintiffs' guardian. It should be noted that a drawee bank has certain defenses under the Uniform Com-

mercial Code, such as negligence on the part of a person who substantially contributes to an unauthorized signature, or failure to comply with the duties imposed upon customers of banks. See § § 3-406 and 4-406, U. C. C. Westroads, however, did not raise such defenses in its pleadings or during the proceedings in the District Court, and therefore such issues are not present in this case.

Although Westroads was properly held liable to plaintiffs, it was error for the trial court to enter judgment in favor of Center Bank on Westroads' cross-claim. Section 4-207, U. C. C., provides that: "(1) Each customer or collecting bank who obtains payment or acceptance of an item and each prior customer and collecting bank warrants to the payor bank or other payor who in good faith pays or accepts the item that (a) he has a good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title; * * *." Under this provision, a collecting bank obtaining payment for an item bearing a forged endorsement is liable to the payor or drawee bank upon its warranties. The first bank in the collection chain must make sure that the endorsement on a check is valid, as it is in the better position to insure that one presenting a check has good title. See, Federal Deposit Ins. Corp. v. Marine Nat. Bank of Jacksonville, 303 F. Supp. 401 (M. D. Fla., 1969), affirmed, 431 F. 2d 341 (5th Cir., 1970); Abraham v. Moore & Schley, 18 U. C. C. Rptr. Serv. 1023 (N. Y., 1976); Birmingham Trust Nat. Bank v. Central Bank & Trust Co., 49 Ala. App. 630, 275 So. 2d 148 (1973), cert. den., 290 Ala. 362, 275 So. 2d 153 (1973); Thieme v. Seattle-First Nat. Bank, 7 Wash. App. 845, 502 P. 2d 1240 (1972); First Federal Savings & Loan Assn. of New Bern v. Branch Banking & Trust Co., 282 N. C. 44, 191 S. E. 2d 683 (1972).

Center Bank contends that it is not liable to Westroads under section 4-207, U. C. C., for three reasons.

First, it relies on section 3-405, U. C. C., which provides: "(1) An indorsement by any person in the name of a named payee is effective if (a) an impostor by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee; or (b) a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or (c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest." Center Bank contends that the endorsement of the cashier's checks in this case was effective under this section.

A careful reading of section 3-405, U. C. C., as well as cases interpreting that section, indicates that it is inapplicable in the present case. Subsection (1) (a) is not applicable because no "imposter" is present. " 'Imposter' refers to impersonation, and does not extend to a false representation that the party is the authorized agent of the payee. The maker or drawer who takes the precaution of making the instrument payable to the principal is entitled to have his indorsement." Comment 2, § 3-405, U. C. C. In the present case, Savin did not pose as plaintiffs' guardian, but acted, or purported to act, as their agent. Westroads took the precaution of making the cashier's checks payable to plaintiffs' guardian, and was entitled to her endorsement. The imposter rule is not applicable. See, Thieme v. Seattle-First Nat. Bank, *supra;* East Gadsden Bank v. First City Nat. Bank of Gadsden, 50 Ala. App. 576, 281 So. 2d 431 (1973); Brady on Bank Checks, § 15.19, p. 336 (Supp., 1977).

Subsections (1) (b) and (c) of section 3-405, U. C. C., are also not applicable, as they apply to a person signing as or on behalf of a maker or drawer, or to an agent or employee of the maker or drawer. In the present case Westroads was the maker or

drawer of the cashier's checks. Savin was not an agent or employee of Westroads, nor was he signing the checks as or on behalf of Westroads. Center Bank, however, contends that Savin procured the cashier's checks by use of forged withdrawal slips, and that therefore his intention that the named payee on the cashier's checks should have no interest in the instrument is controlling and section 3-405, U. C. C., is applicable. Center Bank relies on United States Nat. Bank v. Bank of America, 264 Cal. App. 2d 871, 71 Cal. Rptr. 6 (1968), in support of this proposition. In that case the court held that an endorsement on a cashier's check was effective under section 3-405, U. C. C., where the purchaser of a cashier's check obtained it from the issuing bank in exchange for a personal check which bore the name of a nonexistent payee. The cashier's check was made payable to the same nonexistent payee, and given to a representative of the purported payee, who subsequently deposited it and received the proceeds at another bank. The court held that the intent of the representative, and not the intent of the bank issuing the cashier's check, was controlling, as the drawee bank had issued the cashiers' check in exchange for a check bearing the name of a nonexistent payee, and had not inquired as to the existence of the payee. Section 3-405, U. C. C., was found applicable when the drawee bank sought to collect from the depository bank on the ground of breach of warranty. United States Nat. Bank v. Bank of America, *supra,* is not applicable to the present case. Westroads did not issue the cashier's checks to a payee who was not identifiable, nonexistent, or unknown to it, but issued it to its own customer. In such a case, it was entitled to the proper endorsement of the existing and identifiable payee. See Thieme v. Seattle-First Nat. Bank, *supra.*

Center Bank next contends that under section 3-418, U. C. C., Westroads' payment of the cashier's

checks was final, and that therefore the warranty provisions of section 4-207, U. C. C., do not apply. This contention is clearly erroneous. Sections 3-418 and 4-213, U. C. C., establish when payment on a negotiable instrument or check becomes final in favor of a holder in due course, but Center Bank in this case is not a holder in due course. A bank is not a holder as defined in section 1-201, U. C. C., and therefore not a holder in due course as defined under section 3-302, U. C. C., when it receives a check bearing a forged endorsement. See, Tubin v. Rabin, 533 F. 2d 255 (5th Cir., 1976); Riggs Nat. Bank of Washington, D. C. v. Security Bank N. A., 10 U. C. C. Rptr. Serv. 460 (D. C. Super., 1972); Salsman v. National Community Bank of Rutherford, 102 N. J. Super. 482, 246 A. 2d 162 (1968), affirmed, 105 N. J. Super. 164, 251 A. 2d 460; Brady on Bank Checks, § 5.1, p. 87. When a collecting bank receives a check bearing a forged endorsement and processes it through banking channels, the warranties set forth in section 4-207, U. C. C., apply, and the fact that the drawee bank has paid the check does not bar it from recovery under the warranties of the collecting bank on the ground that final payment has been made. White & Summers, Uniform Commercial Code, § 16-1, p. 519 (1972).

The final contention of Center Bank is that section 3-406, U. C. C., precludes Westroads from recovering on Center Bank's warranties of endorsement. That section provides: "Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business." This section establishes no liability, but creates a conditional estoppel

which shields a bank from liability where a drawer's negligence substantially contributes to a forgery or alteration. Hermetic Refrig. Co., Inc. v. Central Valley Nat. Bank, 493 F. 2d 476 (9th Cir., 1974).

Center Bank relies on the pre-Code case of Connecticut Sav. Bank of New Haven v. First Nat. Bank & Trust Co. of New Haven, 138 Conn. 298, 84 A. 2d 267 (1951). In that case the court held that a bank which delivered a check, payable to its customer, to the purported agent of the customer upon presentation of an obviously altered withdrawal slip, and which bank itself altered the withdrawal slip, could not recover from drawee bank on which it had drawn the check. Although the case generally supports the position of Center Bank, it did not involve the issue of warranty of endorsements.

More recent cases decided under section 3-405, U. C. C., are persuasive that Center Bank may not escape liability in this case. In Bagby v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 491 F. 2d 192 (8th Cir., 1974), an attorney obtained checks payable to his client from an investment firm by presenting to the firm stock certificates which bore the forged endorsement of the client. The attorney had previously opened an account at the firm in the name of his client, but the firm had never dealt with the client herself or checked the attorney's authority. The attorney presented the checks to banks after he had forged the endorsements of the payee, and the checks were ultimately paid by the drawee bank in which the investment firm had its checking account. When the investment firm sought to recover from the drawee bank for paying its checks over forged endorsements, the drawee bank defended on the ground that the investment firm had substantially contributed to the forgeries under section 3-405, U. C. C., and therefore could not recover. The court rejected the defense of the drawee bank, finding that the use of the words "substantially contributes" in

section 3-406, U. C. C., "necessarily requires some showing of a casual relationship equivalent to the 'substantial factor' test generally applied in the law of negligence." The court found that the situation created by the issuance of the checks by the investment firm was not enough to constitute a "substantial factor" in bringing about the forgery, as its negligence was related only to the issuance of the checks, and not to the forgery itself. The court concluded: "In the final analysis, we are convinced that the meaning of section 3-406 is best reflected by precluding a drawer from recovery under these or similar circumstances only where his negligent conduct contributes to the *forgery,* not merely to the unwarranted issuance of the checks, such as in the situation before us." Other courts have approved reasoning of the Bagby case. See, Twellman v. Lindell Trust Co., *supra*; Commonwealth of Pennsylvania v. National Bank & Trust Co. of Central Pennsylvania, 20 U. C. C. Rptr. Serv. 138 (Pa., 1976).

A case directly on point is Society Nat. Bank of Cleveland v. Capital Nat. Bank, 30 Ohio App. 2d 1, 281 N. E. 2d 563 (1972). In that case a customer of the plaintiff bank drew two checks payable to ABS Company, and delivered them to a selling agent of the payee company. The agent forged the payee's endorsement and obtained from the plaintiff bank two cashier's checks, payable to the ABS Company. The agent then forged the endorsements on the cashier's checks and deposited them in the defendant bank, which presented them to, and received payment from, the plaintiff drawee bank. The drawee bank had to reimburse its customer since the checks had been paid over forged endorsements, and it then sought to recover from the defendant collecting bank on the basis of the latter's warranties. The court found that issuing of the cashier's checks was not the cause of any monetary loss to the parties, but rather that the forged endorsements on the cashier's

checks were the cause. It therefore held that the drawee bank which had issued the cashier's checks could properly recover from the collecting bank. See, also, First Nat. Bank v. Liberty Nat. Bank & Trust Co., 392 P. 2d 747 (Okla., 1964); First Nat. Bank of Mineola v. Farmers & Merchants State Bank, 417 S. W. 2d 317 (Tex. Civ. App., 1967); First Nat. City Bank of New York v. Manufacturers Trust Co., 240 N. Y. S. 2d 669, 39 Misc. 2d 428 (1963).

In Thieme v. Seattle-First Nat. Bank, 7 Wash. App. 845, 502 P. 2d 1240 (1972), in a factual situation similar to that in Society Nat. Bank of Cleveland v. Capital Nat. Bank, *supra,* the court also found that the drawee bank which issued a cashier's check in exchange for a check with a forged endorsement, where the cashier's check was made payable to the same payee as that on the check for which it was exchanged, could recover from a collecting bank. See, also, Myers v. First Nat. Bank of Scotia, 345 N. Y. S. 2d 204, 42 App. Div. 2d 657 (1973), for a similar result in a case which has facts analogous to those presented in this case.

The above authorities clearly indicate that Center Bank is liable to Westroads on its warranties of endorsements of the cashier's checks involved in this case. Such liability is absolute, absent the defenses discussed above, and those defenses are not applicable in the present case. Therefore we hold that the District Court erred in granting judgment in favor of Center Bank on Westroads' cross-claim.

The final issue in this case is whether the District Court erred in overruling Westroads' motion for new trial on the ground of newly discovered evidence. Section 25-1142, R. R. S. 1943, provides that a new trial shall be granted for the cause of "newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial." In Pence v. Liermann, 191 Neb. 614, 216 N. W. 2d 746 (1974), this

court stated that the party moving for a new trial on such ground must show that the evidence came to him since the trial and was not equally available to him previous to that trial, and was not simply discovered by exercise of belated diligence. Newly discovered evidence is not sufficient reason for a new trial of a cause if diligence before the trial would have produced notice or knowledge of the alleged recently discovered evidence.

In the present case, the evidence on which Westroads relies to support its motion for new trial could easily have been discovered by the exercise of diligence prior to trial. Westroads and its attorneys had in their possession, prior to trial, a letter stating that a file of Savin's had been discovered, and that the file contained materials relating to the guardianship funds. Although the letter did not specifically refer to the copy of the authorization signed by Barbara, Westroads was put on notice that a file existed which might contain relevant information. Westroads made no attempt to see the file, nor was it denied access to it. In such circumstances, the evidence on which Westroads relies was not evidence which it could not, with reasonable diligence, have discovered and produced at trial. Therefore the trial court was correct in overruling Westroads' motion.

We note that plaintiffs cross-appealed, contending that the trial court erred in dismissing their claim against Center Bank. However, in their brief and oral argument, plaintiffs concede and state that if this court affirms the holding of the trial court that Westroads had no right to charge plaintiffs' accounts for the amount of the forged checks and affirms plaintiffs' judgment against Westroads, then it will not be necessary to also enter judgment in their favor against Center Bank. In view of our conclusions, as set forth above, it is unnecessary for us to determine whether plaintiffs are also entitled to a

judgment against Center Bank, as we have given Westroads a judgment over against Center Bank for the amount of the judgment against Westroads, based on its warranties of endorsement as a collecting bank.

For the reasons given above, the judgment in favor of plaintiffs against Westroads is affirmed. The judgment in favor of Center Bank on Westroads' cross-claim is reversed and the cause remanded with directions to the District Court to enter judgment in favor of Westroads on its cross-claim against Center Bank for the same amount Westroads is required to pay plaintiffs on their judgment against Westroads.

AFFIRMED IN PART, AND IN PART
REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD A. PRENDERGAST ET AL., APPELLEES, V. EARL BENJAMIN NELSON, DIRECTOR OF INSURANCE, STATE OF NEBRASKA, APPELLANT, M. BERRI BALKA, DIRECTOR OF INSURANCE, SUBSTITUED FOR EARL BENJAMIN NELSON.

256 N. W. 2d 657

Filed July 20, 1977. No. 41199.

1. **Limitations of Actions: Malpractice: Time.** The statute of limitations is tolled during the period the matter of medical liability is subject to consideration by the medical review panel and for a period of 90 days following its opinion.
2. **Statutes: Legislature: Property: Due Process.** A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.
3. **Constitutional Law: Statutes: Supreme Court.** It is incumbent on this court, when reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in

favor of its constitutional validity. If possible, a statute should be construed in such a way as to negative any constitutional infirmity.

4. **Physician and Client: Malpractice: Jurisdiction: Adjudication.** All claims or causes of action arising while the patient and the health care provider were subject to the terms and provisions of an act would be subject to adjudication in accordance with the provisions of the act. While each of the parties could change his or her status before a cause of action arose, if the cause of action arose while the parties were subject to the act, they remain subject to it as to that cause of action until its determination.
5. **Legislature: Statutes: Public Policy.** The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situations and circumstances surrounding the members of the class relative to the subject of the legislation which render appropriate its enactment.
6. _____: _____: _____. While it is competent for the Legislature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.
7. **Statutes: Constitutional Law: Public Policy.** In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."
8. **Statutes: Constitutional Law.** A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.
9. _____: _____. The Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the state's action be rationally based and free from invidious discrimination.
10. **Statutes: Constitutional Law: Torts: Public Policy.** The Legislature, consistent with the dictates of the state and federal Constitutions, may pass a law which seeks to distinguish between different types of tort actions. This is conditioned, however, upon those distinctions being reasonable and grounded upon real differences inherent in those tort actions.
11. **Statutes: Constitutional Law: Supreme Court.** The Supreme Court will not set aside a statutory discrimination if any state of facts reasonably exists to justify it.
12. **Contracts: Malpractice: Damages.** There is no impairment of the obligation of contract. The purpose of this provision is to

eliminate possible windfalls resulting from double recovery of damages.

13. **Attorney and Client: Fees: Malpractice.** The Legislature was within its authority in requiring that fee arrangements be subject to review by the courts.
14. **Statutes: Malpractice: Constitutional Law.** The Nebraska Hospital-Medical Liability Act in no way may be construed to grant or impair the credit of the state.
15. **Statutes: Malpractice: Damages.** Nothing in the Nebraska Hospital-Medical Liability Act in any way implies the state is to be obligated with respect to the Excess Liability Fund or liable for any other amounts due pursuant to the act.
16. **Statutes: Constitutional Law.** All persons are charged with knowledge of the provisions of statutes. They must take note of the procedure adopted by them. When that procedure is not unreasonable or arbitrary, there are no constitutional limitations relieving them from conforming to it.
17. _____: _____. In construing an act of the Legislature, all reasonable doubts must be resolved in favor of its constitutionality.
18. **Statutes: Constitutional Law: Courts: Public Policy.** It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains.

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

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellant.

Erickson, Sederstrom, Johnson & Fortune and Cline, Williams, Wright, Johnson & Oldfather, for appellees.

David Lathrop, Milton Murphy, John P. Miller, Daniel G. Dolan, R. M. VanSteenberg, James A. Lane, Clarence A. H. Meyer, Ben L. Anderson, and Darrell K. Stock, for amici curiae.

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

SPENCER, J.

This is a declaratory judgment action seeking a determination of the constitutionality of the Ne-

braska Hospital-Medical Liability Act, sections 44-2801 to 44-2855, R. S. Supp., 1976. Plaintiffs are Richard A. Prendergast, a qualified and practicing nurse anesthetist, Harlan L. Papenfuss, a licensed and practicing physician, and St. Elizabeth Community Health Center, a nonprofit Nebraska corporation. Defendant is the Director of Insurance for the State of Nebraska. This action was filed after the defendant refused to implement the provisions of the act. The District Court found the act constitutional and ordered the Director of Insurance to carry out his duties as required by the act, but stayed the order pending this appeal. We find the act constitutional, and affirm.

We have no question as to the right of the Director of Insurance to question the act as special legislation and as granting the credit of the state in aid of an individual, association, or corporation. We do question the right of the director to raise any question that the act denies an injured party due process or equal protection, or denies the right of access to the courts and the right of a trial by jury.

While we have been liberal in determining the standing of the Attorney General to sue in the name of the State, we have never granted standing except where either the State or the defendants had a direct interest in and were affected by the issues raised. See State ex rel. Sorensen v. State Board of Equalization & Assessment, 123 Neb. 259, 242 N. W. 609, 243 N. W. 264 (1932). Ordinarily a litigant can question a statute's unconstitutionality only when it is being applied to his disadvantage. State v. Brown, 191 Neb. 61, 213 N. W. 2d 712 (1974).

The various questions herein are raised by way of answer to the petition of the plaintiffs in seeking to require the defendant to implement the act. In view of the fact that the plaintiffs are entitled to the relief they seek and the defendant is in a position to question some portions of the act to avoid further litiga-

tion we make an exception in this instance and review all the questions of constitutionality raised in the answer.

The Legislature in the act, Laws 1976, L. B. 434, specifically finds and declares it is in the public interest that competent medical and hospital services be available to the public in the State of Nebraska at reasonable costs; that prompt and efficient methods be provided for eliminating the expense as well as useless expenditure of time of physicians and courts in nonmeritorious malpractice claims; and that a method be provided to efficiently resolve meritorious claims. The Legislature also finds the act essential to assure continuing availability of medical care; to encourage physicians to enter into the practice of medicine in Nebraska; and to have them remain in such practice so long as such physicians retain their qualifications.

The act applies to all qualified health care providers. "Health care providers" includes physicians, nurse anesthetists, and hospitals. To qualify under the act a health care provider must file proof of financial responsibility with the Director of Insurance, and pay surcharges levied for the Excess Liability Fund.

We discuss the provisions of the act as the questions are raised as to its constitutionality in the brief of the defendant. We state first, however, a patient's exclusive remedy against a qualified health care provider is under the act unless the patient has elected not to come within the provisions of the act.

To avoid its provisions, notice of the election must be filed with the Director of Insurance in advance of treatment. Also, the health care provider must be notified as soon as is reasonable under the circumstances that the patient has so elected. This election is effective for a period of 2 years unless sooner revoked. Every qualified health care provider is required to post a notice that he has qualified under the act.

The defendant contends first that the provisions of the act creating a medical review panel are void and of no force and effect in that they are contrary to the fundamental mandates of both the state and federal Constitutions. Section 44-2840 (2), R. S. Supp., 1976, provides as follows: "No action against a health care provider may be commenced in any court of this state before the claimant's proposed petition has been presented to a medical review panel established pursuant to section 44-2841 and an opinion has been rendered by the panel."

The panel consists of one attorney, who acts in an advisory capacity without vote, and three physicians, unless the health care provider is a hospital, when provision is made for a fourth panelist. Each party to the action shall have the right to select one physician, and upon selection such physician shall be required to serve. The two physicians thus selected shall select the third physician panelist. In the case of a hospital defendant, the fourth panelist shall be a hospital administrator selected by the hospital. The panel has the duty to "express its expert opinion in writing to each of the parties as to whether or not the evidence supports the conclusion that the defendant or defendants acted or failed to act within the appropriate standards of care as charged in the complaint and as to the issue of damages proximately caused by failure to act in accordance with such standards."

Section 44-2843 (3), R. S. Supp., 1976, provides: "* * * the panel shall, within thirty days, render one or more of the following expert opinions which shall be in writing and mailed to each of the parties:

"(a) The evidence supports the conclusion that the defendant failed to comply with the appropriate standard of care as charged in the complaint in specified particulars;

"(b) The evidence supports the conclusion that

the defendant involved met the applicable standard of care required under the circumstances; or

"(c) There is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury in specified particulars."

The report, or any minority report, of the medical review panel shall be admissible as evidence in any action subsequently brought by the claimant in a court of law, but such report shall not be conclusive and either party shall have the right to call any member of the medical review panel as a witness. If called, the witness shall be required to appear and testify.

Defendant argues the panel provisions violate Article I, section 13, of the Constitution of Nebraska, which provides: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." Article I, section 13, of the Constitution is merely a declaration of a general fundamental principle. It is the primary duty of the courts to safeguard this declaration of rights and remedies. However, it does not in any way imply that the Legislature is without power to impose a special procedure before resort to the courts. Claimants are not denied access to the courts. Those who do not elect otherwise are merely required to follow a certain procedure before submitting their claims to the courts.

In Campbell v. City of Lincoln, 195 Neb. 703, 240 N. W. 2d 339 (1976), plaintiffs relied on a constitutional provision, claiming the Political Subdivisions Tort Claims Act violated the Constitution by requiring a notice to the governmental subdivision before suit was filed. In sustaining the legislative provision, the court stated: "Finally the plaintiff contends that the Legislature had no power to impose a notice requirement or shorten any statute of limitations with

respect to a tort claim against a governmental subdivision engaged in a proprietary activity. Basically the contention is that the Legislature is powerless to alter a common law right. The law itself as a rule of conduct may be changed at the will or even at the whim of the Legislature unless prevented by constitutional limitations. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77. The Constitution does not forbid the creation of new rights, nor the abolition of old ones recognized by the common law, to attain a permissible legislative object. Silver v. Silver, 280 U. S. 117, 50 S. Ct. 57, 74 L. Ed. 221." Silver involved the challenge of the guest statute of Connecticut on constitutional grounds.

Defendant cites State ex rel. Wright v. Barney, 133 Neb. 676, 276 N. W. 676 (1937), and State ex rel. Sorensen v. Nebraska State Bank, 124 Neb. 449, 247 N. W. 31 (1933), to sustain his contention. Those cases are not in point. They were not concerned with specific remedies or the right of the Legislature to alter common law remedies. Rather, they involved the broad powers of the courts and the right of the Legislature to restrict those powers. The act in question does not affect the jurisdiction of any Nebraska court. It relates to the remedies available and provides for the ultimate determination of the controversy by the courts.

Defendant also relies on Bridge v. City of Lincoln, 138 Neb. 461, 293 N. W. 375 (1940), and Armbruster v. Stanton-Pilger Drainage Dist., 165 Neb. 459, 86 N. W. 2d 56 (1967). Both cases held it was not necessary for the plaintiffs to comply with a notice provision previous to filing a suit for the recovery of damages based upon Article I, section 21, Constitution of Nebraska, specifying that the property of no person shall be taken without just compensation. Those cases also are not in point herein. There, the remedy was provided by Constitution without restriction. It was not necessary for the plaintiffs to

prove that a claim had been filed with a governmental subdivision as provided by its rules when the governmental unit took plaintiffs' property.

There are many Nebraska cases holding contrary to defendant's position with respect to claims for damages against cities. See, for instance, Knapp v. City of Omaha, 172 Neb. 78, 108 N. W. 2d 419 (1961). We there held a petition subject to demurrer where it failed to allege that a notice required by statute had been given. The case of Campbell v. City of Lincoln, 195 Neb. 703, 240 N. W.2d 339 (1976), previously referred to, is also in point herein. There we upheld the notice requirement as a condition precedent to bringing the action.

Defendant cites several cases involving arbitration agreements which in effect close the doors of the courts to the parties. These cases also are not relevant herein. No claimant is being denied access to the courts. Rather, the claimant, unless he has made an election not to be bound by the act, first submits his claim to a medical review panel which renders a finding. This in no way precludes access to the courts for a final determination. The medical review panel is restricted to the three opinions quoted above.

We should not ignore the fact we are dealing with a subject where existing law in most instances requires an expert opinion before a case can be submitted to the jury. In the medical area, the judicial system is called upon to make determinations which in most instances require specialized knowledge. It is an area in which the trier of fact is usually uninformed or at least relatively so.

The act provides, at the expense of a slight delay in filing the suit in court, a procedure for review to determine from the evidence submitted if there is a basis for the claim. If the panel determines there is a basis for the claim, the claimant obviously is benefited. If it determines there is no basis for it, the

claimant is informed of what others think of the merits of his claim. If he disagrees, he still has access to the courts for a vindication of what he thinks his rights may be. The law specifically provides that the statute of limitations is tolled during the period the matter is subject to consideration by the medical review panel and for a period of 90 days following its opinion.

The following quotation from Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77 (1876), cited in Campbell v. City of Lincoln, *supra,* is in point: "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

Defendant next contends the mandatory prerequisite of submission of malpractice claims to a medical review panel is a deprivation of a constitutional right to a jury trial in violation of the state and federal Constitutions. Defendant calls our attention to Article I, section 6, Constitution of Nebraska, which provides: "The right of trial by jury shall remain inviolate," and the Seventh Amendment to the Constitution of the United States, which provides in pertinent part: "In Suits at common law * * * the right of trial by jury shall be preserved * * *." Defendant further calls our attention to our previous holdings that issues of negligence are questions for the jury and that the jury is the sole judge of the credibility of witnesses. Defendant has correctly stated these principles of law. We do not agree with the defend-

ant, however, that they are in any way violated by the provisions of the contested act. The medical review panel does not decide the case. It does provide evidence which may be considered by the jury. The net effect of this provision is to furnish the parties with the opinion of an expert panel. In this respect, it is no different from any other expert testimony received at a trial. The jury still remains as the ultimate arbiter of all fact questions raised.

Defendant builds much of his case on a recent Illinois decision, Wright v. Central Du Page Hospital Assn., 63 Ill. 2d 313, 347 N. E. 2d 736 (1976), and an Ohio case, Simon v. St. Elizabeth Medical Center, 355 N. E. 2d 903 (1976). The latter is a decision of a trial court, the Court of Common Pleas of Montgomery County, Ohio. Both cases found the medical review panel as a condition precedent to the filing of an action an impermissible restriction on the right of trial by jury guaranteed by their state Constitutions. We do not find either of those cases to be persuasive herein. In our view the provisions of the Illinois statute are distinguishable from those of our act. The Ohio decision, holding that the pleading requirements of the act are in conflict with the civil rules of Ohio, is made by a judge at the trial level, and may or may not be the Ohio law. We refer to the Illinois case more in detail hereafter.

A United States Supreme Court case helpful on the issue raised by the defendant is Ex parte Peterson, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919 (1920). The question there related to whether the appointment of an auditor by a federal District Judge to "make a preliminary investigation of the facts; hear the witnesses; examine the accounts of the parties, and make and file a report in the Office of the Clerk of this Court with a view to simplifying the issues for the jury * * *" voided the constitutional right to a jury trial. It was claimed this procedure deprived a party of a trial by jury and violated the Constitution.

The court, in an opinion by Mr. Justice Brandeis, held otherwise, stating: "The command of the Seventh Amendment that 'the right of trial by jury shall be preserved' does not require that old forms of practice and procedure be retained (citations omitted). It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with. * * * "Nor can the order be held unconstitutional as unduly interfering with the jury's determination of issues of fact, because it directs the auditor to form and express an opinion upon facts and items in dispute. The report will, unless rejected by the court, be admitted at the jury trial as evidence of facts and findings embodied therein; but it will be treated, at most, as prima facie evidence thereof. The parties will remain as free to call, examine, and cross-examine witnesses as if the report had not been made. No incident of the jury trial is modified or taken away either by the preliminary, tentative hearing before the auditor or by the use to which his report may be put. * * *"

We recently upheld the constitutionality of the Nebraska guest statute against attack. This statute may be said to affect jury trials since it increases the degree of negligence which must be proven in order to establish a guest claim. Botsch v. Reisdorff, 193 Neb. 165, 226 N. W. 2d 121 (1975). Many of the constitutional claims asserted here were answered in that opinion.

Defendant's attack on the medical review panel is not with reference to any claimed change in the standard of care. Actually, the real malpractice crisis in the medical area involves a question of available medical care for the citizens of the state at a reasonable cost.

Defendant contends the medical review panel interferes with the constitutional right to trial by jury because the report which may be introduced in evidence, if adverse to the claimant, adversely affects his ability to obtain a jury verdict. The converse would then also be true. If the report was adverse to the medical care provider, it would promote the claimant's action. It is a two-way street which equally affects the parties on both sides. We do not accept defendant's implication that a jury could not or would not evaluate a medical review panel's recommendation with objectivity, or follow the trial court's instructions regarding the weight to be given it. Our present experience with expert witnesses certainly indicates otherwise.

The defendant refers to a trial court opinion in Comiskey v. Arlen, reported at 45 Law Week 2019, where a trial judge found the New York act to be unconstitutional. Defendant's brief must have been written before that opinion was reversed by the Supreme Court, Appellate Division, Second Department, 390 N. Y. Supp. 2d 122 (Dec. 20, 1976). The following quotation from the appellate opinion is pertinent: "The whole thrust of the Trial Term's decision was its assumption that no jury could evaluate a medical malpractice panel's recommendation with objectivity, or follow a trial court's instructions regarding the weight to be given it. That assumption was unwarranted and cannot serve as the basis for a declaration of unconstitutionality since 'Historically, jurors for the most part have proven their independence. They guard their roles with a unique

jealousy' (Halpern v. Gozan, supra, at p. 759, 381 N. Y. S. 2d at p. 748)."

Defendant next argues the act is a legislative attempt to usurp judicial functions granted the judiciary by the Constitution of the State of Nebraska. He contends the panel and the nature of its duties impermissibly restricts the jurisdiction of the courts in violation of Article V, section 9, of the Nebraska Constitution. That section provides the District Court shall have both chancery and common law jurisdiction and such other jurisdiction as the Legislature may provide.

In this respect, defendant relies on the Illinois case previously referred to. He overlooks the fact that the Nebraska act provides an elective statutory remedy, a feature which was not present in the Illinois law. He also fails to distinguish the fact that the medical review panel in the Illinois case was not a panel to provide evidence but was a panel to decide the controversy. In Illinois, the panel proceeding was adversary and each party was permitted to call and cross-examine witnesses. The Illinois panel rendered written opinions on conclusions of fact and conclusions of law.

A reading of the Nebraska act demonstrates that the review panel's sole function is to provide an expert opinion based on evidence submitted to it by the parties. It is not an arbitration board and has no authority to dispose of the action. The Nebraska act should promote an early disposition of many cases by a voluntary settlement. It brings the parties together after the facts are available to both sides and both sides have heard the opinion voiced by the review panel. This in effect is in the nature of a pretrial settlement conference. It in no way encroaches on the powers or prerogatives of the court.

Defendant also argues the medical review panel denies to the citizens of this state their right to the equal protection and due process of the law. He

states the provisions of the act apply only to those health care providers who have chosen to participate. He then assumes that inasmuch as this participation is voluntary, it may be terminated at any time. He argues a health care provider receiving an adverse opinion could simply terminate his participation and the report would no longer be admissible against him in any subsequent action brought by the injured patient. Defendant builds his argument on a false premise. Section 44-2821 (2), R. S. Supp., 1976, provides: "If a health care provider shall qualify under sections 44-2801 to 44-2855, the patient's exclusive remedy against the health care provider * * * shall be as provided by sections 44-2801 to 44-2855, unless the patient shall have elected not to come under the provisions of section 44-2801 to 44-2855."

It is incumbent on this court when reasonably possible and consistent with constitutional rights to resolve all doubts as to the validity of a statute in favor of its constitutional validity. If possible, a statute should be construed in such a way as to negative any constitutional infirmity. However, we can see no possible way the provision under attack can be construed as defendant contends.

Under the act, all claims or causes of action arising while the patient and the health care provider were subject to the terms and provisions of the act would be subject to adjudication in accordance with the provisions of the act. While each of the parties could change his or her status before a cause of action arose, if the cause of action arose while the parties were subject to the act, they remain subject to it as to that cause of action until its determination.

Defendant argues a claimant is denied equal protection of the law and due process because the medical review panel is provided only with respect to causes of action arising under the act and such a procedure does not apply generally with reference to

all tort claims. Essentially, defendant is arguing the act operates to single out a class of people for special treatment, but bears no rational relationship to the legitimate purposes of the legislation. We do not agree.

The stated purpose of the act is "to serve the public interest by providing an alternative method for determining malpractice claims in order to improve the availability of medical care, to improve its quality and to reduce the cost thereof, and to insure the availability of malpractice insurance coverage at reasonable rates." The Legislature specifically found and declared it to be in the public interest that competent medical and hospital services be available to the public in the State of Nebraska at reasonable costs. The Legislature is pointing up a crisis in the area of public health and welfare, and using the police power of the state to effect a solution.

The issue of classification has been partially answered in Taylor v. Karrer, 196 Neb. 581, 244 N. W. 2d 201 (1976), which was a malpractice action in which the plaintiff was attacking the special statute of limitations for malpractice actions. We there held: " 'The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situations and circumstances surrounding the members of the class relative to the subject of the legislation which render appropriate its enactment.' " We further said: " 'While it is competent for the Legislature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest that justice or expediency of diverse legislation with respect to the objects to be classified.' " In holding there was some reason of public policy, some substantial difference of situation or circumstance, that

naturally suggested the justice or expediency of the legislation with respect to malpractice actions, we there said: "There are substantial reasons for legislative discrimination in regard to this field. We have seen in recent years the growth of malpractice litigation to the point where numerous insurance companies have withdrawn from this field. Insurance rates are practically prohibitive so that many professional people must either remain unprotected or pass the insurance charges along to their patients and clientele in the form of exorbitant fees and charges. This unduly burdens the public which requires professional services."

In Botsch v. Reisdorff, 193 Neb. 165, 226 N. W. 2d 121 (1975), where the constitutionality of the Nebraska guest statute was upheld, we quoted from Dandridge v. Williams, 397 U. S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), as follows: " 'In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality. * * * The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific. * * * A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. * * * But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. * * * It is enough that the State's action be rationally based and free from invidious discrimination.' "

The classification does have a reasonable basis. The Legislature acted to meet a crisis situation. We have no hesitancy in holding the Legislature could

have found a fair, just, and reasonable connection with the legislation and the promotion of the health, comfort, safety, and welfare of the citizens of Nebraska. As we previously indicated, we have no reason to question the need for the legislation, and the defendant has failed to produce any evidence which would indicate otherwise.

We are dealing with the fundamental right to adequate medical care. To provide this type of care, the Legislature has found it necessary to try to eliminate nonmeritorious malpractice claims and to limit the amount of the recovery in those claims found to have merit. To attempt to meet a crisis, the Legislature is free to experiment and to innovate and to do so at will, or even "at the whim." Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77.

At the time of the enactment of the act in question, there was an imminent danger that a drastic curtailment in the availability of health care services could occur in this state. No one can question the Legislature's power to deal with the problem. We affirm the right of the Legislature to exercise the police power to promote the general health and welfare of the citizens of this state.

We hold the Legislature, consistent with the dictates of the state and federal Constitutions, may pass a law which seeks to distinguish between different types of tort actions. This is conditioned, however, upon those distinctions being reasonable and grounded upon real differences inherent in those tort actions. The section which most clearly presents the question is the one which places a limit of $500,000 upon the recovery in actions based upon medical malpractice where there is no similar limitation upon recovery in other tort actions. Regardless of the extent of the damages, the ceiling of recovery is $500,000.

It is argued that a ceiling on judgments constitutes a special privilege for the health care provider and

an undue restriction on the seriously injured patient. In this respect it must be remembered the Nebraska procedure is an elective one. Under the election, the act guarantees the claimant an assured fund of $500,000 for the payment of any malpractice claim he may have. Under the common law remedy he had no such guarantee and, as in the case of the plaintiff Prendergast, who has been unable to acquire any malpractice insurance, the likelihood of collecting a substantial judgment could be quite remote.

Additionally, the claimant is assured of a procedure which will provide him access to an impartial medical review panel to determine whether the health care provider met the applicable standard of care. In return, claimant by his election agrees to the $500,000 ceiling. We have sufficiently answered the defendant's contention heretofore by holding the classification rests on reasons of public policy and a substantial difference between medical care providers and other tort-feasors. Suffice it to say that the constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective.

Our Legislature is presumed to have acted within its constitutional power despite the fact that in practice its laws may result in some inequality. We will not set aside a statutory discrimination if any state of facts reasonably exists to justify it. We hold a legitimate legislative objective is being furthered by the act. We find the classification is proper. Nothing in the act suggests, as defendant infers, that the legislation involved was enacted for the relief of the medical care provider. The enactment was, and so appears to us to be, in the public interest. This is paramount.

Defendant next argues the act impairs the obligation of contract, in contravention of Article I, section 16, Constitution of Nebraska. He challenges the pro-

vision of the act which provides that credit shall be given with respect to nonrefundable medical insurance benefits, less all premiums paid by or for the claimant. There is no impairment of the obligation of contract. The purpose of this provision is to eliminate possible windfalls resulting from double recovery of damages.

If the insurance policy under which the benefits are paid provides they are refundable to the insurance company in event of recovery in a third party action, such refundability is not affected by the act. Being refundable, the credit against the judgment as provided by the act would not apply. It is only in situations where the claimant has received an overpayment of his damages that the credit becomes operative. Nothing in the act impairs any contract. The only effect of the provision is where a claimant has collected reimbursement of insurance benefits from some other source which he is not required to pay back from the judgment that credit is allowed to the health care provider by reason of that reimbursement. The amount of the judgment is reduced accordingly, but nothing affects any outstanding contracts.

Since the remedy is elective, no basis exists for complaint. Even if the remedy were not elective, this provision would be in the same category as the ceiling provided by the act and is justified by reason of the public purpose sought to be served by the act. In view of the problem presented, the Legislature sought to eliminate windfalls.

Defendant argues section 44-2834 (3), R. S. Supp., 1976, appears to exclude the contractual option of legal representation based upon a contingent fee. The section states: "A patient shall have the right to agree with his attorney to pay for the attorney's services on a mutually satisfactory per diem basis." This could not be objectionable since it requires the agreement of the attorney to any such right. The

act also provides that all attorneys' fees are subject to review by the courts, but since attorneys are officers of the court this is not out of line with existing practice. Much of the literature on the malpractice crisis attacks the contingent fee as the root of the evil. Whether the act eliminates contingent fees is a question we need not decide. Regardless of the fee arrangement, we hold the Legislature was within its authority in requiring that fee arrangements be subject to review by the courts.

Defendant attacks section 44-2836 (4), R. S. Supp., 1976, which provides: "Any provision in a policy attempting to limit or modify the liability of the insurer contrary to the provisions of sections 44-2801 to 44-2855, shall be void." We do not understand defendant's concern. This section would not seem to be any different from other references in the insurance field requiring the insurance carriers to cover the liability which they purport to insure. See, for instance, section 48-146, R. R. S. 1943, relating to workmen's compensation insurance, which provides in part: "No policy of insurance against liability arising under this act shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to the same all benefits conferred by this act, * * *."

Defendant next alleges the act grants the credit of the state in aid of an individual, association, or corporation. The act in no way may be construed to grant or impair the credit of the state. It creates an excess liability fund out of which, among other things, claims in excess of $100,000 but less than $500,000 are to be paid. Provisions are also made for the payment from the fund of money on account of primary liability insurance issued pursuant to provisions of the act. The capitalization for this fund will come from annual surcharges not to exceed 50 percent of the annual premium paid by health care providers for their basic $100,000 medi-

cal malpractice liability insurance policy. It is also funded by special surcharges which may be assessed in an amount proportionate to the surcharge each health care provider has paid to the fund previously as well as amounts received as premiums for medical malpractice insurance written for certain health care providers who qualify pursuant to sections 44-2837 to 44-2839 of the act.

Defendant contends that the writing by the risk manager of this medical malpractice insurance for certain health care providers unable to obtain it elsewhere may result in the loan of the credit of the State of Nebraska, in violation of Article XIII, section 3, Constitution of Nebraska. He likewise contends that the provisions of this act creating a fund out of which certain claims in certain amounts are to be paid may result in a loan of the credit of the State of Nebraska, contrary to Article XIII, section 3 of the Constitution. There is no merit to these contentions.

Nothing in the act in any way implies the state is to be obligated with respect to the excess liability fund or liable for any other amounts due pursuant to the act. Defendant argues the state would have a moral obligation to compenstate a victim. How such a moral obligation could arise he does not state. Clearly, in view of the constitutional provision concerning the credit of the state, there is no way to make a claim against the state for any balance due on a judgment.

The act provides for a special surcharge on all health care providers who have qualified under the act if the amount on hand is insufficient to permit full payment of all claims allowed against the fund during a calendar year. This is in addition to the annual premiums required to be paid by health care providers subject to the act.

Defendant next challenges the elective character of the Nebraska law on the basis of sufficiency of the

notice. He argues "can it reasonably be said that an unconscious patient, seriously ill or injured patient, or for that matter, a patient transported into the State of Nebraska from another state, has consented to the limitations of this act by his failure, prior to the receipt of treatment, to have written the Director of Insurance and informed the health care provider of his declination?" This same situation is present in many areas. All persons are charged with knowledge of the provisions of statutes. They must take note of the procedure adopted by them. When that procedure is not unreasonable or arbitrary, there are no constitutional imitations relieving them from conforming to it. North Laramie Land Co. v. Hoffman, 268 U. S. 276, 45 S. Ct. 491, 69 L. Ed. 953 (1925).

The Workmen's Compensation Act makes no provision for notice before being bound by the act. The notice it provides is, as in this case with respect to patients, a notice of an election not to come under the act. The point to be stressed is that the election is available to be made at any time regardless of the need for medical attention. Those patients who want to preserve their common law rights can advise the Director of Insurance of their election today, tomorrow, or at any time. They must do so, however, before they obtain the health care service. So far as their obligation to advise their doctor is concerned, the law requires only that the notice be given as soon as is reasonable under the circumstances. The Legislature has provided for a notice to be posted by the health care providers. The act delegates to the Director of Insurance the responsibility of determining the size and other details of the notice.

Defendant argues an otherwise unconstitutional act cannot be justified on the basis of the societal circumstances under which it may be alleged to have been enacted. Defendant adopts the strawman

used by the Ohio trial judge, and assumes the legislation was enacted to relieve doctors or insurance companies of some of their burden. We do not accept defendant's premise. Doctors and insurance companies are able to protect themselves against financial burdens by passing the cost on to their patients. Because they were doing so, created part of the problem. The Legislature deemed it necessary to exercise its police power to make available qualified medical services at reasonable prices for the Nebraska public. We find no constitutional violation of this effort.

Defendant seeks to distinguish other legislative attempts at limiting tort liability on a quid pro quo principle. He argues the Workmen's Compensation Act did not deprive the employee of common law damages for his injury. As a practical matter, the doctrines of assumption of risk, contributory negligence, and fellow servant defense precluded the employee from recovering anything by virtue of the injury sustained through the negligence of his employer. For this reason defendant argues the employee was not deprived of any significant benefit when the theoretical right of recovery of common law damages from his employer was altered by enactment of the workmen's compensation statutes. He then points out that to the extent an employee had an action against his employer at common law for a tort-related injury, the Workmen's Compensation Act gave him a substitute remedy for the theoretical common law cause of action which he had against his employer. It gave the employee the right to be compensated without having to demonstrate any fault on the part of his employer, which was a very significant substitute and benefit for the injured employee.

There is no merit to the argument that if a common law right is to be taken away something must be given in return. In any event, however, the Ne-

braska law provides quid pro quo. In return for relatively minor restrictions on the remedy and the ceiling of $500,000, the patient receives assurance of collectibility of any judgment recovered and the benefit of the opinion of a panel of experts. As pointed out heretofore, the collectibility of a judgment is a matter of considerable value, as demonstrated by the evidence in this case that the plaintiff Prendergast, except for the new law, would not be able to acquire any malpractice insurance.

We quote again from Taylor v. Karrer, 196 Neb. 581, 244 N. W. 2d 201 (1976), the following: "There are substantial reasons for legislative discrimination in regard to this field. We have seen in recent years the growth of malpractice litigation to the point where numerous insurance companies have withdrawn from this field. Insurance rates are practically prohibitive so that many professional people must either remain unprotected or pass the insurance charges along to their patients and clientele in the form of exorbitant fees and charges. This unduly burdens the public which requires professional services." While no quid pro quo is necessary, one is provided by the act.

Finally, defendant takes issue with the conclusion that this court's upholding of the guest statute, section 39-6,191, R. R. S. 1943, constitutes some precedent for the Legislature's limiting damages recoverable in malpractice cases. He argues it is not a limitation on damages. It is the limitation on the host driver's duty requiring the higher showing of willful and wanton conduct. This is true, but the principle is the same. The guest statute does affect the result of jury trials, since it increases the degree of negligence which must be proven in order to establish a guest claim. In enacting the medical malpractice damage limitations, the Legislature is doing no more than legislatures of other states have done in the enactment of no-fault statutes in tort actions.

We refer again to Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77: "A person has no property, no vested interest, in any rule of the common law."

In Sommerville v. Johnson, 149 Neb. 167, 30 N. W. 2d 577 (1948), we said: "There are two rules of constitutional construction long followed in this state. 'In construing an act of the legislature all reasonable doubts must be resolved in favor of its constitutionality.' State v. Standard Oil Co., 61 Neb. 28, 84 N. W. 413. 'It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains.' Abie State Bank v. Weaver, 119 Neb. 153, 227 N. W. 922."

Every legislative act comes before this court surrounded with the presumption of constitutionality. This presumption continues until the act under review clearly appears to contravene some provision of the Constitution. We have exhaustively reviewed the many contentions urged by the defendant in his attack on the act which it now is his duty to implement. We find no merit in his contentions. He has failed to meet the burden of proof assumed by him.

The judgment of the District Court is affirmed, and the defendant is directed to proceed to immediately implement the act.

AFFIRMED.

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

Today this court, to the best of my knowledge, for the first time in its history renders what is, for the most part, an advisory opinion. In this respect it lamentably disregards its constitutional functions as a court. This course, if followed in the future, has ominous implications for the future political welfare of this state.

We have said on numerous occasions that the courts may not pass upon the constitutionality of a

statute except at the suit of a person whose rights are adversely affected by the provisions of the statutes which are challenged as unconstitutional. State ex rel. Douglas v. Gradwohl, 194 Neb. 745, 235 N. W. 2d 854; Blackledge v. Richards, 194 Neb. 188, 231 N. W. 2d 319; State v. Brown, 191 Neb. 61, 213 N. W. 2d 712; Ritums v. Howell, 190 Neb. 503, 209 N. W. 2d 160; Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N. W. 2d 626; Bali Hai', Inc. v. Nebraska Liquor Control Commission, 195 Neb. 1, 236 N. W. 2d 614; Stanton v. Mattson, 175 Neb. 767, 123 N. W. 2d 844. Other courts, of course, enunciate the same principle. Broadrick v. Oklahoma, 413 U. S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830; League of Nebraska Municipalities v. Marsh, 209 F. Supp. 189.

The above precept is but a special application of a fundamental constitutional principle founded upon the doctrine of the separation of powers. It is not a judicial function to render advisory opinions. See State ex rel. Douglas v. Gradwohl, *supra,* Clinton, J., responding to the dissents in that case. Courts can constitutionally render opinions only where a case presents an actual controversy between the litigants. Nebraska State AFL-CIO v. State of Nebraska, 445 F. 2d 1333. See, also, opinion of Richard E. Robinson, Chief Judge, 319 F. Supp. 239.

The doctrine of separation of powers is embodied in the Nebraska State Constitution explicitly. "The powers of the government of this state are divided into three distinct departments, the Legislative, Executive and Judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Art. II, § 1, Constitution of Nebraska. The principle is embodied in the Constitution of the United States implicitly. See, Forkosch on Constitutional Law (2d Ed.), § 9, p. 11; 2 Antieau, Modern Constitutional Law, § 11.13, p. 200. Under this doc-

trine, except as otherwise provided by specific constitutional provision, none of the three branches of government shall exercise any power properly belonging to the other.

The precise nature of the judicial power is not defined by the Constitutions. It did not need to be as its nature was known as a matter of history at the time the Constitutions were adopted.

One legal scholar has stated that the judicial power has three characteristics. The first characteristic he describes as that of arbitration. Rights must be contested in an action before a judge or court can act. Unless there is a conflict between parties, a court does not act and its powers are quiescent. In short, the court must have a particular case to decide before it can function. The Legislature, on the other hand, when it enacts a statute, establishes a principle of general application. It does not decide individual contests.

The second characteristic of judicial power follows from the first. The court applies a principle to a special set of facts. The court does not simply announce a general principle which immediately binds others than the parties to the particular litigation. The principle which the court announces may, however, have precedential effect in the decision of future contested cases.

The third characteristic is that a court or judge cannot initiate or begin an action. Even though the court may be aware of a dispute, it cannot intervene on its own initiative. One of the parties to a controversy must first invoke the jurisdiction of the court in the manner prescribed by some law.

The purpose of the doctrine of the separation of powers is to preserve the independence of each of the three branches of government in their own respective and proper spheres, thus tending to prevent the despotism of an oligarchy of the Legislature or judges, or the dictatorship of the executive, or any

cooperative combination of the foregoing. In the words of Justice Brandeis, "[The purpose was] not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." Myers v. United States, 272 U. S. 52, 47 S. Ct. 21, 71 L. Ed. 160. See discussion in Forkosch, The Separation of Powers, 41 Colo. L. Rev. 529.

It is a matter of general observation that for the most part legislators, executives, and administrators have very limited knowledge of what the doctrine of separation of powers imports. The courts, on the other hand, ought to be expected to have this knowledge. The courts must observe the dividing lines, to be sure not always clearly drawn, and to do so by the appropriate exercise of self-restraint. We must not lose our independence, nor intrude upon the functions of the other two branches of government by becoming embroiled in the political processes. Yet inevitably we will if we launch upon the unconstitutional and unwise process of rendering advisory opinions in nonjusticiable causes, that is, opinions rendered on abstract questions of constitutional law, where the opinion is rendered in a case where no person whose rights are affected by the challenged law is a party to the proceeding before the court.

The Attorney General, in this case, openly acknowledges that he represents no persons whose constitutional rights are affected by the provisions of the statute which he challenges and whose validity the court purports to determine. The only justiciable issue before the court in this case is the claim that the act grants the credit of the state in aid of an individual, association, or corporation. I agree that the Director of the Department of Insurance and the Attorney General may raise this issue and that it is justiciable, and I join in that portion of the opinion.

On all the numerous other issues decided as to the constitutionality of various portions of the statute, there is no party before this court in this litigation whose rights are affected. This includes the provisions providing for the opinion of a panel of experts. No panel of experts has acted in this case, or rendered any opinion, and no person has been affected by any such opinion. The same is true of the equal protection and due process claims as they relate to the ceiling on judgments and the claim that such statute intrudes upon the function of the courts.

On the general issue of the necessity of the justiciability of decisions, see Forkorsh, The Separation of Powers, 41 Colo. L. Rev. 529. The Supreme Court of Oregon, in the case of Oregon Medical Assn. v. Rawls, 276 Ore. 1101, 557 P. 2d 664, was asked to determine the constitutionality of a statute similar in many respects to the one before us, including a provision limiting liability. It declined to decide the question in the "abstract" for, among other reasons, the lack of a justiciable issue. That opinion points out reasons, in addition to those here advanced, for declining to decide abstract issues of constitutionality.

The only saving grace of the portions of the opinion to which I take exception is that the opinion openly acknowledges that the issues are not justiciable and that in this case the court is making "an exception" to the justiciability requirements of the constitutional doctrine on the separation of powers. It is to be hoped that this is the sole and only exception that will ever be made.

The giving of advice is the function of the Attorney General for the state and its various departments, or other counsel which the state or its various departments may employ. These persons are members of the executive branch of government. Private litigants must seek advice from their own counsel. Arbitration of justiciable controversies is the function of the courts under the Constitution. It is my view,

for the reasons given, that the opinion in this case is itself, in the particulars indicated, an unconstitutional act by this court. For that reason I cannot fully join therein.

WHITE, C. THOMAS, J., dissenting in part.

I agree with the majority opinion that the creation of the malpractice insurance authority by the Legislature does not constitute lending "the credit of the state" in violation of Article XIII, section 3, Constitution of Nebraska.

I agree that it was within the power of the Legislature to determine that a medical malpractice crisis exists although the record before us does not reflect the existence of such a crisis. If there has been an explosion in malpractice claims, the resulting inundation has not reached this court.

The five such cases this court has heard in the last two years comprise less than 1 percent of the docket of this court. I further note the recent reduction in medical malpractice rates by the Director of Insurance as stipulated in the record by the parties.

Were it within the province of this court to determine whether a sufficient emergency exists to warrant the separate and differing treatment of medical malpractice from the remainder of the body of tort law, I would unhesitatingly suggest that no such evidence has yet been presented us. However, as the majority opinion suggests, this is a matter for the Legislature, and the Legislature has spoken.

The majority opinion characterizes the action as a "declaratory judgment action seeking a determination of the constitutionality of the Nebraska Hospital-Medical Liability Act, sections 44-2801 to 44-2855, R. S. Supp., 1976." The majority opinion of this court then affirms the judgment of the trial court that the act is constitutional. We do so, in many instances, as Judge Clinton's dissent points out, without the presence of any person whose rights might be adversely affected by sections of the act.

It has been the long-established principle that this court will not pass upon the constitutionality of a statute except at the suit of a person whose rights are adversely affected by the provisions of the statutes which are challenged as unconstitutional. State ex rel. Douglas v. Gradwohl, 194 Neb. 745, 235 N. W. 2d 854; Blackledge v. Richards, 194 Neb. 188, 231 N. W. 2d 319; State v. Brown, 191 Neb. 61, 213 N. W. 2d 712; Ritums v. Howell, 190 Neb. 503, 209 N. W. 2d 160; Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N. W. 2d 626; Bali Hai', Inc. v. Nebraska Liquor Control Commission, 195 Neb. 1, 236 N. W. 2d 614; Stanton v. Mattson, 175 Neb. 767, 123 N. W. 2d 844. A declaratory judgment action does not alter this basic standing requirement. Proceedings for a declaratory judgment extend to the validity of a statute when there is a justiciable, determinable controversy between parties in respect to rights thereof. Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397 (1950).

Adherence to the above principle would have limited the majority opinion to the only issue properly raised before it — whether the act provides for an unconstitutional grant of state credit. Despite the lack of concrete adversity between the parties on any further constitutional issues raised, the majority opinion decided to "make an exception in this instance and review all the questions of constitutionality raised in the answer" of the defendant Director of Insurance.

The majority opinion statement that the act is constitutional should not be interpreted as a determination that all sections of the act are constitutional. Only those challenges discussed in the majority opinion have been briefed and argued in this court. The consideration of a cause on appeal is limited to those errors which have been assigned and argued. Schetzer v. Sullivan, 193 Neb. 841, 229 N. W. 2d 550

(1975); McClellen v. Dobberstein, 189 Neb. 669, 204 N. W. 2d 559 (1973). The defendant has not challenged numerous sections of the act. The majority opinion should be limited to only those issues which have been assigned and argued.

The majority opinion concludes that the necessity of insuring adequate health care as perceived by the Legislature justifies the completely different treatment of medical-hospital tort claims as against the entire tort liability field. The genuinity of the "malpractice insurance" crisis is the subject of lively debate, as are the rates charged by carriers in this state to health care providers vis-a-vis, the announced totals paid to claimants in this state.

As I have previously conceded, it is within the power of the Legislature to determine the existence of a medical malpractice crisis and act thereon. This power to act is not without limitation. The action must be reasonable. The test is, as the majority opinion points out, that of the reasonable relationship of the means utilized to the purpose to be achieved. Assuming, however, as does the majority opinion, that the Legislature may appropriately limit and alter the common law right of action of claimants, it is difficult to justify the reasonable relation of the area of justified concern of the Legislature to some of the means employed.

Two provisions of the act, restricting the potential liability of health care providers in malpractice cases, are clearly unconstitutional as special legislation. Section 44-2819, R. S. Supp., 1976, provides that any payment to a claimant from a nonrefundable medical reimbursement insurance plan, by reason of his alleged injury, may be taken as a credit against any judgment rendered under the act. This is a significant deviation from the total concept of restitution in that a negligent party may escape paying for a portion of the damage he causes. Section 44-2825, R. S. Supp., 1976, limits the total amount re-

coverable under the act from a health care provider to $500,000. Likewise, section 44-2825, R. S. Supp., 1976, provides for a shifting of the burden from the responsible health provider tort-feasor, but, here, the burden is shifted not to a collateral source, but to the malpractice victim himself.

If, as the majority opinion suggests, the collateral source rule enriches claimants in health care cases, why does it not do so in every other tort case? The tort-feasor operating a motor vehicle is not entitled to receive credit from the personal resources or prudence of his victim. Nor, under the same analysis, is there justification for limiting the maximum amount recoverable as judgment, since other tort-feasors do not enjoy such limited liability.

Such provisions violate Article III, section 18, of the Nebraska Constitution, which provides: "The Legislature shall not pass local or special laws in any of the following cases, that is to say: * * *

"Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever; * * * where a general law can be made applicable, no special law shall be enacted."

The Idaho Supreme Court was faced with the same issue of recovery limitation as special legislation in Jones v. State Board of Medicine, 97 Idaho 859, 555 P. 2d 399 (1976). There the ceiling was $150,000 per claim. The court, while not passing on the equal protection challenge to the limitation, did hold that it was not special legislation under the Idaho Constitution. However, the basis of the court's holding is the provision in the Idaho Constitution which prohibits special laws only in regard to matters specifically mentioned therein. The Jones opinion contrasted this provision to the California Constitution which has a "catch-all restriction against special laws where a general law would apply." The court there suggests a different holding

on an issue of liability limitation as special legislation may be in order under a constitutional provision such as California's.

The majority opinion discusses the Illinois Supreme Court's decision in Wright v. Central Du Page Hospital Assn., 63 Ill. 2d 313, 347 N. E. 2d 736 (1976), in relation to the constitutionality of medical review panels. In Wright, the Illinois court also held that limitation of recovery in malpractice actions constituted special legislation in violation of the Illinois Constitution, as well as being a denial of equal protection under the federal and Illinois Constitutions. Like the Nebraska statute in issue, the Illinois statute provided a $500,000 ceiling on recovery.

The Illinois court summarized the arguments against the limitation: "Plaintiff argues that by denying recovery for loss and damage in excess of $500,000, the General Assembly has arbitrarily classified, and unreasonably discriminated against, the most seriously injured victims of medical malpractice, but has not limited the recovery of those victims who suffer moderate or minor injuries. She points out that the burden of this legislative effort to reduce or maintain the level of malpractice insurance premiums falls exclusively on those extremely unfortunate victims who most need financial protection." The Illinois court concluded: "We are of the opinion that limiting recovery only in medical malpractice actions to $500,000 is arbitrary and constitutes a special law in violation of section 13 of Article IV of the 1970 Constitution, and we so hold." Wright v. Central Du Page Hospital Assn., *supra.*

Article IV, section 13, of the Illinois Constitution provides: "The General Assembly shall pass no special or local law when a general law is or can be made applicable * * *."

The section is strikingly similar to Article III, section 18, of the Nebraska Constituion, which states "where a general law can be made applicable no

special law shall be enacted." The majority opinion's partial reliance on the elective provisions of the act is misplaced. The reality of the freedom to elect by a claimant was not considered and is not easily demonstrable. Such an election provision ignores the inequality of bargaining power. The very nature of a person's status as a patient places him in a position which makes effective bargaining difficult. A right to elect not to be covered, from which might result a denial of service from the only hospital or physician in a geographical area, can hardly be said to be without implicit coercion. The consideration that the election may result in termination of services, or refusal by health care providers to give service, because of knowledge that the patient has previously filed a notice with the state Department of Insurance not to be covered, will cause a thoughtful person to use caution in exercising the right.

In summary, I agree with the majority opinion that the Nebraska Hospital-Medical Liability Act does not provide an unconstitutional grant of state credit. This was the only issue the parties had standing to raise and the only issue this court should have decided. The majority opinion's holding of constitutionality of the act is limited only to those issues discussed therein. Sections 44-2819 and 44-2825, R. S. Supp., 1976, limiting a tort-feasor's liability under the act, are unconstitutional as special legislation prohibited by Article III, section 18, of the Nebraska Constitution. These constitutionally defective provisions are not cured by the election process provided by the act.

CLINTON, J., joining partially in the dissent of White, C. Thomas, J.

I join in the dissent of White, C. Thomas, J., with the following exception. For the reasons stated in the part of my opinion dissenting from the majority, I do not consider it appropriate to express an opinion as to the unconstitutionality of an act where no party

whose rights are affected thereby is a party to the proceeding, any more than I consider it appropriate to hold that some portion of the act is constitutional where there is no party before this court affected by the provision in question. Therefore I do not join in the portion of the dissent of White, C. Thomas, J., which expresses an opinion as to unconstitutionality.

I particularly join in the portion of the dissent which notes that while the majority opinion appears to give blanket approval to the constitutionality of the act, it should not be considered as deciding the constitutionality of the portions of the act the constitutionality of which is not even argued.

McCOWN, J., dissenting in part.

I concur generally in the dissent of Judge C. Thomas White except that I do not agree that there is any constitutional problem of standing in the posture of this case.

BOSLAUGH, J., dissenting in part.

I agree with Judge C. Thomas White that it is difficult to sustain the separate classification of malpractice claims upon the basis of the evidence which is available. The provisions in the act in regard to an election by a claimant are unrealistic and illusory, and the requirement that nonrefundable medical reimbursement insurance be applied as a credit against a judgment against a negligent health care provider is invalid.

I do not agree that the defendant lacked standing to question the constitutionality of the act. The issue of standing was never raised in the District Court.

The law is not clear as to when an administrative officer may refuse to implement a legislative act on the ground it is unconstitutional. See, Van Horn v. State ex rel. Abbott, 46 Neb. 62, 64 N. W. 365; 16 C. J. S., Constitutional Law, § 82b, p. 252. Where the act in question involves the expenditure of public funds and affects the rights of all the citizens of the state,

it is in the public interest that a determination of constitutionality be obtained as soon as possible. Here the defendant acted in good faith and upon the advice of the Attorney General. See State ex rel. Meyer v. Peters, 188 Neb. 817, 199 N. W. 2d 738.

Although this court, in the exercise of its discretion, may refuse to decide issues tendered in a declaratory judgment action, the issues raised in this case were of great public interest. This court would have been guilty of a disservice to the public if it had refused to decide the issues presented.

JAMES S. REED ET AL., APPELLANTS, V. COUNTY OF HALL, A BODY POLITIC, ET AL., APPELLEES, SIDNEY, INC., A CORPORATION, ET AL., INTERVENERS-APPELLANTS.

256 N. W. 2d 861

Filed July 27, 1977. No. 41112.

1. **Property: Taxation: Statutes: Notice.** Section 77-1315, R. R. S. 1943, requires that a notice be given by first-class mail, addressed to the record owner's last-known address, on every piece of real estate which has been assessed at a higher figure than at the last previous assessment.
2. **Property: Taxation: Statutes.** After the repeal of section 77-1306, R. R. S. 1943, section 77-1315, R. R. S. 1943, is the only statute applicable to the taxing of improvements.
3. **Trial: Courts: Evidence.** It is the province of the trier of the facts to harmonize the testimony insofar as that is possible, and in case of conflicts, to decide as to the weight to be given the testimony of the witnesses. In the absence of obvious error, we are bound by that determination.

Appeal from the District Court for Hall County: LLOYD W. KELLY, JR., Judge. Affirmed in part, and in part reversed and remanded.

Luebs, Tracy, Dowding, Beltzer & Leininger, for appellants and interveners-appellants.

Sam Grimminger, for appellee.

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

SPENCER, J.

In this action plaintiffs-appellants seek to enjoin the defendants-appellees, hereinafter referred to as county, from collecting taxes on certain real estate resulting from increases in assessed valuation for the years 1974 and 1975. Appellants allege the taxes are void because county failed to follow statutory procedures for giving notices of the increases in assessments for the 2 years. The interveners are two corporations who were record title holders of some of the real estate during some of the periods in question.

Appellants are individual owners of an apartment complex in Grand Island. The real estate was purchased in two parts: Phase I (west part) and Phase II (east part.) In order to obtain financing, the appellants had to borrow money at higher than the legal rate of interest for individuals. In order to accomplish this, two corporations were formed. The first corporation was Sidney, Inc., and it purchased the west part of the apartment complex and built apartments and garages thereon. The second corporation, Sidney II, Inc., was formed about a year later, and it obtained financing, obtained title, and built apartments and garages on the east part of the complex.

For a short period of time from December 1972, until August 1973, these appellants were the record title holders of Phase I, having obtained title as individuals so that the tax consequences of ownership would be reported on their individual returns. However, in order to obtain additional financing for Phase II, these individuals deeded Phase I to Sidney II, Inc., in August 1973.

In December 1973, although appellants intended to convey title to the property back to themselves, a mistake was made and instead of Sidney II, Inc., conveying title to the real estate a deed was drawn with Sidney, Inc., as the grantor.

In 1973, substantial improvements were placed on Phase II, and the county changed the appraised value of Phase II to reflect these improvements. The first dispute concerns the increased valuation for Phase II in 1974. The county treasurer's office sent notice of the increase for improvements made on the property prior to the April 1 deadline. The notice was mailed to one of the appellants, James S. Reed, at the address of the registered agent of Sidney II, Inc., in Omaha, Nebraska. The registered agent of Sidney II, Inc., was Warren Zweiback, but he had moved his offices and he denied the notice was ever received by him. It does not appear the address of the registered agent had been changed on the articles of incorporation, so it probably was the last-known address for the corporation. Appellants contend this notice was defective for three reasons: First, James S. Reed was not the record owner since he did not receive title by the December 27, 1973, deed. Second, the notice was not mailed to the last-known address of the record owner. Third, no notice was actually received.

The second dispute concerns the increased assessments on Phases I and II for 1975. The parties disagree on whether notice was sent prior to April 1, 1975. Appellants contend certain corrections were made on April 11, 1975. Because these corrections are reflected in the notice, they contend the evidence clearly shows the notice was not mailed before the deadline. County explains this by stating that two record sheets were kept since the property was resubdivided in December 1974. County contends the correction was only made on the record for the old subdivision and that the record for the new subdivision was correct. Appellants also contend there was a further defect with respect to this notice in that it did not state the old assessed value as required by section 77-1315, R. R. S. 1943. County contends this is not required since this was a new subdivision. To

further complicate the situation, the new plat describing the property by lot number, instead of by metes and bounds, was not filed until December 1974, although it had been approved in October 1972.

The final alleged defect is that the notice was not sent to the record owner. Notice was mailed to James S. Reed as president of the corporation and individually, at his Grand Island address. As previously indicated, title to the property was in Sidney II, Inc., since the attempted conveyance on December 27, 1973, to the appellants, including Reed, mistakenly had Sidney, Inc., as the grantor. The record title to the property at that time was in Sidney II, Inc.

Section 77-1315, R. R. S. 1943, provides as follows: "The county assessor or county clerk where he is ex officio county assessor shall complete his revision of the assessment rolls, schedules, lists, and returns and file them with the county clerk on or before April 1 of each year. The county assessor shall before such filing, notify the record owner of every piece of real estate which has been assessed at a higher figure than at the last previous assessment. Such notice shall be given by first-class mail, addressed to such owner's last-known address. It shall describe said real estate, and state the old and new assessed valuation thereof and the date of the convening of the board of equalization."

Section 77-1315, R. R. S. 1943, requires that a notice be given by first-class mail, addressed to the record owner's last-known address, on every piece of real estate which has been assessed at a higher figure than at the last previous assessment. County argues no notice was required in 1974 because the increased assessment was attributable solely to improvements added during the previous year. In this contention county relies on Watson Bros. Realty Co. v. County of Douglas, 149 Neb. 799, 32 N. W. 2d 763 (1948).

Watson Bros. Realty Co. involved an action to en-

join the collection of a part of real estate taxes. Watson was the owner of a tract of land in the City of Omaha on which the construction of a building was begun in June 1943, and completed in June 1944. On April 1, 1944, while the building was in process of construction, the property was assessed at $12,160 for the land and $30,000 for the improvements. Watson did not question this assessment. On April 1, 1945, the building was assessed at $72,000, adding $42,000 to the previous assessment. This was challenged by Watson, for failure of the county assessor to send the notice required by then section 77-1315, R. S. 1943.

During that period, another statute, section 77-1306, R. S. 1943, provided for an annual assessment of buildings and other improvements not previously included in the value of the land. Unlike section 77-1315, R. S. 1943, this section contained no notice requirement. The holding in Watson was predicated on section 77-1306, R. S. 1943. We there said: "The notice to an owner of property, provided for in section 77-1315, R. S. 1943, is not required in cases where real estate is assessed under the provisions of section 77-1306, R. S. 1943."

When the tax statutes were amended in 1959, section 77-1306, R. R. S. 1943, was repealed. There is now no special statute applying to the taxation of improvements. The assessor is expected to obtain this information from building reports required to be filed in the assessor's office. We agree with appellants. After the repeal of section 77-1306, R. R. S. 1943, section 77-1315, R. R. S. 1943, is the only statute applicable to the taxing of improvements. That statute provides for the mailing of a notice of the increased assessment to the record property owner.

The record indicates the address available to the county assessor's office was that of the two corporations. The notice was sent to the last-known address of the registered agent for the corporation, but it

was addressed to one of the appellants at that address rather than to the registered agent for the corporation. Because the registered agent had moved his office and the person to whom the notice was addressed had never occupied that office, the notice was not delivered. We have no hesitancy in saying that if the notice had been sent to the registered agent at that address, which was the last-known address, there would be no question of notice. That, however, was not done. The notice was defective, and the record indicates it was never received by any of the parties involved in this litigation. We hold the increased assessment for 1974 was void for lack of the notice required by section 77-1315, R. R. S. 1943.

County witnesses testified and the court found that the 1975 notice was sent prior to April 1, 1975. Appellants contend the facts show otherwise. In January 1975, appellants examined the assessment record for the subdivision, and discovered an error in the assessment for new improvements on Phase II. After discussion, it was discovered that some improvements had been counted twice. The commercial property record cards were corrected and returned to the assessor's office. At this time, the legal description on the cards was changed from Burch Subdivision to Reed's Subdivision. On March 17, 1975, Mrs. Robertson of the assessor's office prepared a tax list correction form and the value of the new improvements on Phase II was reduced. This correction was made on the assessment record for Burch Subdivision.

On April 11, 1975, appellants again talked to Mrs. Robertson and indicated the value shown on Burch Subdivision was still wrong because certain garages were included in Phase II which belonged in Phase I. Two tax list correction forms were prepared and a correction was made by transferring $22,240 from Phase II to Phase I. After both corrections had been

made, the value of improvements on Phase I was $166,952, and on Phase II, $176,646. These figures are contained in the assessment record for Reed's Subdivision and in the notice of valuation change. From this appellants argue the notice must have been sent after April 11, 1975, because the corrected figures are stated therein.

Mrs. Robertson testified the 1975 notices were prepared from the assessment records for Reed's Subdivision, and that the figures contained in that record were at all times correct. She further testified the changes she made were made on the Burch Subdivision record, and the problem arose because there were two records covering the same property. Her testimony is undisputed that the notice was compiled from the plat of Reed's Subdivision and was sent before April 1. It is the province of the trier of the facts to harmonize the testimony insofar as that is possible, and in case of conflicts, to decide as to the weight to be given the testimony of the witnesses. In the absence of obvious error, we are bound by that determination.

Appellants claim the 1975 notice was defective for failure to state the old assessed valuation on the notice. In the blank provided for "old assessed value" the notice contained the notation "new subdivision." Section 77-1315, R. R. S. 1943, provides the notice shall describe the real estate, and state the old and new assessed valuation thereon and the date of the convening of the board of equalization.

There is no question, the statute does require the old valuation. Here, however, appellants could not have been prejudiced in any way by the failure to include it. They were familiar with the fact that although the property was subdivided in 1972, the plat was not filed until December 1974. In fact, they had the assessment figure corrected in January and again in March 1975. When they received the notice with the notation "new subdivision" in the place for

the "old assessed value," they knew the assessment had been raised to cover the improvements which had been placed on the property, and knew the amount of the assessment. While we hold the old valuation should be stated even where property lines have been changed, it is merely a technical error in this instance and did not in any way affect the appellants' rights.

The last assignment of error urged by the appellants is that the notice was not sent to the record owner. Two notices of valuation changes were sent: One, to Sidney II, Inc., a Nebraska corporation, in care of James S. Reed, 405 North Pine, Grand Island, Nebraska, 68801; the other, to James S. Reed et al., at the same address. Reed admitted he received these notices of valuation change, but testified that he did not receive them until the middle of April. The trial court found they had been mailed before April 1.

At the time the 1975 notices were sent to James S. Reed, at his Grand Island address, he was the president of Sidney II, Inc., which was the record owner of all the property, because Sidney, Inc., had been mistakenly named as grantor in the warranty deed, dated December 27, 1973. Mrs. Robertson testified that Reed had given her the Grand Island address.

The notice to the corporation covered Reed's Subdivision, Lots 1 and 2, or Phase I. The notice to the appellants covered Reed's Subdivision, Lots 3, 4, and 5, or Phase II. The record indicates that at the time of the notice, appellants were dealing with the property as though the December 1973, deed had conveyed it to them. Reed testified that appellants did not become aware of the error in the conveyance until February 1976. It was corrected at that time.

Reed, at the time of the receipt of the notice on Phase II, was the president of the corporation and while he believed that the individuals were the owners of the property rather than the corporation,

all parties had notice of the increased assessment. Reed also was the one who dealt with the assessor on behalf of the appellants. On this record, the appellants could not have been prejudiced by any misstatement in the name of the record owner. We so find. We affirm the judgment of the trial court as to the 1975 tax.

For the reasons given, we reverse the judgment as to the increased valuation for the 1974 tax; we affirm the judgment as to the 1975 tax, and remand the cause to the trial court for further action pursuant to this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

Boslaugh, J., concurring in result.

STATE OF NEBRASKA, APPELLEE, V. COLLEEN MARY HATRIDGE, APPELLANT.

256 N. W. 2d 327

Filed July 27, 1977. No. 41135.

1. **Criminal Law: Evidence: Words and Phrases.** Generally, hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
2. **Criminal Law: Sentences.** A sentence within statutory limits will not be disturbed on appeal absent an abuse of discretion.

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

J. William Gallup, for appellant.

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

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

WHITE, C. J.

The defendant was charged with shooting her estranged husband, Ronald Raymond Hatridge, with

intent to kill, wound, or maim. A jury trial was had and a verdict of guilty returned. The District Court sentenced defendant to a term of 5 to 10 years' imprisonment and she appeals. We affirm the judgment and sentence of the District Court.

Defendant first contends that the District Court committed error when it overruled her motion for a mistrial. The motion was prompted when, during cross-examination of the defendant, the prosecutor asked the following question: "Q. And isn't it a fact that you even went on a trip with Bill Knott, your neighbor boy?"

It is admitted by the State that the question was immaterial to the issues at trial.

In State v. Casados, 188 Neb. 91, 195 N. W. 2d 210 (1972), we said: "It is a fundamental concept of our criminal law that an accused, whether guilty or innocent, is entitled to a fair trial. It is not only the duty of the trial court but of the prosecutor as well to see that he gets one. A prosecution solidly based upon the law and the facts and supported by sound reasoning does not require bolstering by appeals to passion and prejudice."

Where the defendant has been prejudiced by the conduct of the prosecuting attorney, the conviction will be set aside. State v. Atwater, 193 Neb. 563, 228 N. W. 2d 274 (1975). Each case must be determined on its own facts. State v. Smith, 187 Neb. 152, 187 N. W. 2d 753 (1971); State v. Casados, *supra.*

Turning to the facts of this case, we conclude that defendant was not prejudiced by this question. Defendant was able to answer this question, "No, sir, I did not," before defense counsel raised his objection to it. Defense counsel's objection to the question was sustained, and the jury was instructed by the court to disregard the question. Finally, in light of other unchallenged testimony in the record referring to the visiting by young men at defendant's residence while she was in the process of obtaining a di-

vorce, we cannot say that this single question so prejudiced the defendant as to require a reversal of her conviction.

Defendant's next contention concerns the following exchange between the prosecutor and witness Delene Maxwell, counselor for the District Court for Douglas County, who interviewed each of the four children living with defendant prior to the shooting:

"Q. And what did you tell Mrs. Hatridge?

"A. I thought I should share with her a certain part of the running thread through all of the four children's interviews, of their concern that she was going to shoot their father and that * * *.

"Mr. Carey: I move that be stricken, Your Honor, as hearsay.

"The Court: Overruled at this time."

Defendant contends that the District Court erred in overruling her counsel's objection to the testimony as being hearsay. Section 27-801 (3), R. R. S. 1943, of the Nebraska Rules of Evidence, defines hearsay as follows: "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted * * *."

The statement objected to was not offered in evidence to prove the truth of the matter asserted - that defendant's children were concerned that defendant was going to shoot their father. The concern of the children was not at issue. Rather, the statement was offered to prove an intent on the part of the defendant to shoot her husband.

Even if the testimony had arguably been hearsay, in light of defendant's admissions to Delene Maxwell and Jeffrey Bendon, prior to the shooting, that if her husband came on the premises she felt obligated to shoot him, and that she had a gun, the overruling of defendant's objection resulted in no prejudice to the defendant.

Defendant's last contention is that her sentence is

excessive. Defendant was sentenced to a term of 5 to 10 years imprisonment. This sentence was within statutory limits, and as such, will not be disturbed on appeal absent an abuse of discretion. State v. Gillham, 196 Neb. 563, 244 N. W. 2d 177 (1976). We cannot say that the District Court abused its discretion in sentencing the defendant as it did.

The judgment and sentence of the District Court are correct and are affirmed.

AFFIRMED.

CLINTON, J., concurring in the result.

While I concur in the result of the majority opinion, I disagree with the characterization of the testimony of Delene Maxwell as "not hearsay." If such testimony was offered, as the opinion says, to "prove an intent on the part of the defendant to shoot her husband," then what the children told the witness either directly or by implication in that respect is plainly hearsay. It does not appear from the majority opinion that the children were available for cross-examination.

WHITE, C. THOMAS, J., joins in this concurrence.

BOSLAUGH, J., dissenting.

The statement of Mrs. Maxwell to the defendant concerning information Mrs. Maxwell had "ascertained" from the interviews with the children was not admissible for any purpose. Her conclusion as to the "running thread" through all the interviews was clearly objectionable as hearsay. All that the State was entitled to prove was the defendant's statement to Mrs. Maxwell that if Mr. Hatridge came on the premises "she felt obligated she would have to shoot him, and that she had the gun."

I think it is difficult to say that the admission of Mrs. Maxwell's testimony to the effect that all four of the children were concerned that the defendant was going to shoot their father was harmless error. The defendant admitted that she shot Mr. Hatridge, but claimed she fired the gun in self-defense. Al-

though there was some evidence of statements by the defendant to other persons that she was going to shoot Mr. Hatridge if he came on the premises, Mrs. Maxwell's testimony about the concern of the children was highly prejudicial.

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. J. JAMES EXON, GOVERNOR OF THE STATE OF NEBRASKA, ET AL., APPELLANTS AND CROSS-APPELLEES.

256 N. W. 2d 330

Filed July 27, 1977. No. 41145.

1. **Constitutional Law: Legislature: Colleges and Universities: Board of Regents.** Article VII, section 10, of the Constitution of Nebraska, requires the Legislature to enact legislation vesting the general government of the University of Nebraska in the Board of Regents.
2. **Legislature: Colleges and Universities: Board of Regents.** Although the Legislature may prescribe the duties and powers of the Board of Regents the general government of the University must remain vested in the Board of Regents and the powers and duties of the Board of Regents can not be delegated to other officers or agencies.
3. **Statutes: Colleges and Universities: Board of Regents.** A statute prescribing the powers and duties of the Board of Regents must not be so detailed and specific in nature as to eliminate all discretion and authority on the part of the Regents as to how a duty shall be performed.
4. **Public Funds: Colleges and Universities: Board of Regents.** University funds which are derived from operation of the University or received from the federal government or private donors are subject to the control of the Board of Regents without an annual legislative appropriation.
5. **Public Officers and Employees: Colleges and Universities: Board of Regents.** The determination of salary schedules and compensation to be paid to employees of the Board of Regents is an integral part of the general government of the University and the Legislature may not fix and determine the manner in which raises may be given to the employees of the Board of Regents.

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

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellants.

Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

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

BOSLAUGH, J.

The Board of Regents of the University of Nebraska brought this action for a declaratory judgment to determine whether certain acts of the Legislature affecting the University were in violation of Article VII, section 10, of the Constitution of Nebraska. The defendants are the Governor, the Director of Administrative Services, and the Director of Personnel.

The University of Nebraska was established by the Legislature in 1869. Laws 1869, p. 172. That act provided the general government of the University should be vested in a Board of Regents consisting of the Governor, the Superintendent of Public Instruction, the Chancellor, and nine members appointed by the Legislature in joint session.

Article VII, section 10, of the Constitution, was adopted in 1875. It provides in part: "The general government of the University of Nebraska shall, under the direction of the Legislature, be vested in * * * the Board of Regents * * * who shall be elected * * *. Their duties and powers shall be prescribed by law; * * *." The controversy here centers around the meaning of the phrase "under the direction of the Legislature." The issue is the extent to which the Legislature may control or interfere with the discre-

tion of the Regents in the general government of the University.

It is of some significance that the Board of Regents established by the act of 1869 consisted of 12 members, 9 of whom were appointed by the Legislature. At the Constitutional Convention in 1871, while the proposal which is now section 10 of Article VII was under consideration, some of the delegates stated that the general government of the University should be placed with "persons who will be charged specifically with that business" and who were "separate and beyond all political influences." The Board of Regents as now constituted consists of members chosen directly by the people. We think it is clear that the purpose of the constitutional provision was to remove the University from the plenary control of the Legislature and establish the Board of Regents as an independent body charged with the power and responsibility to manage and operate the University as free from political influence and control as possible.

The early cases which were decided when the University was under the plenary control of the Legislature are of little value in determining the meaning of the constitutional provision. Cases such as State ex rel. Board of Regents v. Moore, 46 Neb. 373, 64 N. W. 965, in which the court based its opinion largely upon the early cases, although stating "our minds do not assent to the reasoning of the line of decisions referred to," should not be considered to be controlling here.

The trial court found generally that the phrase "under the direction of the Legislature" modified "shall be vested" rather than "government." With this finding we agree. It is the duty of the Legislature to implement the constitutional provision by enacting legislation which vests the general government of the University in the Board of Regents.

The trial court further found that the provision

that the duties and powers of the Board of Regents "shall be prescribed by law," means that the Legislature may set forth the powers and duties of the Regents. With this finding we agree but this provision must be considered with the other language of the section which requires that the general government of the University be vested in the Board of Regents. Thus, although the Legislature may add to or subtract from the powers and duties of the Regents, the general government of the University must remain vested in the Board of Regents and powers or duties that should remain in the Regents cannot be delegated to other officers or agencies.

The general appropriation bill adopted by the Legislature in 1975, as amended by L. B. 972 in 1976, and the general appropriation bill adopted in 1976, L. B. 690, contained numerous statements directing the Board of Regents or employees of the University to take certain actions. The trial court held that the statements in these bills which did not constitute an appropriation of funds were advisory only and not mandatory and that the Legislature was without authority to direct employees of the University. Although the defendants did not challenge this finding in their assignments of error, we have considered it and agree that it is correct.

The Legislature can not use an appropriation bill to usurp the powers or duties of the Board of Regents and to give directions to the employees of the University. The general government of the University must remain vested in the Board of Regents. In prescribing the powers and duties of the Regents a legislative act must not be so detailed and specific in nature as to eliminate all discretion and authority on the part of the Regents as to how a duty shall be performed.

The specific statutes which are in question in this case fall into two groups. The first relates to the funds of the University and the second relates

generally to various administrative officers or agencies.

There is no controversy concerning funds which are derived from taxation. The plaintiff concedes that the Legislature has complete control of the money which is to be appropriated to the University from the general revenue of the state. The controversy here concerns funds derived from the operation of the University or received from the federal government or private donors.

A problem in regard to the University Cash Fund arose in 1976 when the Governor made a line item veto of an appropriation from the University Cash Fund for instruction and research support. Since 1949, section 85-125, R. R. S. 1943, has contained a provision that money accruing to the University Cash Fund, which consists of money derived from the operation of the University, shall become available "when appropriated by the Legislature."

The trial court found that: "To the extent there has been a general appropriation in Section 85-131, the Legislature cannot control the use by the Board of Regents of funds generated by university activities including student fees, sale of commodities raised on university property, fees charged at the medical center and similar fees, by requiring specific annual appropriations of the same."

The defendants contend this finding is erroneous and rely upon Article III, section 22, of the Constitution, which provides, "Each Legislature shall make appropriations for the expenses of the Government * * *," and Article III, section 25, which provides, "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law."

The expenditure of the general funds of the state is under the control of the Legislature and it is the duty and responsibility of the Legislature to make the appropriations necessary for the operation of state

government. The restriction upon money to be drawn from the treasury has reference generally to funds of the state that may be used to defray the general expenses of government.

The funds of the University, which are not derived from taxation, have a different status. In State ex rel. Spencer Lens Co. v. Searle, 77 Neb. 155, 108 N. W. 1119, 109 N. W. 770, this court held that the Board of Regents could expend funds donated by the federal government to the University without a specific appropriation by the Legislature. In State ex rel. Ledwith v. Brian, 84 Neb. 30, 120 N. W. 916, this court granted mandamus to compel the State Treasurer to countersign a warrant drawn on the University temporary fund although there had been no biennial appropriation from the fund. This court said: "We can see no reason for a biennial appropriation of these funds. It was the pledged duty of the state to apply them to the use of the university and agricultural college, and the motives which prompted the makers of the constitution to hold the purse strings in the hands of the people cannot apply to the situation presented. The regents of the university under the law are the proper persons and the only persons who may expend this money, and it can be used for no other purpose.

"We are further of the opinion that, when once set apart and appropriated to the proper custodian and beneficiary, subsequent biennial appropriations are not required."

The provision in section 85-131, R. R. S. 1943, that "All money accruing to the university funds is hereby appropriated to the use of the state university," is a legislative recognition of the status of these funds. They can be expended only by the Board of Regents for the benefit of the University. They are trust funds, or have a similar status, and are not available to the Legislature for general governmental purposes. The finding of the District

Court that an annual appropriation was not required was correct.

The second group of statutes relates to a number of different subjects. The statutes involved, together with the holding of the trial court which are challenged by the appeal or cross-appeal, may be summarized as follows:

1. Gifts. L.B. 603 and L.B. 605, which were appropriation bills adopted by the Legislature at the 1975 session, contained provisions relating to gifts to be made available to the state. The bills provided that any gift or bequest of personal property in excess of $10,000 required the approval of the Governor before acceptance, and any gift or devise of real property in excess of $10,000 be approved by the Governor and the Legislature before acceptance. The trial court held these provisions were invalid as an attempt to unlawfully delegate authority vested in the Board of Regents under Article VII, section 10, of the Constitution of Nebraska.

2. Personnel. The trial court held "The Legislature may fix and determine the manner in which raises are to be given to the employees of the Board of Regents," but that the Director of Personnel had no authority in regard to employees of the University who had not been placed under the state personnel system by the Board of Regents.

3. New Facilities. Sections 81-1108.41 to 81-1108.43, R. R. S. 1943, prescribe certain requirements concerning planning, design, and construction of new facilities and the modification or repair of existing facilities. The trial court held the sections were not applicable to the Board of Regents or the University because they would result in an unlawful delegation of authority vested in the Regents by the Constitution.

4. Central Data Processing. Section 81-1117, R. R. S. 1943, relates to the Central Data Processing division within the Department of Administrative

Services. The trial court held the section was not applicable to the Board of Regents or the University because it would result in an unlawful delegation of authority vested in the Regents by the Constitution.

5. Purchasing. Sections 81-153 to 81-162, R. R. S. 1943, establish a centralized purchasing and disposal program for property used by the state and its agencies. The trial court held that these sections did not apply to the Board of Regents or the University because they would result in an unlawful delegation of authority vested in the Regents by the Constitution.

We think the findings of the trial court were generally correct and the statutes referred to above are either invalid or not applicable to the Board of Regents and the University because they relate to some act or function of the general government of the University which under the Constitution is vested in the Regents and can not be delegated to some other officer or department by the Legislature.

We believe the finding by the trial court that the Legislature may fix and determine the manner in which raises are to be given to employees of the Board of Regents was erroneous. The determination of salary schedules and the compensation to be paid to the employees of the Board of Regents is an integral part of the general government of the University. The judgment should be modified by deleting that portion of the judgment.

The judgment as modified is affirmed.

AFFIRMED AS MODIFIED.

SPENCER, J., concurring.

I concur with the majority opinion herein, with the understanding that the opinion holds that the Legislature cannot control the use of cash funds generated by University activities, but that it can consider them in the making of appropriations.

GERALD JOHNSON AND CHESTER P. CUNNINGHAM, APPELLANTS, V. J. JAMES EXON ET AL., APPELLEES.

256 N. W. 2d 869

Filed August 3, 1977. No. 41004.

1. **Constitutional Law: Statutes.** In construing a statute, it is the duty of this court to give that statute an interpretation which meets constitutional requirements if it can reasonably be done.
2. **Legislature: Statutes: Board of Pardons: Words and Phrases.** It was the intent of the Legislature that the words "subject to the approval of the Board of Pardons" should condition the entire section 9 of L. B. 567, Laws of 1975.
3. **Board of Pardons: Statutes: Prisoners.** All prisoners need approval of the Board of Pardons before the provisions of Laws 1975, L. B. 567, may be applied retroactively.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded.

T. Clement Gaughan, Richard L. Goos, and Dennis R. Keefe of Naylor & Keefe, for appellants.

Paul L. Douglas, Attorney General, Paul W. Snyder, and Steven C. Smith, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

SPENCER, J.

This is a declaratory judgment action to secure the benefits of Laws 1975, L. B. 567 (sections 83-170, 83-1,107 to 83-1,111, 83-1,118, and 83-1,126.01, R. S. Supp., 1975), retroactively. The trial court found that any attempt to apply L. B. 567 retroactively would be unconstitutional and void, and dismissed the petition. Plaintiffs prosecute this appeal. The only issue presented by this appeal is whether L. B. 567 may be applied retroactively. We find it may with the approval of the Board of Pardons, and reverse the judgment of the trial court.

The facts were stipulated. Plaintiff Johnson was

sentenced on November 29, 1972, to a term of 3 to 4 years in the Nebraska Penal and Correctional Complex, receiving credit for 86 days jail time. He was paroled on February 2, 1976, and at the time of trial was under the supervision of the Board of Parole. Plaintiff Cunningham was sentenced on May 15, 1973, to a term of 5 years in the Nebraska Penal and Correctional Complex, receiving 3 months credit for time spent in jail. At the time of trial he was an inmate of the penal complex.

L. B. 567 became effective August 24, 1975. Section 9 of the act, section 83-1,126.01, R. S. Supp., 1975, provides: "Any person in the custody of the Department of Correctional Services or under supervision of the Board of Parole shall be subject to the provisions of this act. Any person eligible for immediate discharge or release pursuant to this act shall be so discharged or released no later than one hundred twenty days after August 24, 1975 *subject to the approval of the Board of Pardons.*" (Emphasis supplied.)

Plaintiffs had been granted "good time" pursuant to the laws applicable to them at the time they were sentenced. Both plaintiffs had been considered for commutation and both applications had been denied. The State stipulated that if L. B. 567 was applicable to plaintiffs, they would be entitled to immediate release from custody under the provisions of L. B. 567, if approved by the Board of Pardons.

Under the law in effect at the time plaintiffs were sentenced, "good time" credits were applied to determine the date on which an inmate was eligible for parole, and also the date on which the inmate's release on parole became mandatory. § 83-1,107, R. S. Supp., 1974. Section 2 of L. B. 567 (section 83-1,107, R. S. Supp., 1975), provides for good behavior deductions from an offender's minimum term to determine the date of his eligibility for parole and from his maximum term to determine the date when his

discharge from custody of the state becomes mandatory. Meritorious "good time" is not granted. In its stead, section 3 of L. B. 567 (section 83-1,107.01, R. S. Supp., 1975), provides for faithful performance deductions from an offender's maximum term to determine when his discharge from custody of the state becomes mandatory, but not from his minimum term to determine his parole eligibility date. Under the previous law, meritorious behavior "good time" was not forfeitable after an offender was released on parole. All "good time" granted under L. B. 567 is forfeitable.

Article IV, section 13, Constitution of Nebraska, provides: "The Legislature shall provide by law for the establishment of a Board of Parole and the qualification of its members. Said board, or a majority thereof, shall have power to grant paroles after conviction and judgment, under such conditions as may be prescribed by law, for any offenses committed against the criminal laws of this state except treason and cases of impeachment. The Governor, Attorney General and Secretary of State, sitting as a board, shall have power to remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations in all cases of conviction for offenses against the laws of the state, except treason and cases of impeachment. *The Board of Parole may advise the Governor, Attorney General and Secretary of State on the merits of any application for remission, respite, reprieve, pardon or commutation but such advice shall not be binding on them.* The Governor shall have power to suspend the execution of the sentence imposed for treason until the case can be reported to the Legislature at its next session, when the Legislature shall either grant a pardon, or commute the sentence or direct the execution, or grant a further reprieve." (Emphasis supplied.)

The State is not contending that L. B. 567 is unconstitutional. The State merely contends if L. B. 567 is

given the interpretation that plaintiffs propose, then it would be unconstitutional and void. It is the contention of the State that to interpret section 9 of L. B. 567 (section 83-1,126.01, R. S. Supp., 1975) to require retroactive application of L. B. 567 would render the entire act unconstitutional. In other words, the State contends the act is constitutional if applied prospectively, but would be unconstitutional if applied retroactively.

There is no question, it was the legislative intent that section 9 of L. B. 567 (section 83-1,126.01, R. S. Supp., 1975) be applied retroactively. The State, however, overlooks the fact this was to be done within the ambit of the condition imposed by the following words in the last sentence: "subject to the approval of the Board of Pardons."

We assume the State is applying a strict grammatical construction to the words quoted above within the section. Under that construction, all prisoners eligible for immediate discharge or release under L. B. 567 on the effective date of the act could only be released on approval of the Board of Pardons, while persons who would be entitled to release under the provisions of L. B. 567 but on a date after the effective date of the act would not need the approval of the Board of Pardons.

We do not construe the section in that manner. It is obvious that to do so suggests a classification in violation of the Equal Protection Clause of the Constitution. There is no reasonable explanation for requiring approval of the Board of Pardons for prisoners entitled to immediate release on the effective date of L. B. 567, but not requiring it for those who would be entitled to later release.

In construing a statute, it is the duty of this court to give that statute an interpretation which meets constitutional requirements if it can reasonably be done. Scott v. State ex rel. Board of Nursing, 196 Neb. 681, 244 N. W. 2d 683 (1976). Our review of the

legislative history of the act persuades us it was the intent of the Legislature that the words "subject to the approval of the Board of Pardons" should condition the entire section 9 of L. B. 567, Laws of 1975. We so construe it. We hold all prisoners need approval of the Board of Pardons before the provisions of L. B. 567 may be applied retroactively.

As so construed, section 83-1,126.01, R. S. Supp., 1975, is constitutional. The constitutional challenge by defendants is without merit.

The fact that the Board of Pardons has the ultimate power to deny approval negates the argument that section 9 infringes upon the power of the executive branch of government. As retroactive application of the act is ultimately controlled by the Board of Pardons, even if, as the State argues, such release constitutes a commutation of a sentence, it is valid since the Board of Pardons can commute a sentence at any time.

In view of our conclusions, it is not necessary that we discuss the cases cited by the State holding the retroactive application of "good time" laws invalid, because those cases are not in point herein. Article IV, section 13, Constitution of Nebraska, set out heretofore, specifically provides that the Board of Parole may advise the Board of Pardons on the merits of any application for remission, respite, reprieve, pardon, or commutation.

The trial court held any attempt to apply L. B. 567 retroactively was unconstitutional and void, and dismissed the plaintiff's petition. For the reasons stated, we reverse that judgment and remand the cause for the entry of judgment permitting retroactive application with the approval of the Board of Pardons.

REVERSED AND REMANDED.

McCOWN, J., concurring in result only.

In my view Laws of 1975, L. B. 567, is constitutional and may be applied retroactively without the

necessity of any approval by the Board of Pardons. The contention of the State that a statute which directs the discharge of a prisoner for good conduct before the maximum term of his sentence has been served interferes with the power of the judiciary and with the pardoning and commutation powers of the executive branch, if applied retroactively is, in my opinion, unfounded and disregards the history of constitutional and statutory changes in "good time" laws in this state.

Since 1871, this state has had a "good time" law giving prisoners credit for good behavior. See Laws of Nebraska, Eight Session, 1871, p. 79. From 1871 to 1969, that credit was applied to reduce the maximum term of a sentence and required discharge rather than release on parole when time limits had been met. During the same period of time a single Board of Pardons had the constitutional power to grant paroles, pardons, or commutations. As early as 1960 a study prepared for the Legislative Council committee pursuant to a legislative resolution recommended the creation of a permanent board separate from the Board of Pardons to handle paroles. In 1967, the Legislature submitted a constitutional amendment to be placed on the ballot in 1968 which did just that. At least one of the purposes of the amendment was to separate the power to parole for good conduct from acts of mercy or clemency involved in pardons, reprieves, and commutations traditionally vested in the executive branch. See, Hearings on L. B. 561 before the Government and Military Affairs Committee, Seventy-seventh Session, Nebraska Legislature, 1967.

The constitutional amendment was adopted by the electorate in 1968. It provided: "The Legislature shall provide by law for the establishment of a Board of Parole and the qualification of its members. Said board, or a majority thereof, shall have power to grant paroles after conviction and judg-

ment, *under such conditions as may be prescribed by law,* for any offenses committed against the criminal laws of this state except treason and cases of impeachment." Article IV, section 13, Constitution of Nebraska. (Emphasis ours.)

Under the revised provisions of that section of the Constitution the Board of Pardons retained the "power to remit fines and forfeitures, and to grant respites, reprieves, pardons, or commutations in all cases * * *." It seems clear that the constitutional amendment of 1968 authorized the Legislature to prescribe conditions under which the Board of Parole could not only parole prisoners but could also discharge them from custody.

In 1969, the Legislature implemented the constitutional amendment and gave to the Board of Parole, among other things, the power to dispense with and terminate parole guidance or supervision and also to discharge a parolee from parole at any time. Those 1969 statutes maintained the same good time allowances for prisoners in confinement as had been provided under the old law since 1921 and are now provided in L. B. 567, but the 1969 statutes provided for mandatory release on parole rather than the mandatory discharge from custody required by the prior and subsequent statutes. The 1969 statutes also provided for different amounts of good time allowances while a prisoner was on parole than were applicable during the period of confinement; provided for special meritorious allowances; and directed discharge when the time spent in custody and on parole equaled the maximum term, reduced only by parole good time reductions. In 1975, L. B. 567 essentially returned to the pre-1969 system, except that it is now under the administration of the Board of Parole rather than the Board of Pardons. L. B. 567 now requires discharge by the Board of Parole when the time served in custody and on parole equals the maximum term, less all good time reduc-

tions granted, and removes the differences for good time credits on parole and in custody. Basically a prisoner would be entitled to discharge at a somewhat earlier time under L. B. 567 and under pre-1969 law than he would have been under the statutes in effect between 1969 and 1975.

Under statutes effective since 1972, indeterminate sentences have been the rule in virtually all cases in Nebraska. It should be clear that where indeterminate sentences are involved in which there is a maximum and minimum sentence, a discharge after the minimum term has been served cannot be said to constitute a reduction or commutation of any such indeterminate sentence. Under L. B. 567 a prisoner is not even eligible for parole, much less entitled to a discharge, until his minimum sentence has been served.

The State's position here rests on the assumptions that the constitutional amendment of 1968 did not grant any power to the Board of Parole or the Legislature to discharge a prisoner from custody before the maximum term of his sentence, and that any earlier discharge from custody required by statute constitutes a commutation of sentence. Neither assumption is justifiable. Good time laws such as L. B. 567 and its predecessors provide for credit against sentences to be earned by a convict by his own conduct. Those good time credits are forfeitable. The granting of good time credits is not an act of clemency nor mercy, nor does it constitute an interference with the judicial or executive power under the Constitution. The Legislature should, and does, have the power to set and to change the allowance of good time credits and to grant the benefits uniformly to all prisoners who have earned them.

Subject to ex post facto restrictions, the Legislature may, if it wishes, direct that such good time statutes be applied retroactively as well as prospectively. That was done here. There is no valid reason to conjure up a spectre of unconstitutionality to

deny to any prisoners the benefits earned by their own good conduct simply because they were sentenced at the time before the "good time" statute was changed. L. B. 567 is constitutional, both prospectively and retroactively, without being interpreted as requiring the approval of the Board of Pardons.

LARRY E. SMITH, APPELLANT, V. JOSEPH C. VITEK ET AL., APPELLEES.

256 N. W. 2d 866

Filed August 3, 1977. No. 40977.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded.

Richard J. Schicker of Leigh, Koukal & Schicker, and David J. Cullan of Cullan & Cullan, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

SPENCER, J.

Plaintiff, Larry E. Smith, appeals from the District Court's denial of his request for a writ of mandamus to compel the State to discharge him from custody under the provisions of Laws 1975, L. B. 567. The sole issue presented is whether the provisions of L. B. 567 have retroactive application. We held in Johnson and Cunningham v. Exon, *ante* p. 154, 256 N. W. 2d 869 (1977), that they do if approved by the Board of Pardons. That case decides this issue and is controlling herein.

We reverse the judgment herein and remand the

cause to the District Court for reconsideration in light of our holding in Johnson and Cunningham v. Exon, *ante* p. 154, 256 N. W. 2d 869 (1977).

REVERSED AND REMANDED.

MCCOWN, J., concurring in result only.

I concur in the result only. See my concurring opinion in Johnson and Cunningham v. Exon, *ante* p. 154, 256 N. W. 2d 869.

ROBERT L. GAMRON, APPELLANT, V. ROBERT F. PARRATT, WARDEN, NEBRASKA PENAL AND CORRECTIONAL COMPLEX, APPELLEE.

256 N. W. 2d 867

Filed August 3, 1977. No. 41092.

1. **Statutes: Board of Pardons: Prisoners.** The provisions of Laws 1975, L. B. 567, do have retroactive application if they are approved by the Board of Pardons.
2. **Criminal Law: Sentences: Habeas Corpus: Prisoners.** Habeas corpus will not lie to secure the release of a prisoner until the sentence imposed is served. If the petitioner has served his sentence he is being illegally held and habeas corpus is a proper remedy.
3. **Criminal Law: Habeas Corpus: Prisoners.** In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge, then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Reversed and remanded.

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

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee

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

SPENCER, J.

In this action Robert L. Gamron, appellant, brought a habeas corpus proceeding against the appellee warden contending under the provisions of Laws 1975, L. B. 567, he had completed and served the time required to be served by him. The court sustained appellee's motion to dismiss on the premise that the question involved could not be raised in a habeas corpus action, and also L. B. 567 could not be applied retroactively. We reverse.

The question of the retroactive application of the provisions of L. B. 567 was decided in Johnson and Cunningham v. Exon, *ante* p. 154, 156 N. W. 2d 869 (1977). We there held that the provisions of Laws 1975, L. B. 567, do have retroactive application if they are approved by the Board of Pardons. That case decides this issue and is controlling herein.

The second issue raised is that habeas corpus is not a proper remedy herein. The State contends that to release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void. It is true, most of the cases involving sentences of imprisonment which have reached this court have involved the question of a void sentence. The appellant herein is not attacking the validity of his sentence as were the appellants in the cases cited by the State. In this action Gamron contends he has served his sentence and is entitled to be discharged. He is entitled to a hearing on this issue.

Gamron v. Jones, 148 Neb. 645, 28 N. W. 2d 403 (1947), determined habeas corpus will not lie to secure the release of a prisoner until the sentence imposed is served. If the petitioner has served his sentence he is being illegally held and habeas corpus is a proper remedy.

In Berry v. Wolff, 193 Neb. 717, 228 N. W. 2d 885 (1975), an inmate claimed he was being held in the Penitentiary past his mandatory release date. He

sought relief by habeas corpus. Relief was denied him in the District Court. We accepted the appeal. While the judgment was affirmed, we did not suggest habeas corpus was not the appropriate remedy.

The petitioner-appellant herein has alleged facts which if true would entitle him to his discharge. He is therefore within the ambit of our decision in Tail v. Olson, 145 Neb. 268, 16 N. W. 2d 161 (1944), in which we said: "In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge, then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented."

The judgment herein is reversed and the cause is remanded to the District Court for a hearing in conformity with this opinion.

REVERSED AND REMANDED.

MCCOWN, J., concurring in result only.

I concur in the result only. See my concurring opinion in Johnson and Cunningham v. Exon, *ante* p. 154, 256 N. W. 2d 869.

CLINTON, J., concurring in the result.

I concur in the result for the reason stated in the concurrence of McCown, J., in Johnson and Cunningham v. Exon, *ante* p. 154, 256 N. W. 2d 869.

STATE OF NEBRASKA, APPELLEE, V. CLIFFORD DAVIS, APPELLANT.

256 N. W. 2d 678

Filed August 10, 1977. Nos. 40687, 40688.

1. **Trial: Continuances.** A motion for a continuance is addressed to the sound discretion of the trial court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal.
2. **Criminal Law: Searches and Seizures: Affidavits.** An affidavit

for a search warrant may be based upon hearsay information and need not reflect the direct observations of the affiant.

3. _____: _____: _____. Affidavits for search warrants must be tested in a commonsense and realistic fashion by the courts, and courts should not invalidate search warrants by interpreting affidavits in a hypertechnical rather than a commonsense manner.

Appeals from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Judgment in case No. 40688 affirmed. Judgment in case No. 40687 affirmed in part, and in part reversed and remanded for resentencing.

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

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellee.

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

WHITE, C. J.

These are appeals from two criminal prosecutions brought against the defendant. The first amended information, case No. 40687, charged the defendant with unlawful possession with intent to deliver the controlled substance heroin in count I; illegal possession of a firearm by a felon in count II; and with being a habitual criminal in count III. The second information, case No. 40688, charged the defendant with possession of a controlled substance, phencyclidine. The defendant, in a consolidated trial, was tried by a jury and found guilty of all substantive charges under both informations. The District Court found the defendant to be a habitual criminal and sentenced him to a term of 15 to 45 years imprisonment in the Nebraska Penal and Correctional Complex on the first information and to a concurrent term of 5 years imprisonment on the second information. We affirm the judgment and sentence of the District Court in case No. 40688, and remand case No. 40687 for resentencing.

The defendant first contends that the District Court committed reversible error when it overruled his motions to withdraw his rest on his motion to suppress, and for a continuance of the trial to permit his counsel to depose the police informant. The defendant argues this denial deprived him of his constitutional right to effective assistance of counsel and constituted an abuse of discretion.

There is no question raised concerning counsel's ability, investigation, or preparation in this case. The contention is the District Court prevented the defendant from having effective assistance of counsel when it denied his motions to withdraw his rest and for a continuance to allow the deposition of the police informant.

In Avery v. Alabama, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1940), the Supreme Court said: "Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel. In the course of trial, after due appointment of competent counsel, many procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed."

"A motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal." State v. Goodloe, 197 Neb. 632, 250 N. W. 2d 606 (1977). We have reviewed the record and find no abuse of discretion or denial of defendant's right to effective assistance of counsel by the District Court in denying defendant's motions to withdraw his rest

and for a continuance. This contention is without merit.

The defendant next contends that the District Court committed reversible error in overruling his motion to suppress tangible evidence seized by police in a midnight search of his apartment on October 3, 1975. The defendant argues that the police affidavit, upon which the warrant for the search of his apartment issued, was invalid.

The tests for determining the validity of an affidavit were stated in Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), as follows: "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 U. S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where they claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U. S. 528, was 'credible' or his information 'reliable.' "

The search warrant was requested by Officer John Farmer of the vice and narcotics unit of the Omaha police department. In his affidavit, Officer Farmer stated: "Your affiant has received information from a reliable informant that inside the apartment of 302 North 22nd St., Omaha, Nebraska informant saw an amount of Heroin, within the last 72 hours. This informant has proven their (sic) reliability in the past to affiant on several occasions and also to officer Smith, Leonard of the V/N Unit by giving narcotic related information which led to the issuance of Search Warrants resulting in the recovery of Heroin and Cocaine and the arrests of numerous parties charged with Felony Narcotic cases in the District Court of Omaha. The informant does know what Heroin looks like and how it is packaged for

street sale and has also proven this to Officer Smith and affiant by making controlled narcotic purchases of Heroin and other contraband. Informant stated to affiant that the Heroin was in the control of a party named Clifford Davis who resides at 302 N. 22nd St., Apt. # 807."

The defendant argues that the affidavit is defective in that Officer Farmer's opinion of the informant's reliability was not based upon his personal knowledge of or past dealings with the informant, but rather was based upon Officer Farmer's knowledge of informant's past dealings with Officer Smith, a fellow officer in the vice and narcotics unit of the Omaha police department.

We do not believe that the basis of an affiant's opinion as to the informant's reliability need be based solely upon the affiant's direct knowledge of the informant or the result of past dealings between the affiant and the informant. It is permissible that the affiant's opinion of the informant's proven reliability be based upon the affiant's knowledge of the informant's past contacts with another, in this case, for example, a fellow police officer. In Aguilar v. Texas, *supra,* the Supreme Court clearly stated that an affidavit may be based upon hearsay information and need not reflect the direct observations of the affiant. This court has recognized that affidavits for search warrants must be tested in a commonsense and realistic fashion by the courts, and that courts should not invalidate search warrants by interpreting affidavits in a hypertechnical rather than a commonsense manner. See State v. Bernth, 196 Neb. 813, 246 N. W. 2d 600 (1976). There is no merit to this contention.

The defendant's last contention is that he was improperly sentenced under the habitual criminal act, section 29-2221, R. R. S. 1943. We agree with this contention. The record shows that the State's original informations in both cases did not charge the

defendant with habitual criminal status. The defendant was tried and convicted in a consolidated trial on two informations. Case No. 40687 charged unlawful possession with intent to deliver the controlled substance heroin in count I; and illegal possession of a firearm by a felon in count II. The second information, case No. 40688, charged the defendant with possession of a controlled substance, phencyclidine. Subsequently amended informations alleging habitual criminal counts were added, but the record shows that the amended information in case No. 40688 was withdrawn, and the original one, which did not allege habitual criminal status, was reinstated. In case No. 40687, the amended information charged the defendant with only *one* prior felony conviction and sentence of imprisonment in count III, the habitual criminal count.

The State argues that this is immaterial since the defendant admitted in open court that he was guilty of at least five felonies, and that he raised no objection at the hearing on the sufficiency of the information. We have categorically held where punishment of an accused as a habitual criminal is sought, the facts with reference thereto must be charged in the indictment or information which contains the charge of the felony upon which the accused is prosecuted. The information must contain, for a charge to be valid under the habitual criminal act, that he has been twice previously convicted of a crime and sentenced to at least 1 year confinement on each conviction. State v. Harig, 192 Neb. 49, 218 N. W. 2d 884; Rains v. State, 142 Neb. 284, 5 N. W. 2d 887. The habitual criminal count being fatally defective, it therefore appears that the defendant's two concurrent sentences of 15 to 45 years on the two counts including habitual criminal charges in case No. 40687 were invalid and must be set aside and the cause remanded for resentencing.

In case No. 40688, charging unlawful possession of

a controlled substance, the court originally on February 23, 1976, sentenced the defendant under the habitual criminal act. On March 1, 1976, the court set this sentence aside on the ground that the habitual criminal statute did not apply because the amended information which contained the habitual criminal count had been withdrawn. The court then proceeded to sentence the defendant to a term in the Nebraska Penal and Correctional Complex for a period of 5 years. This was a valid sentence.

The judgment of conviction and the sentence in case No. 40688 is therefore affirmed. The judgment of conviction in case No. 40687 is affirmed but the habitual criminal sentences are set aside because of the defective information and the cause is remanded for proper sentencing in conformity with this opinion.

JUDGEMENT IN CASE NO. 40688 AFFIRMED.
JUDGEMENT IN CASE NO. 40687 AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR RESENTENCING.

CHERYL SWARTZ, APPELLANT, V. DOUGLAS PETERSON, APPELLEE, UNION INSURANCE COMPANY, INTERVENER-APPELLEE.

256 N. W. 2d 681

Filed August 10, 1977. No. 41083.

1. **Trial: Evidence: Insurance.** Where the fact of insurance is relevant to some issue in a case, it cannot be properly excluded, but where not relevant to any issue, evidence of the existence of insurance coverage is inadmissible.
2. **Trial: Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed upon those theories of the case which are presented by the pleadings and which are supported by competent evidence.
3. **Trial: Pleadings.** The trial court has discretion to permit or deny amendments of pleadings on motion to conform to the evidence at the close of all evidence.
4. **Motor Vehicles: Negligence.** Where one driving an automobile is

suddenly confronted by an emergency, requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong.

5. **Motor Vehicles: Negligence: Evidence.** The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it.

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

Nelson, Harding, Marchetti, Leonard & Tate, Kenneth Cobb, and Robert D. Kinsey, Jr., for appellant.

Healey, Healey, Brown, Wieland & Glynn, for appellee.

Barlow, Johnson, De Mars & Flodman, for intervener-appellee.

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

WHITE, C. J.

This is an action for damages allegedly suffered by plaintiff as the result of an automobile accident in Grand Island, Nebraska, on March 4, 1973. Plaintiff alleged that defendant, Douglas Peterson, was negligent in the following particulars: He failed to maintain a proper lookout; he failed to maintain a reasonable control of the vehicle he was operating; he was operating said vehicle at a rate of speed which was greater than was reasonable and prudent for the conditions then existing; and he failed to yield the right-of-way to the vehicle in which plaintiff was a passenger.

In his answer, defendant denied that he was negligent and that plaintiff was disabled as a result of the collision he and plaintiff were involved in, and further alleged that the proximate cause of the collision

was the negligent acts of Robert Mattke, driver of the vehicle in which plaintiff was a passenger.

The case was tried to a jury and a verdict returned in favor of the defendant. Plaintiff filed a motion for a new trial which was overruled and she now appeals. We affirm the judgment of the District Court.

Plaintiff raises two primary contentions on appeal. The first relates to the factor of insurance present in the case. Union Insurance Company filed a petition in intervention. It alleged that plaintiff was riding in an automobile owned by the Grand Island Finance Company at the time of the accident, and that at the time of the accident there was in full force and effect a policy of liability insurance issued by the intervener to the Grand Island Finance Company describing the automobile plaintiff was riding in. As a part of the policy of liability insurance was an endorsement providing for family protection coverage for damages for bodily injury caused by uninsured automobiles. Intervener alleged that it may have some interest in the outcome of the action as between plaintiff and defendant because of the question of uninsured motorist coverage.

During voir dire examination the interest of intervener was disclosed to the jury, as well as the fact that defendant was an uninsured motorist at the time of the accident. Plaintiff moved to disclose the interest of her uninsured motorist carrier in the suit. This motion was denied. Plaintiff contends that this was error, arguing that once the court permitted disclosure of the interest of one insurance company in the proceeding it should have disclosed the interests of all insurance companies.

Where the fact of insurance is relevant to some issue in a case, it cannot be properly excluded, but where not relevant to any issue, evidence of the existence of insurance coverage is inadmissible. Fielding v. Publix Cars, Inc. 130 Neb. 576, 265 N. W.

726 (1936). The fact of insurance is irrelevant to the question of negligence. Muller v. Nebraska Methodist Hospital, 160 Neb. 279, 70 N. W. 2d 86 (1955).

There was no error by the District Court in overruling the plaintiff's motion to disclose her insurance interests. Plaintiff's uninsured motorist carrier never became a party to the action. There is nothing in the record to indicate it was involved in any way in the trial. Nor is there any evidence to indicate that plaintiff was prejudiced by the denial of her motion.

Plaintiff's next assignment of error concerns the giving of instruction No. 10, on sudden emergency, to the jury by the District Court. Plaintiff contends that the instruction was not supported by the pleadings or by the evidence.

A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. Schmidt v. Johnson, 184 Neb. 643, 171 N. W. 2d 64 (1969); Vistron Corp. v. Scoular-Bishop Grain Co., 194 Neb. 696, 234 N. W. 2d 906 (1975). A judgment must be supported by the pleadings. Harrison v. Grizzard, 192 Neb. 243, 219 N. W. 2d 766 (1974).

In response to the allegations of plaintiff's petition, defendant denied that he was negligent and alleged that the proximate cause of the accident was the negligent acts of Robert Mattke in that he failed to maintain a proper lookout; he failed to maintain reasonable control of the vehicle he was driving; he was operating said vehicle at a rate of speed which was greater than was reasonable and prudent for the conditions then existing; and he failed to yield the right-of-way to the vehicle operated by defendant.

It is argued on behalf of defendant, in response to plaintiff's contention that defendant failed to raise the issue of sudden emergency by his pleadings, that defendant's amended answer, which contained a

general denial of negligence and an allegation that the proximate cause of the accident was the negligent acts of another, was sufficient to raise the issue and justify an instruction to the jury on sudden emergency, in light of the evidence adduced at trial.

It is not necessary for us to determine whether defendant's amended answer was sufficient to justify an instruction on sudden emergency. The record indicates that after trial, and the jury verdict in favor of the defendant, the trial court permitted both the defendant and the intervener to amend their pleadings to specifically raise the issue of sudden emergency, pursuant to section 25-852, R. R. S. 1943.

The trial court has discretion to permit or deny amendments of pleadings on motion to conform to the evidence at the close of all evidence. State Securities Co. v. Corkle, 191 Neb. 578, 216 N. W. 2d 879 (1974). Amendments to pleadings may be allowed at any stage, even after all evidence is presented. Swan v. Bowker, 135 Neb. 405, 281 N. W. 891 (1938).

The trial court's decision to permit the amendments to defendant's and intervener's pleadings to include sudden emergency is not assigned as error by plaintiff. The amended pleadings clearly raised the issue of sudden emergency, and plaintiff's contention that the submission of instruction No. 10 was not supported by the pleadings must fail.

Even had plaintiff challenged the action of the District Court in permitting the amendments to the pleadings to include sudden emergency, we do not believe that this was an abuse of discretion by the District Court, or that plaintiff was prejudiced thereby or put at a disadvantage. Both sides were represented by competent counsel. This case arose out of a commonplace two-vehicle collision. The evidence available in this case was fully developed, with every possibility examined and explored. All the evidence available was placed before the jury.

Plaintiff also contends that the instruction on sud-

den emergency was not supported by the evidence at trial. In Watson Bros. Transp. Co. v. Jacobson, 168 Neb. 862, 97 N. W. 2d 521 (1959), we thus explained the doctrine of sudden emergency: " 'In the realm of negligence cases, an emergency has become the basis for a rule of law which is dependent for application upon two factual elements. This court has held that: "Where one driving an automobile is suddenly confronted by an emergency, requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong." * * *' Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491. 'The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it.' Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112."

In Kraft v. Fundum, 175 Neb. 821, 124 N. W. 2d 225 (1963), we stated: " 'The "sudden emergency rule" applies only where the evidence discloses that one became aware of an emergency and was put to a rapid choice of alternative courses of action in order to avoid accident and the jury, in the state of the evidence and in light of subsequent events, might reach the conclusion that the course of action adopted was an unwise one, in which event an instruction defining the right of one confronted by such an emergency is required.' " See, also, Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758 (1957); Stanley v. Ebmeier, 166 Neb. 716, 90 N. W. 2d 290 (1958); Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246 (1960); Vacanti v. Montes, 180 Neb. 232, 142 N. W. 2d 318 (1966).

The record contains the following facts: The accident occurred shortly after midnight on March 4, 1973. The car in which plaintiff was riding was lo-

cated at the parking lot entrance of the Red Baron Lounge, located on the east edge of South Locust Street, Grand Island, Nebraska. Plaintiff, her husband, and another couple had spent a social evening at the Red Baron. It was raining lightly at the time. Mr. Mattke, driver of the vehicle in which plaintiff rode, observed the streets to be wet. Mr. Mattke testified that he intended to drive across South Locust Street, a four-lane street running north and south, and proceed to the Stagecoach Road, a street running east and west and located directly west of the Red Baron parking lot entrance. The accident occurred as Mattke's vehicle crossed South Locust Street. Mr. Mattke's vehicle was struck in the right rear portion by defendant's car.

Defendant Peterson testified that he was traveling south on South Locust Street the night of the accident. He had switched from the right lane to the left lane for southbound traffic approximately 3 blocks from where the accident occurred. He testified that he was traveling approximately 35 miles per hour. Peterson testified that he noticed Mattke's vehicle waiting at the side of the road. Anticipating no danger from the Mattke vehicle, he proceeded to check the rest of the traffic. He then became aware of movement over to his left, out of the corner of his eye. He then noticed the Mattke vehicle attempting to cross in front of him. He stated that he felt there would be a collision and applied his brakes in an attempt to avoid a collision. He testified that there was no time to swerve his car, honk his horn, or flash his headlights.

There was sufficient evidence for the jury to have concluded that defendant was confronted with a sudden emergency, not of his own making. Plaintiff's contention is without merit.

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

AFFIRMED.

GEORGE G. S. HOLMGREN ET AL., APPELLANTS, V. CITY OF LINCOLN, A MUNICIPAL CORPORATION, ET AL., APPELLEES, DAVID C. PIERSON, TRUSTEE, INTERVENER-APPELLEE.

256 N. W. 2d 686

Filed August 10, 1977. No. 41096.

1. **Municipal Corporations: Zoning.** Zoning regulations shall be designed to secure safety from fire, flood, and other dangers and to promote the public health, safety, and general welfare, and shall be made with consideration having been given to the character of the various parts of the area zoned and their peculiar suitability for particular uses and types of development, and with a view to conserving property values and encouraging the most appropriate use of land throughout the area zoned, in accordance with a comprehensive plan. § 15-902, R. R. S. 1943.
2. _____: _____. A comprehensive plan is a guide to community development.
3. **Legislature: Zoning.** Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control.
4. **Zoning: Words and Phrases.** Spot zoning has been generally defined as the singling out of a small parcel of land for a use or uses classified differently from the surrounding area, primarily for the benefit of the owner of the property so zoned, to the detriment of the area and the other owners therein.

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

Duane L. Nelson, for appellants.

Charles D. Humble and Helga L. Kirst, for appellees.

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

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

CLINTON, J.

This is an action to have ordinance No. 10634, an amendment to the general zoning ordinances of the City of Lincoln, declared null and void. The District Court denied relief and the plaintiffs have appealed. We affirm.

The amendatory ordinance here at issue changed the zoning classification of a 4.6-acre tract from Class A-2, single family dwelling district, to Class C, multiple dwelling district. This change would permit the construction of multiple dwellings and row houses, in addition to single and two-family dwellings permitted in higher zoning classifications. The land in question is part of a larger tract, vacant except for some isolated dwellings, and is not in single ownership. The plaintiffs reside on adjacent property which is zoned Class A-2.

The claim of the plaintiffs that the ordinance is void rests on the following premises: (1) The amendment is not "in accordance with a comprehensive plan" as required by section 15-902, R. R. S. 1943. (2) The ordinance is arbitrary and unreasonable because it results in "spot zoning," and is therefore unconstitutional.

Section 15-902, R. R. S. 1943, is the enabling legislation which authorizes cities of the primary class to adopt zoning regulations. In addition to describing generally the powers granted, it recites: "Such zoning regulations shall be designed to secure safety from fire, flood and other dangers and to promote the public health, safety and general welfare, and shall be made with consideration having been given to the character of the various parts of the area zoned and their peculiar suitability for particular uses and types of development, and with a view to conserving property values and encouraging the most appropriate use of land throughout the area zoned, in accordance with a comprehensive plan." The enabling statute was first enacted in 1929. The phrase, "in accordance with a comprehensive plan," was added by an amendment in 1963.

The plaintiffs contend that the comprehensive plan to which the zoning laws must conform was adopted by the Lincoln City-Lancaster County Planning and Zoning Commission on April 12, 1961, and subse-

quently approved by the city council of Lincoln. That comprehensive plan includes all aspects of city and regional planning, embracing, among other things, forecasts as to future population and economic conditions, transportation needs, and proposals for utilities. It also includes a "land use" or zoning section, part of which consists of a zoning map in which the tract which is the subject of this action is proposed as part of a single-family residence area. Part of the tract and adjacent propperty are also considered by the plan as a future site for a public park. The record indicates that this latter use was ultimately rejected by a refusal of the city council of Lincoln to make the necessary capital expenditures.

The comprehensive plan was adopted by the City of Lincoln pursuant to the provisions of sections 15-1101 et seq., R. R. S. 1943, and enacted by the Legislature in 1959. Section 15-1102, R. R. S. 1943, provides: "The general plan for the improvement and development of the city of the primary class shall be known as the comprehensive plan." It then provides that the plan shall include six items separately numbered and described, and then goes on to say: "The comprehensive plan shall include a land-use plan showing *the proposed general distribution and general location* of business and industry, *residential areas, utilities,* and recreational, educational, and other categories of public and private land uses. The land-use plan shall also show *the recommended standards of population density based upon population estimates* and providing for activities for which space should be supplied within the area covered by the plan." (Emphasis supplied).

Section 15-1105, R. R. S. 1943, gives to the planning director the responsibility of preparing "the zoning ordinance" and of "submitting it to the city planning commission." The statute provides that when approved by the commission, it is submitted to the

council for its consideration, and the zoning ordinance shall become effective when adopted by the council. It also provides: "The city council of such primary city may amend, supplement, or otherwise modify the zoning ordinance." The statute requires that before amendment such proposal be submitted to the planning commission for *a recommendation* and report. Provisions for hearing and notice are also contained in the statute.

In essence, the plaintiffs contend that the single-family designation in the plan fixes the use of the property, and therefore, the "in accordance with" provision of the enabling statute is violated and the amendment therefore void. In support of their position the plaintiffs rely primarily upon the opinion of this court in Weber v. City of Grand Island, 165 Neb. 827, 87 N. W. 2d 575, where we had occasion to consider the validity of an amendatory zoning ordinance enacted under the provisions of Chapter 19, article 9, R. R. S. 1943. Section 19-901, R. R. S. 1943, requires the adoption of a comprehensive plan, among other things, as a condition precedent to the exercise of the zoning power by the city. That statute provides in part: "The comprehensive development plan shall be used only as a guide by the planning commission and the municipal legislative body in all matters to which such comprehensive plan applies." The original version of this section was enacted in 1927. While the last-quoted sentence was part of a 1974 amendment, the simple provision, "in accordance with a comprehensive plan," has been included in Chapter 19, article 9, R. R. S. 1943, since the original enactment. The provision requiring the appointment of a planning commission and a recommended comprehensive development plan as a condition precedent was added later, but before the ordinance being considered in the Weber case was enacted. The county zoning enabling act contains a similar condition precedent provision. § 23-114.03,

R. R. S. 1943. Chapter 15, article 9, R. R. S. 1943, contains no express provision making the adoption of "the comprehensive plan" a condition precedent to the exercise of the zoning power.

In Weber, the zoning amendment involved the change of a half block of a residential zone to a commercial classification for the purpose of permitting the construction and operation of a supermarket. We held, among other things, that the amendment constituted arbitrary spot zoning, saying: " . . . there is no competent evidence from which it could be concluded that the action of the board of adjustment permitted the rezoning, or that ordinance No. 3263 was passed for the purpose of promoting the health, safety, morals, or general welfare of the community, in compliance with section 19-901, R. R. S. 1943. The evidence is conclusive that such action and ordinance did not do so." We there noted that the evidence clearly established that the board of adjustment and the council acted in violation of the enabling statutes by spot zoning the property involved, in an arbitrary, unreasonable, discriminatory, and illegal manner for the benefit of one individual to the detriment of the plaintiffs and other owners of property affected. We also said that there *had been no attempt to establish a comprehensive plan* for the area involved. However, in that case we had no occasion to determine what the words "in accordance with a comprehensive plan" meant, that is, whether such a plan is merely a guide, or whether it is something which sets future zoning in concrete until the plan itself is changed. It does not seem to us that the Weber case affords a precedent in this case.

The zoning enabling statutes of many states contain provisions requiring that zoning be accomplished in accordance with "a comprehensive plan." Usually the term was not defined by statute and the courts reached a variety of conclusions as to what

the term meant. See, Haar, "In Accordance With a Comprehensive Plan," 68 Harv. L. Rev., p. 1154; Hagman, Urban Planning & Development Control Law, § 93 et seq., pp. 168 to 178.

An examination of the pertinent language of section 15-1102, R. R. S. 1943, convinces us that the plan was intended to be a general guide. It refers to "general distribution and general location of business and industry, residential areas, utilities, and recreational, educational, and other categories of public and private land uses," as well as to "the recommended standards of population density based upon population estimates." This language clearly leads to the conclusion that "the" or "a" comprehensive plan is the guide. We recently had occasion, in a somewhat different context, to say that such a comprehensive plan is a guide. See Stones v. Plattsmouth Airport Authority, 193 Neb. 552, 228 N. W. 2d 129, where we said: "A comprehensive plan is a guide to community development rather than an instrument of land-use control. See 3 Anderson, American Law of Zoning, § 17.15, p. 307." In Haar, op. cit., p. 1174, it is said: ". . . when plans are conceived to deal in more specific terms they generally focus on the wrong kind of detail, emphasizing maps and diagrams, precise locations and sites, and other details more appropriate for the later stages of implementation and execution. Such an approach makes the master plan in effect a preliminary, sketchy, first-draft zoning ordinance. This overconcern with detail causes the vaunted general perspective of the master plan to expose itself as nothing more than the limited knowledge available at the first stages of survey and analysis; and the zoning ordinance, dealing as it does with concrete cases and problems, becomes a later, matured evaluation. It is only as a series of statements and precepts, representing community choice and decision as to the space needs of various activities and

the interrelationships of land uses, that the master plan can effectively fulfill its role as a guide to regulatory action."

The evidence in this case does not support the conclusion that the amendatory ordinance is not in accordance with "a comprehensive plan." The use designated by the amendment is residential, as called for by the plan, although the amendment permits a higher population concentration. This is not a case where a use entirely different from that contemplated by the plan results. In Bucholz v. City of Omaha, 174 Neb. 862, 120 N. W. 2d 270, we said: "Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control." The following authorities under similar statutes support the specific conclusion here reached: Borough of Cresskill v. Borough of Dumont, 15 N. J. 238, 104 A. 2d 441; Village 2 at New Hope, Inc. Appeals, 429 Pa. 626, 241 A. 2d 81. We conclude that ordinance No. 10634 did not violate the term of the enabling legislation which mandates that zoning be "in accordance with a comprehensive plan."

We now turn to the claim that the classification change of the 4.6-acre tract constituted arbitrary and capricious and therefore unconstitutional spot zoning.

In Weber v. City of Grand Island, *supra,* we said that spot zoning has been generally defined as the singling out of a small parcel of land for a use or uses classified differently from the surrounding area, primarily for the benefit of the owner of the property so zoned, to the detriment of the area and the other owners therein. As previously noted, that case involved the rezoning of a one-half block area in the midst of what was otherwise a residential area. We said: "The validity of spot zoning depends upon more than the size of the spot, and spot zoning as such is not necessarily invalid, but its validity de-

pends upon the facts and circumstances appearing in each particular case." Hagman, op. cit., § 93, p. 169, analyzes spot zoning in the following fashion: "Spot zoning is invalid where some or all of the following factors are present:

"1. a small parcel of land is singled out for special and privileged treatment;

"2. the singling out is not in the public interest but only for the benefit of the landowner;

"3. the action is not in accord with a comprehensive plan.

"The list is not meant to suggest that the three tests are mutually exclusive. If spot zoning is invalid, usually all three elements are present, or, said another way, the three statements may merely be nuances of one another."

We regard the following factors as significant in this case in determining whether the change of zoning of the 4.6-acre tract is arbitrary and unreasonable spot zoning and hold that they do support the council's action. (1) The tract itself and the land to the east and west is largely vacant. (2) The change from the original proposed uses is not radical, that is, it is from one type of residential use to another type of residential use. (3) There is conflicting expert testimony as to whether the zone change is in the public interest. (4) There is competent, conflicting evidence to the effect that the tract of which the area in question is a part, does not, because of natural and man-made boundaries lend itself to extensive single-family development. (5) The land in question and the larger vacant tracts of which it is a part are in diverse ownership and this fact supports the conclusion that the rezoning was not for the special benefit of one single landowner to the detriment of the others. We have said: "What is the public good as it relates to zoning ordinances affecting the use of property is primarily a matter lying within the discretion and determination of the municipal

body to which the power and function is committed; and unless an abuse of discretion has been clearly shown, it is not the province of the court to interfere." Crane v. Board of County Commissioners, 175 Neb. 568, 122 N. W. 2d 520.

The determination of the District Court that the ordinance was not unconstitutional spot zoning is correct.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROGER E. METZGER, APPELLANT.

256 N. W. 2d 691

Filed August 10, 1977. No. 41202.

1. **Time: Words and Phrases.** The words "on or about" do not put the time at large, but indicate that it is stated with approximate certainty. The phrase is used in reciting the date of an occurrence to escape the necessity of being bound by an exact date and means "approximate," "about," "without substantial variance from," "near."
2. **Criminal Law: Venue: Proof.** The venue of an offense may be proven like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient.
3. **Criminal Law: Evidence: Proof.** Evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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

Tye, Worlock, Tye, Jacobsen & Orr and Patrick J. Nelson, for appellant.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for appellee.

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

WHITE, C. J.

Defendant was charged with forgery. The case was tried to a jury and a guilty verdict returned. The District Court sentenced the defendant to a term of 1 year in the Nebraska Penal and Correctional Complex. Defendant filed a motion for a new trial, which was overruled, and now appeals. We affirm the judgment and sentence of the District Court.

Defendant first contends on appeal that the State failed to prove beyond a reasonable doubt every material element of the crime charged. Specifically, defendant argues that there was no evidence to support a finding, beyond a reasonable doubt, that the offense was committed on September 16, 1974. Both the information and the complaint alleged that the defendant committed the offense "on or about" September 16, 1974.

In State v. Armstead, 283 S. W. 2d 577 (Mo., 1955), the court stated: " * * * the words 'on or about' do not put the time at large, but indicate that it is stated with approximate certainty * * *. [T]he phrase is used in reciting the date of an occurrence to escape the necessity of being bound by an exact date and means 'approximately,' 'about,' 'without substantial variance from,' 'near.' " See, also, 67 C. J. S., On; Upon, p. 496; 29A Words and Phrases, On, In, or About, p. 257; State v. Guillot, 200 La. 935, 9 So. 2d 235 (1942).

The record shows that the check in question, No. 2293, was dated September 16, 1974. The Phelps County court checkbook contained a missing check stub preceded by and followed by checks unquestionably authorized and dated September 16, 1974. The check in question was deposited October 3, 1974. There was sufficient evidence for the jury to conclude that the offense was committed by the de-

fendant on or about September 16, 1974, as charged. There is no merit to this contention.

Defendant next contends that the State failed to establish venue. In State v. Liberator, 197 Neb. 857, 251 N. W. 2d 709 (1977), we said: "The venue of an offense may be proven like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient."

The check in question originated in the checkbook of the Phelps County court. Jeanne Ortegren, clerk of the county court of Phelps County for approximately 5 years beginning in May 1971, testified that the unissued checks of the Phelps County court were kept in her desk at the Phelps County courthouse, and that defendant had constant access to the checks. This was sufficient evidence for the jury to conclude that the offense was committed in Phelps County.

Defendant's last contention is that the District Court erred in allowing in evidence concerning shortages in the account of the Harlan County court which involved defendant.

Defendant was charged with forgery in violation of section 28-601, R. R. S. 1943. The State was required to prove that the defendant falsely made, altered, counterfeited, printed, or photographed a check with intent to defraud. A specific intent is an essential element of the offense. Section 27-404 (2), R. R. S. 1943, of the Nebraska Rules of Evidence, provides: "Evidence of other crimes, wrongs, or acts * * * may * * * be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See, also, Yost v. State, 149 Neb. 584, 31 N. W. 2d 538 (1948).

Defendant argues that even though this evidence

may have been relevant, it was highly prejudicial and should have been excluded. It was within the discretion of the District Court to ascertain the relevancy of the evidence, its potential prejudicial effect, and to then determine whether such evidence should be admitted. The District Court's determination to admit this evidence cannot be said to be an abuse of discretion. See, State v. Ray, 191 Neb. 702, 217 N. W. 2d 176 (1974); State v. Garrett, 191 Neb. 439, 216 N. W. 2d 170 (1974).

The judgment and sentence of the District Court are correct and are affirmed.

AFFIRMED.

HUMPHREY FEED & GRAIN, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, A UTAH CORPORATION, APPELLEE AND CROSS-APPELLANT.

257 N. W. 2d 391

Filed August 17, 1977. No. 41088.

1. **Shippers: Carriers: Grain: Damages.** In actions by a shipper against a carrier for lost goods, a prima facie case is made out when the shipper shows delivery of a quantity of goods to the carrier; arrival at destination of a lesser quantity, taking into account normal losses inherent in goods such as grain due to loss of moisture; and the amount of damages.
2. **Bills of Lading: Evidence.** Where the bill of lading reflects the shipper's weight and load count, the weight listed on the bill of lading is not, in and of itself, sufficient evidence of the quantity of goods delivered by the shipper to the carrier. In such a case the shipper must produce further evidence of the quantity of goods delivered to the carrier.
3. **Statutes: Property: Interstate Commerce: Damages: Attorney's Fees.** In cases involving loss of property in interstate shipments, interest and attorney's fees may not be recovered under section 74-715, R. R. S. 1943.
4. **Interstate Commerce Commission: Courts: Carriers: Jurisdiction.** The Interstate Commerce Commission and the federal courts do not have exclusive jurisdiction of claims against interstate carriers. The Interstate Commerce Act did not supersede

the jurisdiction of state courts in cases where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission; or relate to a subject as to which the jurisdiction of the federal courts had otherwise been made exclusive.

5. **Carriers: Discrimination.** A charge of unlawful discrimination on the part of a common carrier may be predicated upon the furnishing to some patrons of services or facilities which are unjustifiably denied to others.
6. **Interstate Commerce Commission: Jurisdiction.** Under the doctrine of "primary jurisdiction," preliminary resort to the Interstate Commerce Commission is required where the inquiry is essentially one of fact and of discretion in technical matters, and when uniformity can only be secured if determination is made by the Interstate Commerce Commission.
7. **Interstate Commerce Commission: Railroads.** The Interstate Commerce Commission must make the initial determination as to whether rail service provided by an interstate carrier is reasonable.
8. **Railroads: Public Service Commissions.** It is the general rule that a railroad has a duty under its state franchise to maintain and repair its lines and provide service thereon. Such duty is based on the railroad's obligation to properly provide services to the public impartially, without discrimination for or against persons demanding similar services.
9. ____: ____. Whether or not a railroad has a duty to maintain a spur track or sidetrack depends on whether the track benefits only private interests, or whether the track has become part of the main line and is used to serve the public at large.
10. **Shippers: Carriers: Discrimination.** Where a claim by a shipper involves the questions of whether rail service and facilities provided by an interstate carrier were reasonable and nondiscriminatory, the doctrine of "primary jurisdiction" applies.

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

Raymond M. Crossman, Jr., of Crossman, Barton & Norris, for appellant.

Daniel P. Morisseau, for appellee.

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

BRODKEY, J.

This is an action by Humphrey Feed & Grain, Inc.

("Humphrey"), against Union Pacific Railroad Company for damages resulting from alleged losses of grain transported by the railroad for Humphrey; and for loss of profits allegedly caused by the railroad's failure to maintain in good repair a sidetrack which serves the premises leased to Humphrey by the railroad. The District Court granted summary judgment in favor of Union Pacific on Humphrey's claim for lost profits. Humphrey received a jury verdict on its claim for damages resulting from losses of grain, and the trial court denied Humphrey interest or attorney's fees on its judgment. Humphrey has appealed from the summary judgment granted to the railroad, and from the denial of interest and attorney's fees on the judgment. Union Pacific has cross-appealed from the judgment in Humphrey's favor on the ground a verdict should have been directed. We affirm the judgment for Humphrey for damages for loss of grain, and also the denial of interest and attorney's fees. We vacate, with instructions, the summary judgment granted in favor of Union Pacific on the claim for lost profits.

In its petition, Humphrey alleged that between October 1, 1971, and December 31, 1974, it had delivered to the railroad 121 carloads of grain for shipment, and had received a bill of lading for each car which reflected the number of pounds of grain loaded aboard each car. Plaintiff alleged that each carload of grain was delivered by the defendant or a connecting carrier to a point of destination with a shortage of grain in excess of generally accepted shrinkage. Humphrey alleged that the railroad is subject to the provisions of the Carmack Amendment, Title 49 U. S. C. A., § 20, par. (11); and it was liable to Humphrey thereunder for the loss of the grain in excess of normal shrinkage. Humphrey further alleged that it had filed claims with the railroad for the alleged losses within the time provided by section 74-715, R. R. S. 1943; that the claims were not

adjusted or paid by the railroad within the specified time period; and that it was therefore entitled to interest and reasonable attorney's fees under that section. Humphrey prayed for judgment against the railroad in the amount of $21,677.36, plus interest and attorney's fees.

In a separate cause of action, Humphrey alleged that it was the lessee of a portion of the railroad's right-of-way, and that there is an implied covenant under the lease that the railroad would keep its sidetrack, which serves the leased premises, in such a state of repair and maintenance so as to provide Humphrey with full and satisfactory shipping facilities. Humphrey also alleged that the railroad had a statutory duty to keep the sidetrack in repair under section 74-503, R. R. S. 1943. Humphrey alleged that the railroad has failed to maintain the sidetrack in good repair during the period from September 1, 1972, through December 31, 1974; that only three cars could be "spotted" on the sidetrack due to the disrepair; that the railroad failed to make necessary repairs despite oral demands by Humphrey; and that Humphrey received approximately 130 cars less on the average than his competitors as a result of the disrepair of the sidetrack. Humphrey prayed for a judgment against the railroad in the amount of $91,000 for lost profits incurred as a result of the alleged failure of the railroad to maintain its sidetrack in good repair.

In its answer, Union Pacific denied the shortages of grain and its liability on Humphrey's claim for damages. The railroad admitted the existence of the lease, but denied it had failed to keep the sidetrack in good repair, and denied the allegation of lost profits. Union Pacific filed a motion to dismiss the claim for lost profits on the ground that the subject matter of that claim was outside the jurisdiction of the District Court, but that motion appears not to have been ruled on by the trial court. The railroad

also moved for summary judgment on the claim for lost profits, and that motion was sustained by the District Court. As previously stated, Humphrey received a jury verdict and judgment in its favor on its claim for damages incurred as the result of grain losses, but the trial court denied interest and attorney's fees on that judgment.

We first examine the contentions of the parties in regard to the judgment in Humphrey's favor on its claim for damages resulting from grain losses. The facts adduced at trial are as follows.

From October 1, 1971, through December 31, 1974, Humphrey delivered 118 carloads of grain to the railroad for shipment. Three claims for 121 carloads originally filed were withdrawn prior to or during the trial. The cars were "spotted" by the railroad on the sidetrack which serves Humphrey's business, and were loaded by Humphrey. In loading the cars, Humphrey uses a "dump" scale, which is a balance scale governed by a 560 or 600 pound weight. Grain is loaded into the scale, which automatically dumps the grain when the 560 or 600 pound weight limit is reached. A counter is automatically tripped when each dump occurs so that the number of dumps is recorded.

After a car is loaded, the railroad is notified, and its agent seals the car. The agent prepares a bill of lading, and in so doing uses the weight figure provided by Humphrey. After the grain reaches its destination, an account of sales is sent to Humphrey, which shows the weight at destination. The bills of lading and the account of sales regarding the 118 shipments involved in this case were received in evidence, and showed that the weight at destination was less than the weight at origin, taking into account the tariff of normal shrinkage of 1/8 of 1 percent, on the 118 shipments.

In support of the contention that the dump scale was accurate, Humphrey's owner testified that the

weights arrived at by using the dump scale compared with weights recorded on Humphrey's truck scale. Such comparisons were made when a grain producer delivered grain to Humphrey in a truck and the grain was weighed on the truck scale. When the grain was immediately loaded on railroad cars via the dump scale, the truck scale weight could be compared to the dump scale weight. The truck scale was inspected annually by the State of Nebraska, and passed inspections for accuracy.

Humphrey also introduced evidence that one of its customers, who had a truck too large for its truck scale, would load grain on the truck via the dump scale, and the weight would be checked by weighing the truck at a scale of another elevator. Comparisons between the dump scale weight and the weight recorded on the scale of the other elevator were favorable.

Humphrey's owner testified that he had filed claims with the railroad on the 118 shipments within 90 days of settlement, which was the time he was told what the weight at destination was, and that the claims were not adjusted or paid by the railroad.

A professor who was an expert in grain science testified on behalf of Union Pacific. In summary, his testimony was that grain loses weight during shipment due to loss of moisture, and that the amount of weight loss depends on the water content of the grain and the humidity. Another expert witness, a supervisor of weights, testified that dump scales are not regarded as accurate scales in the industry. Evidence was adduced to the effect that dump scales are inaccurate if not properly maintained and kept in good repair. An analysis of Humphrey's records indicated that, during the relevant time period, 33 percent of its shipments were overweight, 61 percent were underweight, and 6 percent were even, when Humphrey's dump scale weights were compared to the destination weights. The evi-

dence also showed that Humphrey's dump scale was not cleaned and inspected in accordance with the recommendations of the manufacturer of the scale.

Union Pacific contends that the trial court erred as a matter of law in overruling its motion for a directed verdict at the close of all the evidence, and in overruling its motion for judgment notwithstanding the verdict. In so arguing, the railroad relies on the rule that the trial court should direct a verdict when there is not sufficient evidence upon which a jury can properly proceed to find a verdict in favor of the party upon whom the burden of proof is imposed. See Moats v. Leinemann, 188 Neb. 452, 197 N. W. 2d 377 (1972). In this case, however, we believe there was sufficient evidence upon which the jury could proceed to find in favor of Humphrey.

A motion for a directed verdict must be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; and such a 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. Laux v. Robinson, 195 Neb. 601, 239 N. W. 2d 786 (1976). This court will not interfere with the findings of a jury on a fact question unless the preponderance of the evidence is so clearly and obviously contrary to the findings that it is the duty of the reviewing court to correct the mistake. Dort v. Swift & Co., 193 Neb. 606, 228 N. W. 2d 588 (1975). Under these rules, the question presented is whether the evidence, and reasonable inferences therefrom, was sufficient for the jury to find by a preponderance of the evidence that grain losses occurred during the shipments.

Humphrey's claim was brought under Title 49 U. S. C. A., § 20, par. (11), which provides that a railroad is liable for loss of property caused by it. In actions by a shipper against a carrier for lost goods, a prima facie case is made out when the shipper

shows delivery of a quantity of goods to the carrier; arrival at destination of a lesser quantity, taking into account normal losses inherent in goods such as grain due to loss of moisture; and the amount of damages. See, Missouri Pacific R. R. Co. v. Elmore & Stahl, 377 U. S. 134, 84 S. Ct. 1142, 12 L. Ed. 2d 194 (1964); Nye-Schneider-Fowler Co. v. Chicago & N. W. R. R. Co., 106 Neb. 149, 182 N. W. 967 (1921). The question of the correctness of weights is for the jury and is a fact which the shipper must prove by a preponderance of the evidence. Nye-Schneider-Fowler Co. v. Chicago & N. W. R. R. Co., *supra*. Where the bill of lading reflects the shipper's weight and load count, the weight listed on the bill of lading is not, in and of itself, sufficient evidence of the quantity of goods delivered by the shipper to the carrier. Dublin Co. v. Ryder Truck Lines, 417 F. 2d 777 (5th Cir., 1969). In such a case the shipper must produce further evidence of the quantity of goods delivered to the carrier.

In this case Humphrey produced not only the bills of lading, but also evidence in regard to the accuracy of its dump scale, and testimony that the weight reflected on the bills of lading was in fact the weight of the grain loaded in the railroad cars. Union Pacific introduced evidence that the dump scale was inaccurate, and that it had not been properly maintained and cleaned. The evidence clearly raised a fact question for the jury, and the evidence introduced by Humphrey was sufficient for the jury to find by a preponderance of the evidence that the quantity of grain Humphrey delivered to the railroad was the quantity reflected on the bills of lading. Therefore, it was proper for the trial court to overrule Union Pacific's motions for a directed verdict and for judgment notwithstanding the verdict; and the railroad's contention to the contrary is without merit.

We next turn to the question of whether the Dis-

trict Court erred in denying Humphrey interest from the date of its claims against the railroad and reasonable attorney's fees on its judgment for damages resulting from losses of grain. It is uncontroverted that the shipments were interstate shipments, and that Union Pacific's liability for losses is governed by Title 49 U. S. C. A., § 20, par. (11), known as the Carmack Amendment, which imposes liability of a carrier for the full actual loss, damage, or injury to property of the shipper. With the enactment of the Carmack Amendment, Congress superseded diverse state laws with a national uniform policy governing interstate carriers' liability for property loss, and the federal law governs liability for loss or damage. New York, N. H. & H. R. R. Co. v. Nothnagle, 346 U. S. 128, 73 S. Ct. 986, 97 L. Ed. 1500 (1953); Sweeney v. Morgan Drive Away, Inc., 394 F. Supp. 1216 (D. Colo., 1975); Vacco Industries v. Navajo Freight Lines, Inc., 63 Cal. App. 3d 262, 133 Cal. Rptr. 628 (1976). The federal law does not authorize the allowance of attorney's fees in an action for loss or damage to property in shipment. Atlantic Coast Line R. R. Co. v. Riverside Mills, 219 U. S. 186, 31 S. Ct. 164, 55 L. Ed. 167 (1911); Sutherland v. Ringsby Truck Lines, Inc., 549 P. 2d 784 (Colo. App., 1976); T. I. M. E.—DC, Inc. v. Southwestern Historical Wax Museum Corp., 528 S. W. 2d 901 (Tex. Civ. App., 1975).

Although there is no provision in the Carmack Amendment providing for recovery of interest or attorney's fees on loss or damage to property, section 74-715, R. R. S. 1943, provides: "Every claim for loss or damage to property in any manner, or overcharge for freight for which any common carrier in the State of Nebraska may be liable, shall be adjusted and paid by the common carrier delivering such freight at the place of destination within sixty days, in cases of shipment or shipments wholly within the state, and within ninety days in cases of

shipment or shipments between points without and points within the state, after such claim, stating the amount and nature thereof, accompanied by the bill of lading or duplicate bill of lading or shipping receipt, showing the amount paid for or on account of such shipment, which shall be returned to the complainant when the claim is rejected or the time limit has expired, shall have been filed with the agent of the common carrier at the point of destination of such shipment, or at the point where damages in any other manner may be caused by any common carrier. In the event such claim, which shall have been filed as above provided within ninety days from the date of the delivery of the freight in regard to which damages are claimed, is not adjusted and paid within the time herein limited, such common carrier shall be liable for interest thereon at seven per cent per annum from the date of filing of such claim, and shall also be liable for a reasonable attorney's fee, to be fixed by the court, all to be recovered by the consignee or consignor, or real party in interest, in any court of competent jurisdiction; and in the event an appeal be taken and the plaintiff shall succeed, such plaintiff shall be entitled to recover an additional attorney's fee, to be fixed by such court or courts; Provided, in bringing suit for the recovery of any claim for loss or damage, as herein provided, if the consignee or consignor, or real party in interest, shall fail to recover a judgment in excess of the amount that may have been tendered in an offer of settlement of such claim by the common carrier liable hereunder, then such consignee or consignor, or real party in interest shall not recover the interest penalty or attorney's fees herein provided." Humphrey contends that it is entitled to interest from the date of its claim and attorney's fees under section 74-715, R. R. S. 1943. Union Pacific contends that Congress has preempted the field of law concerning interstate carriers' liability for property loss, and

that therefore section 74-715, R. R. S. 1943, may not constitutionally be applied in cases involving interstate commerce.

It is clear that the District Court was correct in denying Humphrey interest from the date of filing its claims. An award of interest is in the nature of damages. 22 Am. Jur. 2d, Damages, § 179, p. 256. The Carmack Amendment does not provide for an award of interest from the date of filing a claim, and, as stated previously, it governs liability for loss or damage to property in interstate shipments. Humphrey cites no authority to support its proposition that interest is merely a cost of litigation, and that interest from the date of filing a claim may be awarded under a state statute such as section 74-715, R. R. S. 1943, in cases governed by the Carmack Amendment. The interest provisions of section 74-715, R. R. S. 1943, cannot be applied in cases involving interstate shipments, as Congress has preempted the field with a national uniform policy governing interstate carriers' liability for property loss or damage.

The question of whether the District Court erred in denying Humphrey reasonable attorney's fees under section 74-715, R. R. S. 1943, raises additional questions. In Marsh & Marsh v. Chicago & N. W. Ry. Co., 103 Neb. 654, 173 N. W. 679 (1919), this court held that the provisions regarding attorney's fees in section 6063, R. S. 1913, now section 74-715, R. R. S. 1943, could be applied in cases involving an interstate shipment, stating: "The statute under consideration provides for the allowance of attorney's fees in all cases where claims for loss or damage for which a common carrier may be liable shall not be adjusted and paid within a fixed period. By this statute no attempt is made to regulate interstate commerce. Neither is the imposition of attorney's fees to be considered as a penalty; rather it is to be considered as a part of the costs incurred in the ac-

tion, although not so denominated in the statute. The allowance is clearly in the nature of costs. It is not a fixed sum to be recovered as a part of the judgment, but its amount is to be fixed by the court." See, also, Schneider v. Davis, 109 Neb. 638, 192 N. W. 230 (1923); Eckman Chemical Co. v. Chicago & N. W. Ry. Co., 107 Neb. 268, 185 N. W. 444 (1921). Unless the decisions in Marsh & Marsh v. Chicago & N. W. Ry. Co., *supra,* and later cases were erroneous and should be overruled, the District Court erred in denying Humphrey reasonable attorney's fees under section 74-715, R. R. S. 1943.

The Supreme Court of the United States has not specifically ruled on the validity of state statutes like section 74-715, R. R. S. 1943, but the case of Missouri, Kansas & Texas Ry. Co. of Texas v. Harris, 234 U. S. 412, 34 S. Ct. 790, 58 L. Ed. 1377 (1914), is relevant. That case involved the validity of a Texas statute which permitted recovery of attorney's fees, relating to the collection of claims not exceeding $200, in amount against any person or corporation doing business in Texas for personal services rendered or for labor done, for material furnished, or for any claim for lost or damaged freight. The court found that the statute was a police regulation designed to promote the prompt payment of small but well-founded claims, and that it had a broad sweep which only incidentally included claims arising out of interstate commerce. The court concluded that it did not directly burden interstate commerce, and that therefore it was not repugnant to the commerce clause of the Constitution or in conflict with federal law concerning interstate carriers. It was there stated: "The local statute, as already pointed out, does not at all affect the ground of recovery, or the measure of recovery; it deals only with a question of costs, respecting which Congress has not spoken. Until Congress does speak, the State may enforce it in such a case as the present."

Subsequent to the Harris case, Texas amended its statute so that it is now similar to section 74-715, R. R. S. 1943. In Thompson v. H. Rouw Co., 237 S. W. 2d 662 (Tex. Civ. App., 1951), the court held that attorney's fees could not be awarded under the new Texas statute in cases involving property loss in interstate shipments. The court noted that the Harris case turned on the fact that the old Texas statute permitted a nominal and limited fee on small claims. The court found that the rule in Harris was not applicable to the new Texas statute, and that Texas could not extend an interstate carrier's liability for losses beyond the damages recoverable under the Carmack Amendment. Thompson v. H. Rouw Co., *supra*, was approved by the Supreme Court of Texas in Southwestern Motor Transport Co., Inc. v. Valley Weathermakers, Inc., 427 S. W. 2d 597 (Tex., 1968). Florida also has a statute similar to section 74-715, R. R. S. 1943, and Florida courts have also held that attorney's fees may not be recovered under that statute in cases involving interstate shipments. See Allied Van Lines, Inc. v. Brewer, 258 So. 2d 496 (Fla. App., 1972). Nebraska appears to be the only state which has permitted recovery of attorney's fees in cases brought under the Carmack Amendment. See Annotation, 37 A. L. R. 3d 1125.

In Chicago & N. W. Ry. Co. v. Nye Schneider Fowler Co., 260 U. S. 35, 43 S. Ct. 55, 67 L. Ed. 115 (1922), section 6063, R. S. 1913, now section 74-715, R. R. S. 1943, was challenged on the ground that its provision awarding attorney's fees violated the constitutional guarantees of due process and equal protection. Although that case involved an intrastate shipment, and did not involve the issue of preemption as raised in the present case, the court's characterization of attorney's fees is relevant. The court upheld the statute against attack on due process and equal protection grounds, stating that common carriers may be required to meet their duties in regard to prompt

payment of a valid claim, and "that a reasonable *penalty* may be imposed on them for failure to promptly consider and pay such claim, in order to discharge delays by them. This penalty may be in the form of attorney's fees." (Emphasis supplied.) It is clear that the court viewed an award of attorney's fees under section 74-715, R. R. S. 1943, as a penalty, and not simply as a cost of litigation.

The above authorities indicate that the rationale underlying Marsh & Marsh v. Chicago & N. W. Ry. Co., *supra,* is no longer valid. Section 74-715, R. R. S. 1943, in effect imposes a penalty on carriers who violate its provision requiring that carriers adjust and pay claims within 90 days of an interstate shipment. The award of attorney's fees under section 74-715, R. R. S. 1943, has been characterized as a penalty by the United States Supreme Court in Chicago & N. W. Ry. Co. v. Nye Schneider Fowler Co., *supra.* Section 74-715, R. R. S. 1943, is not limited to recovery of nominal attorney's fees on small claims, but purports to apply to all interstate shipments regardless of the size of the claim. The Texas and Florida cases discussed above are persuasive that section 74-715, R. R. S. 1943, may not be constitutionally applied to interstate shipments. Therefore, insofar as Marsh & Marsh v. Chicago & N. W. Ry. Co., *supra,* and later cases hold that attorney's fees may be recovered in cases involving *interstate* shipments, they are overruled. The District Court was correct in denying Humphrey attorney's fees and interest under section 74-715, R. R. S. 1943, in this case.

The final question for resolution is whether the District Court erred in granting summary judgment in favor of Union Pacific on Humphrey's claim for lost profits. Humphrey contends that the railroad has a duty to repair the sidetrack which serves its premises under the common law, the Constitution and statutes of Nebraska, and an implied covenant of the lease of part of the railroad right-of-way to

Humphrey from Union Pacific. Union Pacific contends that it is under no duty to construct or maintain sidetracks to suit the needs and uses of individual shippers located along its lines, absent a special agreement or contract; and that the Interstate Commerce Commission has exclusive primary jurisdiction of Humphrey's claim.

Although Humphrey devotes its argument to the duty of a railroad to maintain public sidetracks located on the railroad right-of-way, resolution of the question raised by Humphrey's claim for lost profits requires an examination of the specific allegations in its petition. Humphrey alleged that from 1972 to 1974 the railroad "permitted its side track servicing plaintiff's place of business to get in such a state of disrepair that only three cars could be spotted on said side track at one time. Plaintiff, on many occasions, made oral demands on defendant's agents to repair said side track; but defendant failed and refused to make the necessary repairs. During said period and because of the state of disrepair of defendant's side track, plaintiff received approximately 130 cars less on the average than other grain elevator operators at Monroe, Platte Center, Tarnov and Farmer's Elevator in Humphrey, Nebraska." Humphrey alleged that it lost profits of $700 per car, praying for total damages of $91,000

Although Humphrey has cast its claim in terms of the alleged failure of the railroad to repair its sidetrack, the essence of its claim is that the railroad did not afford reasonable and equal terms, service, facilities, and accommodations to all persons engaged in the operation of grain elevators; and did not afford reasonable car service to Humphrey because of the limited number of cars that could be spotted on the sidetrack. Humphrey's suit is not one in equity to require the railroad to repair the sidetrack, nor does it involve the power of the Nebraska Public Service Commission to require a carrier to repair its equip-

ment under certain conditions. See § 75-115, R. R. S. 1943. Therefore the primary question is not simply whether the railroad has a duty to repair the sidetrack, but whether Humphrey may maintain an action for lost profits in the courts of this state on the ground that the railroad discriminated against Humphrey in regard to facilities and car service by permitting a sidetrack to fall in disrepair. For the reasons that follow, we conclude that Humphrey may not maintain such an action in the courts of this state because the Interstate Commerce Commission has primary jurisdiction of such a claim.

The provisions of the Interstate Commerce Act, Title 49 U. S. C. A., Ch. 1, et seq., apply to common carriers engaged in the transportation of passengers or property by railroads in interstate commerce. Section 1, par. (4), requires that it shall be the duty of every common carrier to provide and furnish transportation upon reasonable request therefor. Section 3 prohibits common carriers from giving undue or unreasonable preference or advantage to any particular person or company. Section 1, par. (11), provides that it shall be the duty of every carrier to furnish safe and adequate car service and to establish just and reasonable practices with respect to car service. Under section 8 of the act, a common carrier shall be liable to any person for the full amount of damages sustained in consequence of any violation of the provisions of the act. Section 9 provides that any person claiming to be damaged by any common carrier under the act may either make complaint to the Interstate Commerce Commission, or may bring suit in its behalf for the recovery of damages in any District Court of the United States of competent jurisdiction. Although the Interstate Commerce Act establishes comprehensive rights and duties of interstate carriers and gives the Interstate Commerce Commission and the federal courts jurisdiction of all suits for damages under sections 8

and 9, federal courts do not have exclusive jurisdiction of claims against interstate carriers. Section 22 of the act provides that "nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; * * *." Therefore, the act "did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission; or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive." Pennsylvania R. R. Co. v. Puritan Coal Mining Co., 237 U. S. 121, 35 S. Ct. 484, 59 L. Ed. 867 (1915). See, also, Union Transfer Co. v. Renstrom, 151 Neb. 326, 37 N. W. 2d 383 (1949).

Section 74-513, R. R. S. 1943, provides: "Every railroad corporation shall give to all persons and associations fair, equal, prompt and impartial service and accommodations in furnishing, delivering and transporting cars, and in delivering and transporting commodities, merchandise, produce, and other property, without discrimination or favoritism, whether the industry receiving or shipping commodities, merchandise, produce, or other property, or the sidetracks by which it is served, is located on or off such railroad company's right-of-way." See, also, section 74-503, R. R. S. 1943, which requires railroads to afford reasonable and equal facilities to persons engaged in the operation of grain elevators. Insofar as Humphrey's claim rests on the common law and the statutes of Nebraska, its claim is essentially one of discrimination in facilities under sections 74-513 and 74-503, R. R. S. 1943. A charge of unlawful discrimination on the part of a common carrier may be predicated upon the furnishing to some patrons of services or facilities which are unjustifiably denied to others. 13 Am. Jur. 2d, Carriers, §

198, pp. 717, 718. Since the Interstate Commerce Act has not superseded the jurisdiction of state courts generally, Humphrey was entitled to bring its claim in the District Court, but only if a decision would not involve "matters calling for the exercise of the administrative power and discretion of the Commission; or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive." Pennsylvania R. R. Co. v. Puritan Coal & Mining Co., *supra*. Union Pacific does not contend that the subject matter of Humphrey's claim for lost profits has been made exclusive in the Interstate Commerce Commission and that Congress has preempted the field. It does, however, contend that the doctrine of primary jurisdiction applies.

The primary jurisdiction doctrine applies whenever enforcement of a claim, originally cognizable in the courts, requires the resolution of issues that have been placed within the special competence of an administrative body in accordance with the purposes of a regulatory scheme. Whether the purposes of the Interstate Commerce Act require that the Interstate Commerce Commission should first pass on a question depends on whether the question raises issues of transportation policy that should be considered by the commission in the interests of uniformity and administrative expertise. See, United States v. Western Pacific R. R. Co., 352 U. S. 59, 77 S. Ct. 161, 1 L. Ed. 2d 126 (1956); Interstate Commerce Commission v. Baltimore & Annapolis R. R. Co., 398 F. Supp. 454 (D. Md., 1975); Interstate Commerce Commission v. Maine Central R. R. Co., 505 F. 2d 590 (2d Cir., 1974); Hewitt v. New York, N. H. & H. R. R. Co., 284 N. Y. 117, 29 N. E. 2d 641 (1940). Preliminary resort to the Interstate Commerce Commission is required where the inquiry is essentially one of fact and of discretion in technical matters and when uniformity can only be secured if determination is made by that Commission. Agri-

cultural Services Assn., Inc. v. Commonwealth, 210 Va. 506, 171 S. E. 2d 840 (1970). The Interstate Commerce Commission must make the initial determination as to whether rail service is reasonable. Elgin Coal Co. v. Louisville & Nashville R. R. Co., 411 F. 2d 1043 (6th Cir., 1969). Allegations of discriminatory car service, for example, fall squarely within the policy of primary jurisdiction of the Interstate Commerce Commission. Taylor County Sand Co. v. Seaboard Coast Line R. R. Co., 446 F. 2d 853 (5th Cir., 1971). The effect of the application of the doctrine of primary jurisdiction is to preclude resort to the courts in the first instance, or to preclude the court from supplying a remedy, or passing upon particular issues until the issues have been passed upon by the administrative agency. 2 Am. Jur. 2d, Administrative Law, § 795, p. 699; Davis, Administrative Law of the Seventies, § 19.01, p. 435 (1976).

Humphrey contends that the doctrine of primary jurisdiction is not applicable in this case because the issue presented is only a legal one of whether the railroad had the duty to maintain its public sidetrack. It contends that the issue is not one of fact calling for the exercise of administrative discretion or expertise, and that therefore the doctrine of primary jurisdiction should not apply. See Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1922).

We believe that this contention is erroneous. It is the general rule that a railroad has a duty under its state franchise to maintain and repair its lines and provide service thereon. Interstate Commerce Commission v. Maine Central R. R. Co., *supra;* Bivins v. Southern Ry. Co., 247 N. C. 711, 102 S. E. 2d 128 (1958). A railroad's duty to operate and maintain its lines is based on its obligation to properly provide services to the public impartially, without discrimination for or against persons demanding similar services. See 74 C. J. S., Railroads, § 124 a,

p. 557, § 390, p. 939. Whether or not a railroad has a duty to maintain a spur track or sidetrack depends on whether the track benefits only private interests, or whether the track has become part of the main line and is to serve the public at large. See, Alton R. R. Co. v. Illinois Commerce Commission, 305 U. S. 548, 59 S. Ct. 340, 83 L. Ed. 344 (1938); 74 C. J. S., Railroads, § 124 b, p. 558. The question of whether Union Pacific had a duty to repair the sidetrack in this case, however, is not, in and of itself, dispositive of Humphrey's claim. Even assuming, without deciding, that the railroad was under a duty to maintain the sidetrack as part of its main line, a determination of whether Humphrey is entitled to lost profits involves the question of whether the sidetrack facilities in fact provided it by Union Pacific were reasonable and nondiscriminatory as compared to those facilities made available to the public at large, and particularly to Humphrey's competitors. The nature of the controverted question and the nature of the inquiry necessary for its solution is the determining factor in regard to application of the doctrine of primary jurisdiction. Great Northern Ry. Co. v. Merchants Elevator Co., *supra*. Humphrey's claim in this case involves the question of whether rail service and facilities provided by an interstate carrier were reasonable and nondiscriminatory, and raises factual questions which can best be determined by the Interstate Commerce Commission due to its expertise and ability to establish uniform rules concerning the reasonableness of facilities provided by interstate carriers. Therefore it would appear that the doctrine of primary jurisdiction applies in this case, and Humphrey must pursue its claim before the Interstate Commerce Commission.

Humphrey's claim for lost profits was also based on the allegation that there is an implied covenant in its lease that the railroad would keep its sidetrack in such a state of repair and maintenance so as to pro-

vide Humphrey with full and satisfactory shipping facilities. Such an allegation is without merit in this case. Although Humphrey sets forth the general rules in regard to implied covenants in its brief, it cites no cases which hold that such a covenant may be implied in a lease of land by a railroad to the operator of a grain elevator, and we have found none. The lease is silent in regard to the sidetrack. Although Humphrey was entitled to expect the railroad to conform to the applicable laws concerning its duties to provide reasonable facilities to Humphrey on a nondiscriminatory basis, such duties cannot be elevated to the status of an implied covenant in the lease. Absent a contract between Humphrey and the railroad in regard to the sidetrack, the railroad's duties with respect to the sidetrack are only those required by law, and not ones of an implied covenant.

We note that the District Court granted summary judgment in favor of Union Pacific on Humphrey's claim for lost profits. In view of our holding that the doctrine of primary jurisdiction applies in this case, the District Court should not have resolved the issues raised by Humphrey's claim for lost profits under the common law and the law of Nebraska. Therefore we vacate the summary judgment granted in favor of Union Pacific on Humphrey's claim for lost profits under the common law and Nebraska law, as the District Court should have deferred jurisdiction on that issue to the Interstate Commerce Commission. We affirm the judgment in favor of Humphrey on its claim for damages resulting from grain losses, and affirm the denial of interest from the date of its claims, and attorney's fees.

AFFIRMED IN PART, AND IN PART VACATED.

CLINTON and WHITE, C. THOMAS, JJ., concur in the result.

BOSLAUGH, J., dissenting in part.

I dissent from that part of the majority opinion which vacates the summary judgment for the de-

fendant on the cause of action for lost profits.

The petition alleged the defendant had violated "its statutory and contractual duties" to keep the sidetrack "servicing plaintiff's place of business" in repair. There was no allegation that the public or any person other than the plaintiff had been injured by the defendant's failure to repair the sidetrack. There was no issue as to whether the defendant had failed to provide adequate and suitable sidetracks for public use in Humphrey, Nebraska.

The plaintiff's right to recover depended upon proof that the defendant had breached a duty which it owed to the plaintiff. Unless the plaintiff could establish that the defendant owed a duty to the plaintiff to maintain the sidetrack in good repair, the plaintiff could not recover damages resulting from the failure to repair the sidetrack. In my opinion the primary issue here was whether the defendant owed a duty to the plaintiff to repair the sidetrack.

The petition alleged that the defendant had both a contractual duty and a statutory duty to the plaintiff to repair the sidetrack. The record shows conclusively that the defendant had no contractual duty to repair the sidetrack.

To establish a statutory duty the plaintiff relied upon section 74-503, R. R. S. 1943, which requires railroads operating in Nebraska to "afford reasonable and equal terms, service, facilities and accommodations" to all shippers. The railroads, however, are not required to furnish such facilities free of cost to the shippers. In Missouri Pacific Ry. Co. v. Nebraska, 217 U. S. 196, 30 S. Ct. 461, 54 L. Ed. 727, a statute requiring railroads to construct and maintain sidetracks at their expense to serve elevators constructed on the right-of-way was held invalid.

Sections 74-504 and 74-508, R. R. S. 1943, provide a remedy for shippers who want a sidetrack constructed and maintained on the right-of-way adjacent to and opposite an industry. Under these sec-

tions the shipper may be required to share in the cost of constructing and maintaining the sidetrack. The plaintiff did not attempt to proceed under these sections.

I would affirm the summary judgment for the defendant on the cause of action for lost profits.

SPENCER, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. JEROLD KNOLES, APPELLANT.

256 N. W. 2d 873

Filed August 17, 1977. No. 41143.

Constitutional Law: Criminal Law: Motor Vehicles. A prosecution for a "traffic infraction" under the "Nebraska Rules of the Road" is a criminal offense within the meaning of the double jeopardy provisions of Article I, section 12, of the Constitution of the State of Nebraska.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Reversed.

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

Paul L. Douglas, Attorney General, and Dean F. Skokan, for appellee.

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

CLINTON, J.

The defendant, Jerold Knoles, was charged in the county court of Sarpy County with making an illegal U-turn on Interstate 80 in violation of section 39-651, R. R. S. 1943. Trial was had in the county court where the defendant was found not guilty of the offense charged and the case was dismissed. On appeal to the District Court for Sarpy County by the county attorney's office, the judgment of the county court was reversed. On appeal to this court the defendant has raised several assignments of error,

however we feel it is necessary to consider only one, that being whether the defendant was twice placed in jeopardy by being tried in the District Court after the county court had found him not guilty. We reverse.

Arguing that double jeopardy only attaches when both proceedings are criminal, Mitchell v. State, 12 Neb. 538, 11 N. W. 848, the State contends that an action to recover the penalty for this traffic infraction is a civil proceeding. To reach this conclusion the State apparently relies on the following sections of the Nebraska statutes: Section 39-6,102, R. R. S. 1943, declares that "Unless otherwise declared . . . a violation of any provision of sections 39-601 to 39-6,122 shall constitute a traffic infraction as defined in section 39-602"; section 39-602(106), R. S. Supp., 1976, which defines a traffic infraction as "the violation of any provision of sections 39-601 to 39-6,122 or of any law, ordinance, order, rule, or regulation regulating traffic which is not otherwise declared to be a misdemeanor or a felony and which shall be a civil offense"; and section 39-6,112, R. S. Supp., 1976, the penalty provision, which provides that "Any person who is found guilty of a violation of Chapter 39, article 6, or of Chapter 39, article 7, for which a penalty has not been specifically provided shall be fined: (1) Not more than one hundred dollars for the first offense. . . ." Thus the State argues that a traffic infraction is a civil offense and the county attorney could properly appeal the county court's decision without violating a person's right not to be twice placed in jeopardy. Although the State is correct in asserting that jeopardy only attaches in criminal proceedings, Art. I, § 12, Constitution of Nebraska, we cannot agree that the proceeding in question was civil.

A brief examination of the statutory scheme of the Nebraska Rules of the Road may be helpful. In 1973 the Nebraska Legislature amended the rules of the road to establish three categories of offenses: Traf-

fic infractions, misdemeanors, and felonies. All offenses not otherwise designated were declared to be traffic infractions by section 39-6,102, R. R. S. 1943. Section 39-602(106), R. S. Supp., 1976, defined a traffic infraction not otherwise designated as a felony or misdemeanor as a civil offense. A perusal of the rules shows that only a few offenses are expressly declared to be misdemeanors: Sections 39-604(2); 39-619.01; 39-668; 39-669.21 (incorporating sections 39-6,127, 39-6,133, 39-6,138, 39-6,140, and 39-6,192); 39-699.01; and 39-6,100, R. R. S. 1943. Some offenses, labeled neither misdemeanors nor felonies, authorize imprisonment as a penalty despite their purported civil classification: Sections 39-669.02; 39-669.04; and 39-669.05, R. R. S. 1943. Two unlabled offenses, sections 39-669.06 and 39-669.20, R. R. S. 1943, are in fact felonies by virtue of the criminal code's general definition which provides that "The term felony signifies such an offense as may be punished with death or imprisonment in the Nebraska Penal and Correctional Complex. . . ." § 29-102, R. R. S. 1943. Furthermore, some offenses which bear no label at all are declared to be crimes, despite the provisions of sections 39-602(106), R. S. Supp., 1976, and 39-6,102, R. R. S. 1943, e.g., section 39-669.08, R. R. S. 1943.

In State v. Missouri P. Ry. Co., 64 Neb. 679, 90 N. W. 877, an original action was commenced in the Nebraska Supreme Court to recover a fine for the violation of a freight law. Since the Supreme Court had only appellate jurisdiction of crimes, the right of the State to maintain the action was dependent upon whether a violation of that law gave rise to a civil action. Relying on Mitchell v. State, *supra,* wherein this court had held that a proceeding to collect a statutory forfeiture for an offense constituted a civil action, the Attorney General contended the action before the court was likewise civil.

However, in the case then before it, this court de-

clared that the rule was different with respect to statutory fines. The primary definition of a fine, the court stated, is a pecuniary punishment inflicted by the sentence of a court exercising criminal jurisdiction. Furthermore, the court stated it could not remember ever having heard the action of a court giving judgment in a civil case described as a fine. This court felt that the language employed by the Legislature was significantly indicative of a crime. "Every transgression of the section quoted is characterized as an 'offense,' the means by which the law is to be enforced is described as a 'prosecution,' the verdict is called a 'conviction,' and the judgment a 'fine.' These words abound in the Criminal Code and they are associated in popular thought with laws for the prevention and punishment of crime." State v. Missouri P. Ry. Co., *supra.* In effect calling the proceeding criminal, this court dismissed the action for want of jurisdiction.

An examination of the relevant statutes involved in the action before us reveals a great similarity between their wording and the factors militating toward a finding that the proceeding in State v. Missouri P. Ry. Co., *supra,* was criminal. First, section 39-6,105, R. S. Supp., 1976, states that: "Whenever any person shall be charged with a traffic infraction, such person shall be issued a citation pursuant to the provisions of section 29-424. Any person who refuses to sign the citation shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished as provided by the provisions of section 29-426." Immediately, words connoting a criminal action can be seen. The statute speaks of a person being "charged" with an infraction. A refusal to sign the citation results in one being "guilty of a misdemeanor," and punishment upon "conviction" is prescribed. Such words are commonly associated with a criminal proceeding.

Section 29-422, R. R. S. 1943, declares it to be a pol-

icy of the State "to issue a citation in lieu of arrest or continued custody for any offense which is a traffic infraction. . . ." The phrase, "in lieu of arrest or continued custody" can hardly be associated with anything but a criminal proceeding. Section 29-424, R. R. S. 1943, the section relating to the issuance of citations for traffic infractions, requires the citation to contain, among other things, "the offense charged," and also requires that the person cited shall sign a promise to appear in court and thereafter such person "shall be released from custody." Being "released from custody" can only point to a criminal proceeding. Section 29-426, R. R. S. 1943, provides for a fine or imprisonment for failing to appear with regard to the command of a citation. This section also constitutes the penalty for failing to sign a citation. Clearly, the possible imposition of a jail sentence can indicate only a criminal action.

Other statutory terms found in the rules of the road relevant with respect to the civil-criminal determination are: The "judgment of conviction" with regard to a traffic violation; the citation deemed a complaint for "prosecution" purposes; the allowance of the posting of a "guaranteed arrest-bond" when a bond is required; and the providing of a fine when a person has been found "guilty." As stated in State v. Missouri P. Ry. Co., *supra,* these words are associated with criminal law, and we think they conclusively show that this violation was a crime and the proceeding criminal, notwithstanding the legislative labeling of a traffic infraction a civil offense.

Lastly, an examination of Mitchell v. State, *supra,* the case relied on by the State for the proposition that this is a civil proceeding, reveals that it rests on the same fragile foundation that was recently disapproved in State v. Kolosseus, 198 Neb. 404, 253 N. W. 2d 157, in connection with a claim that a prosecution for violation of a city gambling ordinance was a civil

proceeding, that being the action is claimed to be civil since it is a common law action for debt.

Accordingly, we hold that a violation of section 39-651, R. R. S. 1943, is a crime and the resulting trial a criminal proceeding, and further, that a prosecution for a traffic infraction is a criminal offense within the meaning of the jeopardy provisions of our Constitution. When the defendant was found not guilty and the case dismissed by the county court, he could not be tried again for the same offense in the District Court without being twice placed in jeopardy. See State v. Hutter, 145 Neb. 798, 18 N. W. 2d 203. The judgment of the District Court is reversed.

REVERSED.

ROBERT J. GOLONKA, APPELLANT, V. JOHN W. GATEWOOD, APPELLEE.

257 N. W. 2d 403

Filed August 31, 1977. No. 40889.

1. **Trial: Pleadings: Evidence.** It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence.
2. **Trial: Instructions: Appeal and Error.** A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence, and a failure to do so is prejudicial error.
3. **Physicians and Surgeons: Malpractice.** Malpractice may consist in the lack of skill or care in diagnosis as well as in treatment.
4. **Physicians and Surgeons: Malpractice: Negligence: Damages.** To make a skillful and careful diagnosis of the trouble from which the plaintiff is suffering is one of the fundamental duties of a physician, and if he fails in that regard as well as in the application of improper treatment, and damages result therefrom, he must answer therefor.

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

Walsh, Walentine & Miles, for appellant.

Lyle E. Strom and C. L. Robinson for Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee.

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

SPENCER, J.

This is a medical malpractice action arising out of surgery performed by the defendant physician upon the plaintiff, Golonka, at Archbishop Bergan Mercy Hospital at Omaha, Nebraska, on August 24, 1970. A jury returned a verdict for the defendant. Plaintiff appeals. We reverse.

Plaintiff first saw Dr. Gatewood professionally on June 5, 1970. Plaintiff showed him a lump on the back of his left knee which had been present for 8 years. Plaintiff told him he had pain in the left knee and ankle when pressure was applied to the mass and numbness on the lateral surface of the left leg and top of the foot. The plaintiff also was concerned about a growth on his face which the defendant diagnosed as a sebaceous cyst. Plaintiff testified he selected defendant as a surgeon because he knew defendant did a lot of work in the area of plastic surgery and he was concerned about having a scar on his face after the removal of the facial growth.

In diagnosing the growth in the back of plaintiff's left knee, defendant took the history of the growth, examined plaintiff's blood pressure, listened to his heart, and felt the swelling behind the knee and attempted to move it up and down. Based upon this examination, defendant diagnosed the lump as a Baker's cyst. Plaintiff's family physician at some time prior to June 1970, had also diagnosed it as a Baker's cyst. Defendant recommended that the lump be surgicially removed. He indicated it was rather minor surgery and told plaintiff he would be back to work within 2 days.

When plaintiff entered the hospital he was asked

to sign and did sign a printed form which in its material portion and with certain blanks filled in, stated: "1. I hereby authorize Doctor Gatewood and/or such assistants as may be selected by him to perform the following operation(s) excision of L neck cyst and Baker's cyst - L knee upon the above named and/or any other therapeutic procedure that his judgment may dictate to be advisable for the patient's well-being.

"2. The nature and purpose of the operation, the risks involved, and the possibility of complications have been explained to me. I acknowledge that no guarantee or assurance has been made as to the results that may be obtained."

Golonka testified that no one gave any statement to him as to hazards or possible complications that might arise from the contemplated surgery other than defendant's statement that it was minor surgery. Actually, the situation was such that plaintiff had every reason to believe he was subjecting his person to only minor surgery consisting of the removal of two cysts, one from his face and one from behind his left knee.

Plaintiff was given a general anesthetic and rendered unconscious at approximately 7:45 a.m. on August 24, 1970. The defendant was assisted in surgery by Dr. Monson. During the course of the operation defendant cut the skin and divided the fascia, the covering over the muscles, and exposed the mass behind the plaintiff's left knee. As soon as defendant saw the growth he knew he was not dealing with a Baker's cyst, but rather a tumor of the peroneal nerve, a major nerve affecting the lower extremities. It controls the flexion of the foot and sensation to the top and lateral surface of the foot.

Defendant had never before removed a tumor of the peroneal nerve. He and Dr. Monson discussed the problem for approximately 15 minutes. They agreed the tumor could not be shelled out or enucle-

ated. Defendant testified the nerve fibers appeared to be permeated throughout the tumor. He further testified: "I didn't think that it should be enucleated. I thought this had a good possibility of being a malignant tumor, and therefore I didn't want to seed the area." He testified why he thought the tumor was probably malignant: "It was a very hard tumor. There was some redness on either end and over the top of it. And it was my judgment, after having seen many tumors over the years, that this had a good possibility of being malignant."

Defendant and Dr. Monson agreed that the proper course of action was to excise the tumor mass. Prior to making this decision the doctors palpated the tumor and lifted it by lifting the nerve at both ends and rotating it. Defendant then proceeded to resect the tumor. The nerve was cut on each side of the tumor and the tumor removed. About 1 inch of the peroneal nerve was removed in the process.

Defendant then sent the tumor and nerve which he had removed to Dr. Moran who was waiting in pathology. Completion of the surgery was suspended until Dr. Moran could examine it. He called a few minutes later advising the tumor was benign with no evidence of malignancy present. Defendant testified the tumor was sent to pathology for examination after it was removed because if the tumor was indeed malignant he wanted to remove some more of the nerve to make sure he got all of it. After receiving Dr. Moran's report, defendant then anastomosed the nerve in an end-to-end fashion.

When Golonka regained consciousness after surgery he found his leg fully encased in a plaster cast and flexed at an angle of about 70 degrees. It was at this time that he was first advised by Dr. Gatewood as to the nature of the surgery that had been performed upon him, namely surgical removal of a benign solitary neurilemoma, together with approximately 1 inch of the peroneal nerve. He was also

told that as a result of this surgery he would be totally incapacitated for some weeks or months, and that he would have some permanent impairment of the function of his left leg in an as yet unknown degree.

At the time of the surgery, plaintiff was 27 years old, in good health, and physically active. During his high school and college years he had been an athlete. Following surgery, plaintiff experienced considerable pain in his lower left leg. After a long and painful convalescence, plaintiff reached a point where he could walk with his left leg in a brace. At the time of trial he still had pain in his leg. He also had atrophy and altered sensation on the left side of the calf which he described as feeling like "if you take the hair on your arm and just pull it. Then when it really hurts, it's — sometimes it's like pouring boiling water on it." Prior to the operation, plaintiff was employed full time. He was forced to give up his job in March 1971. At the time of trial plaintiff was unemployed and was receiving a Social Security disability pension.

The only assignment of error we need to consider is plaintiff's principal contention on appeal. The District Court erred in failing to submit to the jury the question of whether defendant was negligent in failing to conduct proper and adequate diagnostic tests to determine the true nature of the growth behind plaintiff's left knee before undertaking surgery thereon. A specific request was made for this instruction, but it was not given in any form.

At the instruction conference plaintiff's attorney made the following comments concerning the tendered instruction which was refused by the court: "I will limit my remarks to the instructions of the Court as prepared for submission viewed by me. My first exception is to instruction No. 2, and the instruction (sic) is in failing to include as part of the allegations of negligence submitted to the jury. The

first allegation set forth in Plaintiff's petition as amended, to-wit: 'In failing to conduct proper and adequate diagnostic tests to determine the true nature of the growth behind Plaintiff's left knee before undergoing surgery thereon,' in this respect I claim no absolute magic for particular wording of the allegation, but my request is, and my exception is, that the Court should, either in the words I have suggested, or in some adequate and proper words, tender to the jury the question as to whether Defendant departed from the standard accepted medical practice in failing to do the most fundamental thing required of all surgeons, and that is to make a proper and adequate diagnosis of the tumor which he contemplates surgically removing before undertaking surgically (sic) thereon, particularly where the proposed surgery or the contemplated surgery involves permanent physical harm to the patient."

It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence. Laux v. Robinson, 195 Neb. 601, 239 N. W. 2d 786 (1976). Plaintiff specifically requested the jury be instructed that plaintiff claims the defendant was negligent "in failing to conduct proper and adequate diagnostic tests to determine the true nature of the growth behind plaintiff's left knee before undertaking surgery thereon." This was the theory on which plaintiff predicated and tried his case.

It is argued plaintiff is actually contending it was the duty of defendant to make a correct diagnosis, or he had the obligation to correctly ascertain the true nature of the growth behind the plaintiff's left knee during the course of the surgery on August 24, 1970, when he became aware that the growth was not a Baker's cyst as originally thought but a tumor of the peroneal nerve. It is suggested this should have been done prior to making the decision to surgically remove the tumor and a portion of the nerve. Plain-

tiff's evidence may be so construed. There is evidence in the record if accepted by the jury which would sustain a finding that the defendant should have sent a sliver or wedge of the tumor to pathology before its removal.

Plaintiff's tumor was one of the peroneal nerve. Dr. Moran, the pathologist used by defendant, gave the following description of these tumors: "A nerve has many nerve fibers. It's like a telephone wire cable. And each fiber is covered by a layer of Schwann cells, and each fiber plus the Schwann cells is covered by a thin coating of connective tissue, neurogenic connective tissue, and then several of these are gathered in a bundle, and then several bundles are gathered together, but they are separated by this neurogenic connective tissue.

"So the neurofibroma arises from the connective tissue covering of a nerve, whereas a neurolemmoma (sic) or Schwannoma is a tumor of the Schwann cells alone. But most of these tumors are mixed. They have both elements, and we call them by the predominant element." The plaintiff's tumor, according to Dr. Moran, was a mixture of a neurilemoma and a neurofibroma, but was primarily a neurilemoma.

Dr. Lawrence J. Minette testified for the plaintiff by videotape deposition. He testified he studied the pathology slides prepared by Dr. Moran from the cross section cut from the tumor material removed from behind the plaintiff's left knee. He also obtained four paraffin blocks prepared by Dr. Moran containing additional tumor material and from these he cut and prepared additional cross sections of the tumor. On this basis he testified that the tumor, in his opinion, could have been carefully dissected away from the nerve; that a neurilemoma is a known entity; and that "generally it is accepted that a neurolemmoma (sic) should be dissected from the nerve with full preservation, as much as possible, of

the nerve and its function." He gave his opinion that the defendant should have dissected the neurilemoma from the capsule and nerve with preservation of the nerve and nerve function, and that in accordance with accepted medical standards practiced in the Omaha community, resection or excision of the neurilemoma and nerve tissue, such as was done by the defendant, should not have been done. Dr. Minette admitted that in attempting to enucleate a neurilemoma some portion of the nerve fibers may be cut.

Dr. Tapas K. Das Gupta also testified for the plaintiff by deposition. Dr. Das Gupta reviewed the slides prepared by Dr. Moran and Dr. Minette, and also had additional tissue slides prepared from the original paraffin blocks made by Dr. Moran. He gave his opinion that the plaintiff's tumor was dissectible without excision of the nerve. Dr. Das Gupta testified he was the coauthor of an article entitled, "Tumors of Peripheral Nerve Origin: Benign and Malignant Solitary Schwannomas" which appeared in scholarly journals in 1970, in which he stated: "The benign form of peripheral nerve tumors can be easily separated from the nerve trunk and there is no reason to resect any specified peripheral nerve."

Defendant testified the nerve fibers appeared to be permeated by the tumor material and, based upon the pathological report, it still appeared that way to him. The defendant interpreted the pathology report to the effect that the tumor permeated the nerve fibers and separated them; that it was interspersed between the nerve fibers and into them; and that it would not have been possible, in his opinion, to dissect them out. Dr. Monson testified the nerve went through the mass and was not identifiable. Dr. Moran testified the tumor conformed to the general description of a neurilemoma found in textbooks, where the nerve fibers are described as interspersed throughout the tumor.

Dr. Moran testified on cross-examination he would normally think that an 8-year-old fully encapsulated tumor was probably benign. The question asked him was: "Assume from the history of the patient from whom this tumor was removed that he had this growth behind his knee for eight years, and assume further that that tumor was encapsulated and of the size that you saw it to be. A. Well, you would normally think it was benign."

Dr. Browne, defendant's principal expert witness, gave similar testimony on cross-examination. When he was pinned down to probabilities, he testified: "I would think in those circumstances if you were making a judgment one way or the other, I would say it was probably benign. I would say that."

The proper procedure to follow, the plaintiff suggested, was to do a wedge biopsy on the tumor to determine conclusively whether it was benign or malignant prior to making a determination to excise it and a portion of the nerve. Dr. Walburn testified that, in his opinion, the standard of medical practice prevailing in Omaha in 1970 required that a frozen section of the tumor be taken before causing permanent damage to the nerve by surgery.

Dr. Browne testified that a biopsy is a standard recognized diagnostic technique available to a physician for arriving at an accurate diagnosis of the nature of a tumor prior to surgery. Defendant acknowledged that a biopsy can be made at the time of surgery to determine if a growth is benign or malignant.

Dr. Moran testified the tumor was of sufficient size to permit the taking of a wedge biopsy. If that had been done he would have used the same procedures he used in analyzing the whole tumor.

Defendant testified he was concerned about seeding the area with malignant cells. Dr. Walburn agreed that the seeding of malignant cells is a danger to be considered in all frozen sections. He also

acknowledged that any time one surgically invades a malignant tumor, such as in conducting a wedge biopsy or attempting to enucleate, there is a substantial risk of seeding the area with malignant cells.

Plaintiff's theory of the case as set forth in his tendered instruction and the evidence was not presented to the jury. The only issues submitted were the excision of 1 inch of nerve tissues when it was not necessary or proper to do so; failing to advise the plaintiff as to the risk inherent in the surgery; defendant's lack of experience with the removal of neurilemomas; and in failing to make the disclosures a reasonably careful medical practitioner in the same circumstances would have made.

A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence, and a failure to do so is prejudicial error. Zavoral v. Pacific Intermountain Express, 178 Neb. 161, 132 N. W. 2d 329 (1965). While much evidence was adduced on the failure to properly diagnose as evidence of negligence, this issue was removed from the jury's consideration by the failure to give the tendered instruction.

Malpractice may consist in the lack of skill or care in diagnosis as well as in treatment. We said in Cook v. Moats, 121 Neb. 769, 238 N. W. 529 (1931): "To make a skilful and careful diagnosis of the trouble from which the plaintiff is suffering is one of the fundamental duties of a physician, and if he fails in that regard as well as in the application of improper treatment, and damages result therefrom, he must answer therefor."

In In re Estate of Johnson, 145 Neb. 333, 16 N. W. 2d 504 (1944), we said: "The rule is: 'A patient is entitled to an ordinarily careful and thorough examination, such as the circumstances, the condition of the plaintiff, and the physician's opportunities for examination will permit, and, while he does not in-

sure the correctness of his diagnosis, a physician or surgeon is required to use reasonable skill and care in determining through diagnosis the condition of the patient and the nature of his ailment, and is liable for a failure, due to a want of the requisite skill or care, to diagnose correctly the nature of the ailment, with resulting injury or detriment to the patient.' "

In the instant case, considering the fact defendant had had no previous contact with a tumor of the peroneal nerve, the instruction was essential for plaintiff's theory of the case. There was testimony of experts that a proper diagnosis was not made. The jury, if properly instructed, could have found defendant was negligent in excising the tumor and a part of the peroneal nerve before a test was made. In In re Estate of Johnson, *supra,* we said: "It has repeatedly been held that 'there is a fundamental difference in malpractice cases between mere errors of judgment and negligence in previously collecting data essential to a proper conclusion, * * * thus, if he omits to inform himself, * * * as to the facts and circumstances, and injury results, he is not relieved of liability for errors of judgment.' "

The failure to give the tendered instruction was prejudicially erroneous. We reverse the judgment herein and remand the cause for a new trial.

REVERSED AND REMANDED.

WHITE, C. THOMAS, J., concurring.

The trial court refused to instruct the jury on an issue essential to plaintiff's theory of the case, i. e., failure of defendant to properly diagnose by causing a wedge biopsy to be taken from the tumorous mass, prior to its excision. Expert testimony had been adduced to the effect that such a procedure was in accord with generally accepted standards of medicine and surgery in Omaha, Nebraska. Expert testimony was offered to the contrary. A jury issue was presented. It is for this error the judgment is reversed and the cause remanded for a new trial.

CLINTON, J., joins in this concurrence.

WHITE, C. J., dissenting.

For the following reasons I respectfully dissent from the majority opinion.

In both his brief and oral argument, plaintiff contends that the District Court committed error when it failed to instruct the jury on one of his theories of malpractice; and that the defendant was negligent in not properly diagnosing the growth behind plaintiff's left knee *after* defendant exposed it during the course of surgery and prior to its excision by defendant.

It is true, as the majority opinion notes, that the trial court has a duty to instruct the jury upon all issues *presented by the pleadings* which are supported by the evidence. Laux v. Robinson, 195 Neb. 601, 239 N. W. 2d 786 (1976). However, a careful review of the record in this case shows clearly that the plaintiff never sought, either by his pleadings or otherwise during the course of the trial, to have the jury instructed upon defendant's duty to diagnose the growth behind plaintiff's left knee after it had been exposed *during* the course of surgery. Both plaintiff's pleadings and his requests to the court, by their language, related to defendant's duty to make an adequate diagnosis *prior* to undertaking surgery upon the growth behind plaintiff's left knee.

In an amendment to his amended petition, plaintiff asserted that the defendant was negligent: "In failing to conduct proper and adequate diagnostic tests to determine the true nature of the growth behind Plaintiff's left knee *before undertaking surgery thereon.*" (Emphasis supplied.) Plaintiff never further amended his pleadings. Plaintiff requested that the court instruct the jury as follows: "The Plaintiff claims that the Defendant was guilty of one or more of the following specifications of negligence: 1. in failing to conduct proper and adequate diagnostic tests to determine the nature of the

growth behind Plaintiff's left knee *before undertaking surgery thereon.*" (Emphasis supplied.) At the instruction conference, plaintiff's counsel, taking exception to the court's failure to give his tendered instruction, stated that the court should instruct the jury on the obligation of the defendant to make an adequate and proper diagnosis of the tumor which he contemplated surgically removing before undertaking surgery thereon.

The District Court refused to instruct the jury as ostensibly requested by the plaintiff on the basis that there was no evidence that the defendant had departed from any standards of the community or of similar communities in regard to preliminary diagnosis. This ruling was correct. There was no evidence in the record to indicate that the defendant should have done any more than he did in examining the lump behind plaintiffs left knee. The failure of the District Court to instruct the jury on plaintiff's theory of malpractice as presented to this court was the result of plaintiff's failure to so request, or to present its theory to the District Court in a clear and unequivocal manner. A party cannot be heard to complain of an error which he himself has been instrumental in bringing about. Ballantyne v. Parriott, 172 Neb. 215, 109 N. W. 2d 164 (1961).

In any event, it is clear that plaintiff received a fair submission of his case to the jury. Plaintiff was allowed to present his evidence. Plaintiff's disability results from the removal of approximately 1 inch of his peroneal nerve. Plaintiff contends that defendant was negligent in removing this portion of nerve. Defendant testified that he removed this portion of the nerve because (1) he did not think that the tumor could be dissected from the nerve, or be enucleated, and (2) he felt that the tumor was probably malignant and was concerned about seeding the area with malignant cells. At trial, plaintiff, through his evidence, attacked both of these judgments.

Instruction No. 2, given to the jury by the court, read, in part: "In his petition, plaintiff alleges that defendant was negligent in the following particulars: 1. In excising approximately one inch of nerve tissue from behind plaintiff's left knee *when it was not necessary or proper to do so.*" (Emphasis supplied.)

The proper procedure to follow, plaintiff suggested, was to do a wedge biopsy on the tumor to determine conclusively whether it was benign or malignant, prior to making a determination to excise it along with a portion of the nerve. Defendant's failure to have a wedge biopsy taken, according to the plaintiff, was negligence. Dr. John Walburn, plaintiff's witness testified that, in his opinion, the standards of medical practice prevailing in Omaha in 1970 required that a frozen section of the tumor be taken before causing permanent damage to the nerve by surgery.

Dr. Moran testified that the tumor was of sufficient size to permit the taking of a wedge biopsy. He further testified that it did not surprise him that the tumor was sent to him in its entirety, rather than a simple wedge biopsy, because that was a fairly common practice in the community. Defendant testified that it is not the practice in Omaha to perform a biopsy on a tumor of the size of plaintiff's. Defendant testified that it is the general practice of surgery in Omaha for the surgeon, in the exercise of his judgment during the course of surgery, to make a determination of the lesion or tumor which he is operating on. In his opinion, the procedures which he followed conformed with the standards of practice in Omaha. In response to a hypothetical question, Dr. Claude H. Organ testified that the surgeon, based upon the assumed facts, "exercised good judgment and I know of no things in the surgical management of this that was not done." Dr. Monson testified that, in his opinion, the defendant complied with good surgical practices of the community in the diagnosis of this

tumor and the judgments that he reached in the method of its removal and in the management of the patient during the course of that operation. Dr. Kenneth Browne, a neurosurgeon practicing in the Omaha community for 25 years, stated that he has never seen a tumor of the peroneal nerve. He testified that such tumors are so rare that it cannot be said there was a standard approach to these tumors in Omaha.

Instruction No. 7, given to the jury by the court, stated in part: "By 'negligence', commonly referred to as malpractice in this type of case, is meant the doing of some act under the circumstances surrounding or leading up to the incident complained of which a doctor, who is a general surgeon, of ordinary prudence would not have done, *or the failure to do some act or to take some precaution* which a doctor, who is a general surgeon, of ordinary prudence would have done or taken, *according to prevailing recognized medical standards.*" (Emphasis supplied.)

The issue of whether or not defendant, according to prevailing recognized medical standards, under the circumstances of this case, should have caused a wedge biopsy to be taken on the growth behind plaintiff's left knee prior to making a determination to excise the growth and portion of the peroneal nerve was submitted to the jury.

Instructions to the jury should be considered as a whole and if they fairly submit the case and cover the issues, there is no prejudical error. Hadenfeldt v. State Farm Mut. Auto. Ins. Co., 195 Neb. 578, 239 N. W. 2d 499 (1976). Much of the evidence in this case was conflicting. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Grady v. Denbeck, 197 Neb. 795, 251 N. W. 2d 164 (1977).

Defendant entered the operating room believing that he would remove a Baker's cyst from behind

plaintiff's left knee. During the course of the operation, as he cut through the fascia and exposed the growth, he realized that the growth behind plaintiff's left knee was not a Baker's cyst, but instead a tumor of the peroneal nerve.

Defendant determined that plaintiff's tumor had a good possibility of being malignant. He did not attempt to enucleate the tumor or dissect the nerve fibers from the tumor because he did not think that this could be surgically done, and, believing the tumor to be malignant, he was concerned about seeding the area with cancerous cells.

Defendant testified as to why he thought that plaintiff's tumor was probably malignant: "It was a hard tumor. There was some redness on either end and over the top of it. And it was my judgment, after having seen many tumors over the years, that this had a good possibility of being malignant."

Defendant's determination that this tumor was probably malignant was not lightly reached. Surgery was suspended for about 15 minutes after the tumorous mass was exposed, while defendant and Dr. Monson discussed the tumor. The tumor was palpated and closely examined. Dr. Monson agreed with defendant that the tumor was probably malignant. The record shows that defendant has been practicing surgery in the Omaha community since 1939, with the exception of 4 years in the Army during which time he was stationed at a neurosurgical center. He obviously has encountered numerous tumors, though admittedly never one of this specific nerve, such tumors being very rare.

In response to a *hypothetical* question, Dr. Browne stated that a fully encapsulated, 8-year-old tumor of the peroneal nerve which was not causing any particular problems to the patient, would in his judgment probably be benign. However, regarding the specific facts of this case, Dr. Browne testified: "According to the testimony that I am acquainted

with, they felt it was probably a malignant growth and this would certainly be a reasonable conclusion, so far as I can tell from all the testimony that's been given."

Defendant's determination that plaintiff's tumor was probably malignant was certainly a reasonable one. It was a judgment based upon almost 40 years of surgical experience. It was a judgment shared in by Dr. Monson.

It is clear from the record that had plaintiff's tumor in fact been malignant, the course of action taken by the defendant, excision of the tumor and portion of the nerve, was without qualification the proper way to proceed.

Plaintiff suggests that even though defendant thought the tumor malignant, he should have conducted a wedge biopsy prior to excising it along with the nerve, to determine conclusively whether or not it was in fact malignant. Given defendant's reasonable conclusion that the tumor was malignant, such a course of action - taking a wedge biopsy - would have constituted the grossest negligence by defendant.

Dr. Monson testified that even with a frozen section, it is sometimes not possible to tell whether a tumor is malignant or not. Defendant, believing the tumor malignant, did not wish to surgically invade the tumor and risk seeding the area with cancerous cells. He testified that there was no way to protect against seeding the area with malignant cells. Plaintiff's witness, Dr. Walburn, agreed that the seeding of malignant cells is a danger to be considered in all frozen sections and acknowledged that any time one surgically invades a tumor, such as in conducting a wedge biopsy that is malignant, there is a substantial risk of seeding the area with malignant cells. Dr. Organ testified that even though a surgeon thinks that a tumor is probably benign, he must protect against the possibility of seeding the

area with malignant cells and that this ordinarily means removing the tumor in its entirety.

Plaintiff, and a majority of the members of this court, place defendant in a position where he is damned if he doesn't order a wedge biopsy (for fear that the tumor, even though thought malignant, might turn out in fact to be benign) and damned if he does order a wedge biopsy (should the tumor turn out to be malignant as originally thought and the area seeded with malignant cells as a result). Such a position is certainly not condusive to the development of sound medical practice.

Defendant thought the tumor malignant and decided to excise it along with a portion of nerve. Defendant did not think that the tumor could be enucleated or the nerve fibers dissected out. Dr. Monson agreed and assisted with this course of action. Dr. Walburn would have conducted a wedge biopsy prior to making a decision on whether or not to excise the tumor. Drs. Minette and Das Gupta would have attempted to dissect the nerve fibers from the tumor. They felt that this could be done.

Plaintiff's evidence, viewed most favorably to him, merely shows that defendant had other options in dealing with this tumor and that other doctors would have acted differently.

What we recently held in Kortus v. Jensen, 195 Neb. 261, 237 N. W. 2d 845 (1976), is appropriate here: "It is not enough merely to present the testimony of a doctor who would have acted differently, or who is willing to express the opinion that the operation should have been performed differently. The Supreme Court of Washington was presented with similar evidence in Hayes v. Hulswit, 73 Wash. 2d 796, 440 P. 2d 849 (1968). The court there concluded: 'In the last analysis, all that plaintiff's evidence establishes is a difference of professional opinion as to diagnosis and treatment. This alone is not evidence of malpractice. * * * The testimony of other physi-

cians that they would have followed a different course of treatment than that followed by the defendant, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. In such cases the court must hold that there is nothing upon which the jury may pass, the reason being that the jury may not be allowed to accept one theory to the exclusion of the other.' "

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

STATE OF NEBRASKA, APPELLEE, V. LEROY ALLEN HARPSTER, APPELLANT.

257 N. W. 2d 702

Filed September 28, 1977. No. 41197.

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

T. Clement Gaughan, Public Defender, and Paul M. Conley, Deputy Public Defender, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, Assistant Attorney General, for appellee.

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

BOSLAUGH, J.

The defendant was originally charged with shooting Donna I. Harpster, his wife, with intent to kill, wound, or maim. Pursuant to a plea bargain, the information was amended to charge assault with intent to inflict great bodily injury, to which the defendant pleaded nolo contendere. The defendant was found guilty and sentenced to 6 to 10 years imprisonment. The defendant has appealed and contends the sentence imposed was excessive.

The shooting took place at the defendant's home in Lincoln, Nebraska. During an argument with his wife, the defendant went to his bedroom, picked up and loaded a .20 gauge shotgun, and returned to the hallway with the gun cocked and his finger on the trigger. The gun discharged, striking Mrs. Harpster in the left shoulder, inflicting very serious injuries. The defendant then attempted to reload the gun. The defendant was intoxicated at the time of the offense and claims that the shooting was accidental. A witness, who was present at the time of the shooting, states that immediately before shooting his wife, the defendant stated that he would "blow her head off."

The defendant is 37 years of age and has a 7th grade education. The defendant was committed to the State Training School for Boys in Maryland at the age of 14 and was sentenced to the Maryland State Reformatory for larceny of an automobile when he was 16 years of age. In 1961 the defendant was sentenced to a federal prison for violation of the Dyer Act. In 1970 he was sentenced to the Nebraska Penal Complex for debauching a minor. On that occasion the defendant had forced two young men to commit sodomy at gunpoint. In 1974 the defendant was charged with attempted murder in San Bernardino, California, for assaulting his wife with a knife.

In view of the defendant's past record and the violent nature of the offense which was committed, the sentence which was imposed in this case was not excessive. The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM TROUT, APPELLANT.

257 N. W. 2d 703

Filed September 28, 1977. No. 41236.

Criminal Law: Sentences. In the absence of an abuse of discretion on the part of the trial court, this court will not overturn an order which denies probation, or disturb a sentence imposed within statutory limits.

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

T. Clement Gaughan, Public Defender, and Richard L. Goos, Chief Deputy Public Defender, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, Assistant Attorney General, for appellee.

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

BRODKEY, J.

William Trout, defendant and appellant herein, was charged in the District Court for Lancaster County with embezzlement under section 28-538, R. R. S. 1943. Defendant pled guilty to the offense as charged, and was sentenced to imprisonment in the penal complex for not less than two nor more than five years. Defendant has appealed to this court, contending that the sentence imposed was excessive, and that the trial court erred and abused its discretion in not placing him on probation. We affirm the sentence of the District Court.

In 1975 and 1976 defendant was employed by the Family Service Association of Lincoln, a non-profit corporation providing child care services under the name of the Lincoln-Lancaster Child Care System. During this period defendant served as bookkeeper, and was later promoted to the position of program director. It is undisputed that the defendant embez-

zled more than $15,000, and possibly as much as $26,000, from his employer by opening an unauthorized revolving bank account, depositing therein State of Nebraska warrants payable to the Child Care System, and then using the funds for his own purposes. The motive for the crime was apparently that the defendant was under pressure from various creditors.

Defendant is 42 years old, divorced, and maintains a home for his daughter, who is seventeen years old. The presentence report shows that the defendant resigned from employment with his father in 1962 because he was misappropriating funds, although no charges were filed. In 1974 it was discovered that the defendant had forged transcripts of a state university in order to obtain employment with the Nebraska Department of Education and with a public school by falsely representing he held masters and bachelor of arts degrees. The initial charge of forgery was later reduced to a charge of obtaining money under false pretenses in connection with the forged transcripts, and defendant was ultimately fined $100. When sentencing the defendant in this case, the trial court noted that the defendant had admitted guilt to a deliberate, premeditated crime which took place over a period of time; that defendant had embezzled while holding a position of trust; that the defendant's record indicated that he has a propensity for engaging in criminal conduct; and that a sentence of probation would depreciate the seriousness of the offense. The record sustains the conclusions of the trial court. However, defendant contends that he is deserving of a sentence of probation because he has indicated a willingness to make restitution for his crime, that incarceration would result in hardship to him and his daughter, whereas probation would enable him to live productively in the community. We do not find this argument compelling in this case.

It has long been the rule that where the sentence imposed is within the statutory limits, this court will not disturb the sentence on appeal absent an abuse of discretion on the part of the trial court. State v. Tweedy, 196 Neb. 253, 242 N. W. 2d 631 (1976). Similarly, an order which denies probation will not be overturned absent an abuse of discretion. State v. Frans, 192 Neb. 641, 223 N. W. 2d 490 (1974). The sentence imposed in this case was within the statutory limits of one to seven years as set forth in section 28-506, R. R. S. 1943. The serious nature of the crime to which defendant pled guilty, and the factors referred to by the trial court at the time of sentencing, clearly indicate that the court did not abuse its discretion in imposing the sentence upon the defendant, and the sentence of the District Court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNEST S. WESOLOWESKI, APPELLANT.

257 N. W. 2d 704

Filed September 28, 1977. No. 41258.

Criminal Law: Sentences. This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion.

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

T. Clement Gaughan, Public Defender, and Thomas L. Hagel, Deputy Public Defender, for appellant.

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

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

SPENCER, J.

Defendant, Ernest S. Wesoloweski, pled guilty to the offense of petit larceny in the municipal court. He was sentenced to a term of imprisonment of 30 days in the city jail. The District Court affirmed the sentence of the municipal court. Defendant prosecutes this appeal, alleging excessiveness of sentence, and arguing that he should have been granted probation. We affirm.

This appeal is obviously frivolous. Defendant has a past record involving a 6 year indeterminate sentence under the Federal Youth Corrections Act, and a 1 year probation from the county court of Lancaster County. Defendant is no first offender, nor an ideal candidate for probation. The court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Leal, 198 Neb. 233, 252 N. W. 2d 167 (1977).

Defendant's record makes a more drastic penalty than a fine or probation necessary in this instance. Defendant has received what we would consider to be a minimal sentence with his record. There has been no abuse of discretion herein. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT LEE HOWARD, APPELLANT.

257 N. W. 2d 705

Filed September 28, 1977. No. 41288.

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

T. Clement Gaughan, Public Defender, and Paul M. Conley, Deputy Public Defender, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, Assistant Attorney General, for appellee.

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

WHITE, C. THOMAS, J.

The defendant was convicted on his plea of guilty to the offense of robbery. The defendant was sentenced to a term of from 5 to 8 years in the Nebraska Penal and Correctional Complex, with credit for time spent in the county jail awaiting trial. As part of a plea bargain, a charge of assault with intent to rob was dismissed and the county attorney's office agreed not to file a charge of willful failure to appear in the District Court for trial on a felony charge. The defendant appeals contending his sentence was excessive. We disagree and affirm.

On April 16, 1976, the car in which the appellant was riding stopped to pick up a hitchhiker in Lincoln, Nebraska. After riding for a time, the appellant struck the hitchhiker with a table leg and demanded money from him. He struck the victim a second time and extracted from him the sum of $27.

After arraignment the defendant failed to appear for trial in the District Court and his bond was forfeited. During this period of time the defendant was apprehended in Missouri and escaped from the custody of authorities there. Subsequently the defendant was arrested in California, waived extradition, and returned to Nebraska. At the time of his arrest, the defendant was a heavy user of drugs. He had a very spotty work record and a criminal record involving primarily misdemeanors, with the exception of the escape charge filed in Missouri. The trial court specifically found that ". . . any sentence less than what it would impose in this case would depreciate the seriousness of the offense and would create disrespect for the law, not only by this defendant but by others who might be inclined to commit the same

type of offense." It has long been the rule in this State that absent an abuse of discretion, the judgment of a trial court in imposing a sentence within the statutory limits will not be disturbed on appeal. State v. Miller, 199 Neb. 19, 255 N. W. 2d 860.

The judgment and sentence of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD B. REEVES, APPELLANT.

257 N. W. 2d 706

Filed September 28, 1977. No. 41303.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

William B. Zastera, for appellant.

Paul L. Douglas, Attorney General, and John R. Thompson, Assistant Attorney General, for appellee.

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

BOSLAUGH, J.

The defendant was originally charged with robbery. The charge was reduced to larceny from the person, to which the defendant then entered a plea of guilty. The defendant has appealed and contends his sentence of 2 years imprisonment was excessive.

The robbery took place in a park in Nebraska City shortly after midnight. The defendant and a group of people had been drinking and having a party in the park. The defendant obtained the victim's money by threatening to shoot him. The defendant was armed with a tire iron, but in the dark the victim could not see that the defendant did not have a gun. After the defendant had obtained the victim's

money, the defendant returned a part of it to the victim.

The defendant is 19 years of age and has a 9th grade education. He has a criminal record dating from 1972, and has been in several institutions, including the Youth Development Center at Kearney, Nebraska. His past offenses include theft, auto theft, assault and battery, assault with intent to do great bodily harm, and breaking and entering. Probation and jail sentences have proved to be ineffective as a means to rehabilitate the defendant.

The sentence which was imposed in this case is the legal equivalent of an indeterminate sentence of 1 to 2 years imprisonment. It clearly was not excessive under the circumstances.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WALTER A. SCHMIDTLINE, APPELLANT.

257 N. W. 2d 707

Filed September 28, 1977. No. 41304.

Criminal Law: Sentences. In the absence of an abuse of discretion on the part of the trial court, this court will not overturn an order which denies probation, or disturb a sentence imposed within statutory limits.

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

Judy L. Raetz, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, Assistant Attorney General, for appellee.

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

BRODKEY, J.

Walter A. Schmidtline, the defendant and appel-

lant herein, was charged in the District Court for Dawes County with two counts of arson in the second degree under section 28-504.02, R. R. S. 1943. Defendant pled nolo contendere to one of the counts, and the second count was dismissed. Defendant was sentenced to imprisonment in the penal complex for a term of two years. He has appealed to this court, contending that the sentence imposed was excessive. We affirm the sentence of the District Court.

The record shows that the defendant set two fires in Chadron, Nebraska, in October 1976, causing significant damage to buildings and other property on each occasion. Defendant was employed as a police officer at the time. The motive for setting the fires is not clear. Defendant received no monetary gain, did not appear to bear a grudge against the property owners or the community in general, and psychological evaluation indicates that he gets no pleasure from setting or watching fires. Defendant was under stress at the time due to marital problems, his probationary status of his employment, and long and irregular work hours resulting from a shortage of police officers in Chadron.

Defendant is 30 years old, married, and has two small children. He has never been convicted of a felony or a misdemeanor prior to his conviction in this case. He has a good employment record, and has been an active member of a church. He has voluntarily sought counseling in regard to his involvement in the fires, but can give no specific reason for his behavior other than that he was under extreme duress. His wife is employed as a school teacher, and has been supportive of him throughout these proceedings. Several members of defendant's community wrote letters to his probation officer expressing the opinion that the defendant was a fit candidate for probation.

At the time of sentencing, the trial court referred

in detail to the criteria for sentencing set forth in section 29-2260, R. R. S. 1943. The trial court specifically found that the defendant was not in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; and that the risk is not substantial that the defendant will engage in additional criminal conduct should probation be granted. The sentencing judge concluded, however, that a sentence of imprisonment was required because a sentence of probation would depreciate the seriousness of defendant's crime and would promote disrespect for the law. See section 29-2260 (2) (c), R. R. S. 1943.

It has long been the rule that where the sentence imposed is within the statutory limits, this court will not alter the sentence absent an abuse of discretion on the part of the trial court. State v. Tweedy, 196 Neb. 253, 242 N. W. 2d 631 (1976); State v. Frans, 192 Neb. 641, 223 N. W. 2d 490 (1974). Although it is true that the presentence investigation disclosed many factors supporting defendant's contention that probation would be an appropriate sentence, the record shows that the trial court carefully considered all relevant factors in imposing the sentence. The sentence imposed was in fact an indeterminate sentence of one to two years under section 83-1,105, R. S. Supp., 1976. Section 28-504.02, R. R. S. 1943, provides for imprisonment of one to ten years upon conviction of arson in the second degree, and therefore defendant's sentence was the minimum provided for by that section. The fires set by the defendant resulted in significant property damage, and the seriousness of defendant's crime cannot be disregarded. Under the circumstances of this case, we cannot say that the trial court abused its discretion in imposing the sentence that it did, and therefore the sentence is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT S. INLOW, APPELLANT.

257 N. W. 2d 824

Filed October 5, 1977. No. 41317.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Murphy, Pederson & Piccolo and LeRoy Anderson, for appellant.

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

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

BOSLAUGH, J.

After a trial by a jury the defendant was convicted of robbery and sentenced to 5 to 15 years imprisonment. He has appealed and contends that the trial court erred in denying his request that he be placed on probation.

The robbery took place at a service station just west of North Platte, Nebraska, on June 24, 1976. The attendant on duty at the time was Del Perkins, then 72 years of age. The defendant entered the station at about 11:30 p.m., and stated that he wanted to buy a 12-pak of beer. When Perkins entered the walk-in cooler to get the beer, the defendant closed the door and attempted to hold it closed. Perkins pushed the door about halfway open and as he left the cooler, the defendant struck him on the side of the head with a hard instrument. The defendant continued to strike Perkins about the face and head until he had forced him to the floor. The defendant removed approximately $170 from the cash register and then left the station. After another customer arrived, Perkins was taken to a hospital. Nine stitches were required to close the lacerations above his left eye and on the back of his head.

The defendant was positively identified by Perkins and the State had the testimony of an accomplice. There was also other evidence which identified the defendant as the person who struck Perkins and took the money from the cash register.

The defendant is 21 years of age and has a 9th grade education. He was unmarried and unemployed at the time of the offense. The defendant has an arrest record dating from 1971. He was committed to the Youth Development Center in 1972 for breaking and entering. He was imprisoned in the Missouri State Penitentiary in 1974 for burglary and escaping jail. A charge of automobile theft in North Platte, Nebraska, was dismissed at that time because of the Missouri sentence.

The defendant's record shows that he is a violent person who has a great disrespect for authority. Although he now professes to have become a very religious person his conduct in the past cannot be ignored. The offense which he committed involved violence and injury to the victim. It would have been an abuse of discretion to grant probation to the defendant. The sentence imposed was not excessive in view of the circumstances of the case.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN NEWMAN, APPELLANT.

257 N. W. 2d 825

Filed October 5, 1977. No. 41318.

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

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

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

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

CLINTON, J.

The defendant was charged, under the provisions of section 28-408.03, R. R. S. 1943, with first degree sexual assault and entered a plea of no contest. The trial judge sentenced him to a term of not less than 5 nor more than 9 years in the Nebraska Penal and Correctional Complex. On this appeal he asserts that the sentence is excessive and asks that the above minimum be substantially reduced. We affirm.

The defendant is 17 years of age. The crime in question was accomplished by breaking and entering during the nighttime the home in which the victim, a married woman with an infant child, was sleeping. The woman is a deaf mute. The woman's husband was absent from the home at the time of the attack. The victim offered minimal resistance because of fear and fear for her child. The act of rape was accomplished twice by the defendant.

The defendant has a previous history of sexual assaults. As a juvenile of the age of 15 he committed his first rape and was treated at the Lincoln Regional Center for about 1 year. An earlier attempted rape had not been prosecuted and had been dealt with by a lecture. He admits three other assaults with intent to rape which failed.

The trial court analyzed the statutory conditions tending to indicate a sentence of probation, concluded that they did not apply in this case, and imposed the sentence here questioned. The record discloses no mental or other abnormalities which explain the defendant's conduct. The trial court concluded he was a danger to females and that incarceration was required.

The trial court did not abuse its discretion in imposing the sentence it did and in the absence of such abuse the sentence is affirmed. See State v. Martinez, 198 Neb. 347, 252 N. W. 2d 630.

AFFIRMED.

IN RE TRUST ESTATE CREATED BY THE LAST WILL AND TESTAMENT OF EDGAR H. SCOTT, DECEASED. ELEANOR SCOTT PAINE, APPELLANT, V. THE UNITED STATES NATIONAL BANK OF OMAHA, SUCCESSOR TRUSTEE, APPELLEE.

257 N. W. 2d 826

Filed October 5, 1977. No. 41332.

Courts: Judgments. A District Court has no power to vacate or modify its judgment after term on the ground that an error of law had been committed by it in rendering such judgment.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Motion for summary affirmance sustained.

Edward J. McCarthy and James R. Sacoman, for appellant.

James R. Schumacher and Morsman, Fike, Davis & Polack, for appellee.

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

SPENCER, J.

Plaintiff-appellant appeals from the overruling of her motion for a new trial filed pursuant to section 25-2001(3), R. R. S. 1943, to vacate an order entered July 29, 1976. Appellee has filed a motion for summary affirmance, which we hereby sustain.

The proceedings originated in the District Court for Douglas County. Following timely and proper notice of hearing to all interested parties, an order approving the final report of the trustee and directing the

distribution of the remaining assets of the testamentary trust was entered on July 29, 1976. Appellant filed a motion for a new trial at the following term of court on January 14, 1977, requesting the court to vacate the order of July 29, 1976, pursuant to section 25-2001(3), R. R. S. 1943. The court concluded at a hearing held January 26, 1977, that the facts presented did not come within that subdivision.

Section 25-2001, R. R. S. 1943, provides that the District Court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made. Subsection (3) provides: "for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order * * *."

Appellant's brief sets out four assignments of error. Only one of them is pertinent to the issue raised by this appeal: Whether the District Court was correct in concluding that the facts presented at the hearing of January 26, 1977, did not come within subdivision (3) of section 25-2001, R. R. S. 1943. Appellant predicates her motion for relief on that subsection.

We agree with the trial court. Subdivision (3) of section 25-2001, R. R. S. 1943, is not the proper subdivision under which to proceed to modify or vacate an order that is contrary to law after the term of court at which such order was made. Appellant's remedy was a motion for a new trial under subdivision (6) of section 25-1142, R. R. S. 1943. This section provides in pertinent part: * * * The former verdict, report, or decision shall be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes * * *: (6) that the verdict, report or decision * * * is contrary to law." No such motion was filed and time for filing has expired. There is no showing that appellant was unavoidably prevented from filing an application for new trial within 10 days.

Relief under section 25-2001 (3), R. R. S. 1943, is

limited strictly to the grounds enumerated therein. This statutory remedy does not extend to errors of law or judicial acts. The first part of the provision, "for mistake, neglect, or omissions of the clerk . . ." only applies to the actions of the clerk of the court. See Estate of McKenna v. McCormick, 60 Neb. 595, 83 N. W. 844 (1900).

The rest of subdivision (3), section 25-2001, R. R. S. 1943, "or irregularity in obtaining a judgment or order" is defined by McKenna as a judgment or order which is rendered contrary to the course of law and the practice of the courts. The judgment appellant is attempting to set aside was regularly entered. Appellant was notified of its entry. Appellant, however, slept on her rights and waited for approximately 6 months before resorting to the present procedure. She is now attempting to correct what she urges is an error of law by resort to the statutory provision in question.

This court early held that a District Court has no power to vacate or modify its judgment after term, on the ground that an error of law had been committed by it in rendering such judgment. Dillon v. Chicago, Kansas & Nebraska Railroad Co., 58 Neb. 472, 78 N. W. 927 (1899). In that case, resort was sought under the predecessor of the present statute to supply an omission in the previous judgment.

Assuming, as contended by the appellant, that the trial court overlooked a provision in the will, and assuming it would make a difference in the result, a judgment was entered. Appellant did not process an appeal from that alleged erroneous order. That judgment is now final. We agree with the trial court. This is not the type of mistake or irregularity embraced within the ambit of subdivision (3) of section 25-2001, R. R. S. 1943.

The motion for summary affirmance is sustained.

MOTION FOR SUMMARY AFFIRMANCE SUSTAINED.

STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER ROUBIDEAUX, APPELLANT.

257 N. W. 2d 828

Filed October 5, 1977. No. 41366.

Criminal Law: Sentences. An order denying probation and a sentence imposed with the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge.

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

Edmund Hollstein, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

BRODKEY, J.

In an amended information filed in the District Court for Sheridan County, Christopher Roubideaux, the defendant and appellant herein, was charged with feloniously entering a building under section 28-533, R. R. S. 1943. A jury trial was waived, and the trial court found the defendant guilty as charged. Defendant was sentenced to a term of imprisonment in the penal complex of three years, which is the minimum sentence provided for by section 28-533, R. R. S. 1943. Defendant has appealed to this court, contending that the District Court erred in failing to place him on probation. We affirm the sentence of the trial court.

The record shows that the defendant and two other persons entered a liquor store in Whiteclay, Nebraska, with the intent to rob the store. The perpetrators were masked, and one of them carried a shotgun. The store owner took cover behind a door, which was struck by a shotgun blast, and avoided injury only because she ducked. She identified the de-

fendant as the person in possession of the shotgun. The defendant and one of his companions denied this, stating that the third perpetrator, who was not available at trial due to his incarceration in California, had fired the shotgun. Defendant was intoxicated at the time of the incident.

At the time of trial the defendant was 19 years old, unmarried, and worked as a kitchen helper. Defendant has a long history of alcohol abuse, and subsequent to the crime in this case was arrested for intoxication and resisting arrest. At the time of sentencing the trial court considered in detail the factors relevant to sentencing as set forth in section 29-2260, R. R. S. 1943. The court specifically found that there was a substantial risk that the defendant might engage in criminal conduct, particularly because of his problem with alcohol; that a lesser sentence would depreciate the seriousness of the offense and tend to promote disrespect for the law; and that the crime threatened very serious bodily injury to persons present. Before pronouncing sentence, the trial court considered all factors in the presentence report which were favorable to the defendant, including letters written on his behalf to the probation officer.

It has long been the rule that an order denying probation and a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge. State v. Michon, 198 Neb. 562, 254 N. W. 2d 80 (1977). Defendant received the minimum sentence under section 28-533, R. R. S. 1943, and the record supports the findings made by the trial court at the time of sentencing, as set forth above. There was no abuse of discretion on the part of the District Court, and therefore the sentence received by the defendant is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE V. RONALD POLICKY, APPELLANT.

257 N. W. 2d 829

Filed October 5, 1977. No. 41372.

Appeal from the District Court for Butler County: WILLIAM H. NORTON, Judge. Affirmed.

James M. Egr, for appellant.

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

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

CLINTON, J.

The defendant, on February 2, 1977, entered a plea of guilty to the charge of having, on August 8, 1976, feloniously assaulted Gloria Steffens with intent to inflict great bodily injury. The trial court determined, after having received the results of an appropriate examination, that the defendant was competent to stand trial and after a thorough arraignment determined that the plea was made voluntarily and intelligently and accepted the plea and sentenced the defendant to a term of 3 to 6 years in the Nebraska Penal and Correctional Complex.

On this appeal the only issue raised is the claim of excessive sentence and we are asked to place the defendant on a "structured" probation and direct that the defendant be given comprehensive psychiatric help and counseling at the Lincoln Regional Center.

The record before us establishes the following. Defendant at the time of sentencing was 20 years of age. He has an I. Q. of about 75 and has periodic epileptic seizures which are moderately controlled by medication.

The assault in question occurred when the defendant entered the mobile home of the victim after asking to use the telephone. The assault was com-

pletely unprovoked and was accomplished by repeated strikings with a dull paring knife which the defendant had brought with him from his home. The motivation for the assault is not adequately explained by the defendant. On an earlier occasion the defendant committed an unprovoked assault upon another female, using a table leg, and rendered that victim unconscious. The assaults have no apparent overt sexual implications.

The defendant underwent physical and psychiatric examination at the Nebraska Psychiatric Institute and the Lincoln Regional Center. The final diagnosis at the Lincoln Regional Center was (1) antisocial personality and (2) epilepsy. Reports in the record conclude the attack was not a consequence of the epilepsy and that further similar unprovoked attacks might occur. No specific plan of treatment for the antisocial personality is recommended. The various reports were reviewed by the medical director of the Department of Correctional Services, who recommended incarceration: "Since he has already been evaluated by N. P. I. and the Lincoln Regional Center and they have not recommended any therapeutic program, the only other recourse to protect the public is to sentence him to the Penitentiary."

It is apparent the trial court did not err in denying probation. This court cannot devise a course of treatment when the experts in the field did not or cannot.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY DONOHUE, APPELLANT.

257 N. W. 2d 830

Filed October 5, 1977. No. 41376.

Criminal Law: Sentences. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion.

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

Ralph A. Bradley of Wagoner & Wagoner, for appellant.

Paul L. Douglas, Attorney General, and Robert F. Bartle, for appellee.

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

MCCOWN, J.

The defendant, Timothy Donohue, pleaded guilty to the offense of sexual assault, first degree, and was sentenced to imprisonment in the Nebraska Penal and Correctional Complex for 8 to 25 years, and given credit for 121 days evaluation and jail time. The sole issue on appeal is whether or not the sentence is excessive.

On November 18, 1976, a 12-year-old girl was walking home from school and cut through a field on the outskirts of Grand Island, Nebraska. The defendant called to her to come over to some bushes where he was standing. She refused and when he approached, she ran. The defendant caught up with her, grabbed her, and when she held onto a tree, he hit her on the head and knocked her to the ground. She started to scream but the defendant put his hand over her mouth. He threatened to hit her again and knock her unconscious. After he had raped the girl, he told her that if she told anyone about it he would kill her. The victim ran to the next house and reported the incident to the householder who called the police. The defendant was arrested, identified, and pleaded guilty to the offense.

The District Court in sentencing the defendant found that the defendant's acts did not cause serious physical injury to the victim but did cause severe emotional shock and therefore serious personal injury. The penalty for the crime of sexual assault,

first degree, is imprisonment for not less than 1 year nor more than 25 years. The District Court imposed an indeterminate sentence of 8 to 25 years imprisonment.

Defendant was 18 years old at the time of this offense. His juvenile record included traffic offenses and two convictions for auto burglary. His adult record included three convictions for petit larceny and he was placed on probation on one of those convictions 3 days before the commission of the offense involved here. The presentence investigation report indicates similar sexual crimes against several other young girls which did not result in any charges.

The District Court temporarily committed the defendant to the Lincoln Regional Center for observation and diagnosis as a sexual sociopath. The directors of the Lincoln Regional Center and the Security Unit at the center both reported that, in their opinion, the defendant would not benefit from treatment in a regional center and should be sentenced to the Nebraska Penal and Correctional Complex.

In view of the nature of the crime and the facts set out in the presentence investigation report, and the necessity for protection of the public against repetition of defendant's conduct, the District Court did not abuse its discretion and the sentence is not excessive. A sentence imposed within statutory limits will not be distrubed on appeal unless there is an abuse of discretion. State v. Williams, *post* p. 256, 257 N. W. 2d 832.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TOMMIE L. WILLIAMS, APPELLANT.

257 N. W. 2d 832

Filed October 5, 1977. No. 41419.

Criminal Law: Sentences. A sentence imposed within statutory limits

will not be disturbed on appeal unless there is an abuse of discretion.

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

T. Clement Gaughan and George R. Sornberger, for appellant.

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

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

MCCOWN, J.

The defendant, Tommie L. Williams, was charged with the felony offense of first degree sexual assault. He entered a plea of nolo contendere to a lesser amended charge of assaulting another inmate while confined in the Nebraska Penal and Correctional Complex. He was sentenced to 18 months to 5 years in the Nebraska Penal and Correctional Complex to be served consecutively to the sentence he was then serving. The sole issue on this appeal is whether or not the sentence is excessive.

The outline of the State's evidence presented to the sentencing court and the presentence investigation report show that the defendant, another inmate, and the victim were confined in the same cell at the reformatory. On the night of August 28, 1976, after the victim had refused sexual advances, the defendant held the victim from behind while the other inmate hit the victim several times in the face and stomach and the defendant held a pair of scissors in view of the victim. Thereafter the victim was forced to have fellatio with the defendant and the other cellmate.

The penalty for sexual assault in the first degree is imprisonment for not less than 1 year nor more than 25 years. § 28-408.03, R. R. S. 1943. The penalty for assault by an inmate of the penal complex is impris-

onment for not more than 5 years. § 28-411(2), R. R. S. 1943.

The defendant was 18 years old at the time of the offense involved in this appeal and the primary thrust of his argument that the sentence is excessive is based on his youth. The presentence report from his previous felony conviction shows an extensive juvenile record largely involving burglary, receiving stolen property, and robbery. At age 17 he was charged with burglarly in the District Court and following a plea bargain pleaded guilty to an amended charge of receiving stolen goods. He was serving a 2 to 5 year sentence in the reformatory at the time the offense involved in this appeal occurred.

The nature of the charge, the violence involved, and the past record of this defendant establish that the sentence was not excessive. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. McKenney, 198 Neb. 564, 254 N. W. 2d 81.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MILTON J. HALEY, APPELLANT.

257 N. W. 2d 833

Filed October 5, 1977. No. 41420.

1. **Criminal Law: Sentences.** A sentence within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
2. **Criminal Law.** The primary function of the criminal law is to protect individuals and society from the depredations of the criminally bent.

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

T. Clement Gaughan and George R. Sornberger, for appellant.

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

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

SPENCER, J.

Defendant, Milton J. Haley, appeals from a sentence of 18 months to 5 years in the Nebraska Penal and Correctional Complex on a charge of unlawfully assaulting another. Defendant was originally charged with first degree sexual assault. He pleaded nolo contendere to the amended charge. He prosecutes this appeal, alleging the sentence is excessive. We affirm.

Haley was charged with sexual assault, first degree, for committing fellatio. As the result of plea bargaining, an amended information was filed, charging him with assaulting another inmate while being confined in the Nebraska Penal and Correctional Complex. The evidence disclosed that Haley forced a cell mate to engage in fellatio with him.

The possible penalty for the crime to which defendant pled nolo contendere is imprisonment in the Nebraska Penal and Correctional Complex for not more than 5 years. The minimum, therefore, would be one-third of the statutory maximum, or 20 months. The sentence Haley received is 18 months to 5 years, which is within the statutory limits. We have repeatedly said that a sentence within statutory limits will not be disturbed on an appeal absent an abuse of discretion by the trial court. State v. McCurry, 198 Neb. 673, 254 N. W. 2d 698 (1977).

There has been no abuse of discretion here. Defendant relies on State v. Etchison, 188 Neb. 134, 195 N. W. 2d 498 (1972), and urges the court to examine his sentence in the light of the criteria there stated. Defendant's crime involved the use of force and intimidation. The crime was demeaning to the victim as well as being a vicious one. The criteria enumer-

ated in Etchison, *supra*, was based on adherence to the following premise: "The primary function of the criminal law is to protect individuals and society from the depredations of the criminally bent."

The defendant at the time of the offense was serving a sentence for assault with intent to commit robbery, a felony offense. There was no abuse of discretion herein. The sentence is affirmed.

AFFIRMED.

FLORENCE ROSSITTO ET AL., APPELLANTS, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

258 N. W. 2d 126

Filed October 12, 1977. No. 41108.

1. **Property: Municipal Corporations: Damages.** An owner of property which does not abut upon a street proposed to be vacated by action of the city is not entitled to recover damages unless he has sustained an injury different in kind and not merely in degree from that suffered by the public at large, and the fact that the property owner or others who must enter or leave the property must take a more roundabout way to reach the property does not constitute special or peculiar injury different in kind from that suffered by the public at large.
2. _____: _____: _____. A landowner has no vested interest in the flow of traffic past his property and damage caused by diversion of traffic is not normally compensable.

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

John W. McClellan, Jr., of McClellan & Tiedeman, for appellants.

Herbert M. Fitle and Robert J. Hamer, for appellee.

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

CLINTON, J.

This is an action by plaintiffs, owners of real es-

tate, to recover damages from the defendant City of Omaha by reason of the vacation of a street. After both sides had presented their evidence and rested, the trial court granted the City's motion for a directed verdict because the plaintiffs had proved no compensable damage. We affirm.

The plaintiffs are the owners of a tract of commercial property located at the northeast corner of the intersection of 30th and Fillmore Streets in the City of Omaha. Fillmore Street abuts the plaintiffs' property on the south and, at the time of the vacation in question, ingress and egress to the plaintiffs' property was afforded only from Fillmore Street. Direct ingress and egress to the plaintiffs' property from 30th Street had, at some previous time, been cut off and is not involved in this action. Two business buildings are located on a portion of the plaintiffs' property, one of which is used as an automobile service station and the other as a package liquor store. The part of the lot not occupied by the buildings is used for vehicular parking ancillary to the two businesses.

By ordinance the defendant City vacated the one block of 29th Street which, prior to the vacation, abutted the east side of the block south of the plaintiffs' property. Fillmore Street connects 30th Street and that portion of 29th Street which was vacated. Fillmore Street now ends at what was 29th Street. At no time did 29th Street extend north of Fillmore Street, nor did Fillmore Street extend easterly beyond 29th Street.

Previous to the vacation, vehicular traffic could use 29th Street to reach Fillmore Street in order to enter or leave the plaintiffs' property. Now all traffic to and from the property must enter and leave Fillmore Street from 30th Street.

Plaintiffs' property is abutted on the east by a north and south alley. To the east of the alley and in the same block with the plaintiffs' property and

fronting on Fillmore Street is a residential property. Fillmore Street is unimproved, as was the vacated block of 29th Street.

The evidence discloses that the damage claimed by the plaintiffs arises solely from some inconvenience of access and whatever diversion of traffic may result from the vacation of the one block of 29th Street. Ingress and egress to the plaintiffs' property from Fillmore Street is unaffected. One of the plaintiffs testified that large vehicles such as tractors with semitrailers attached would have some difficulty leaving the premises because of limited space for turning, whereas formerly they would have entered and left Fillmore Street simply by circling the block south of that on which the plaintiffs' property is located. One of the plaintiffs also testified that other types of vehicles used 29th Street for access to Fillmore Street and their property.

The plaintiffs' service station business does not include the sale of diesel fuel. There is no evidence that the plaintiffs were unable to secure delivery of fuels from their suppliers. The exhibits offered in evidence make it clear that access to the property is not unreasonably restricted by the vacation of 29th Street. There is no evidence that any of the improvements on the property must be modified because traffic to the premises can now come and leave from one direction only.

The following principles are applicable to the disposition of this appeal. An owner of property which does not abut upon a street proposed to be vacated by action of the city is not entitled to recover damages unless he has sustained an injury different in kind and not merely in degree from that suffered by the public at large, and the fact that the property owner or others who must enter or leave the property must take a more roundabout way to reach the property does not constitute special or peculiar injury different in kind from that suffered by the pub-

lic at large. Hanson v. City of Omaha, 157 Neb. 403, 59 N. W. 2d 622; Kraft & Sons, Inc. v. City of Lincoln, 182 Neb. 187, 153 N. W. 2d 725; Painter v. State, 177 Neb. 905, 131 N. W. 2d 587; Fougeron v. County of Seward, 174 Neb. 753, 119 N. W. 2d 298.

A landowner has no vested interest in the flow of traffic past his property and damage caused by diversion of traffic is not normally compensable. Deyle v. State, 194 Neb. 36, 229 N. W. 2d 565; Verzani v. State, 188 Neb. 162, 195 N. W. 2d 762; Painter v. State, *supra*.

AFFIRMED.

CLYDE COLMAN ET AL., APPELLEES, V. COLMAN FOUNDATION, INC., ET AL., APPELLEES, LUTHERAN FAMILY AND SOCIAL SERVICE OF NEBRASKA, INC., INTERVENER-APPELLANT. COLMAN FOUNDATION, INC., ET AL., APPELLEES, V. CLARENCE MEYER, ATTORNEY GENERAL, ET AL., APPELLEES, LUTHERAN FAMILY AND SOCIAL SERVICE OF NEBRASKA, INC., INTERVENER-APPELLANT.

258 N. W. 2d 128

Filed October 12, 1977. No. 41126.

1. **Trial: Intervention.** The interest required for intervention as a matter of right is a direct and immediate legal interest of such a character that the intervener will either lose or gain by the direct operation and legal effect of the judgment.
2. **Trial: Intervention: Charities.** The possibility that a charitable organization might share in the assets of another charity is not a sufficient interest to support intervention as a matter of right in a proceeding to liquidate the charity and distribute its assets.

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

Thomas J. Culhane, for intervener-appellant.

Baird, Holm, McEachen, Pedersen, Hamann & Haggart, Ronald R. Brackle, and Gary G. Thompson, for appellees Colman and Colman Foundation, Inc.

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

BOSLAUGH, J.

The Colman Foundation, Inc., is a charitable trust which was established under the will of Andrew H. Colman who died in 1932. From 1933 until 1956, the Foundation operated an orphanage for protestant children at Diller, Nebraska, in accordance with the terms and conditions of the will. In 1956 the trustees determined that it was impractical to continue operation of the orphanage and discontinued its operation.

In 1974 this action was commenced to liquidate the foundation and distribute the assets of the trust to Nebraska Children's Home Society, Martin Luther Home Society, Inc., Epworth Village, Inc., and Child Saving Institute. The action was consolidated with a separate action brought by the heirs of Andrew H. Colman who claimed the assets on the theory of a resulting trust. On March 8, 1976, the trial court found that the heirs of Andrew H. Colman had no interest in the assets of the foundation; that the proceedings for liquidation of the foundation and distribution of its assets were governed by section 21-1954, R. R. S. 1943; and that a further trial should be had regarding the proposed plan of distribution.

On April 29, 1976, the Lutheran Family and Social Service of Nebraska, Inc., filed a motion for leave to intervene and a petition of intervention in the action. The petition alleged that the intervener was a nonprofit corporation engaged in providing food, shelter, and care to protestant orphan children in Nebraska; and that it should be permitted to share in the distribution of the assets of the foundation.

The trial court found that the intervener did not allege such a direct and immediate legal interest in the litigation as would authorize or permit interven-

tion and dismissed the petition in intervention. The intervener has appealed.

Intervention as a matter of right is governed by section 25-328, R. R. S. 1943. The interest required for intervention as a matter of right is a direct and immediate legal interest of such a character that the intervener will either lose or gain by the direct operation and legal effect of the judgment. City of O'Neill v. Consumers Public Power Dist., 179 Neb. 773, 140 N. W. 2d 644. An indirect, remote, or conjectural interest in the result of the suit is not enough.

In a proceeding under the Nebraska Nonprofit Corporation Act a court of equity has broad powers as to how the assets of the corporation shall be distributed. § 21-1954, R. R. S. 1943. There is no provision in the act for intervention in the proceeding by other charitable organizations seeking some share in the distribution.

In Sister Elizabeth Kenny Foundation, Inc. v. National Foundation, 267 Minn. 352, 126 N. W. 2d 640, the Minnesota Supreme Court held that the possibility a charitable organization might share in the assets of another charity was not a sufficient interest to support intervention as a matter of right. We believe this is the correct rule. See, also, Veterans Industries, Inc. v. Lynch, 8 Cal. App. 3d 902, 88 Cal. Rptr. 303; Stackpole v. Brewster Free Academy, 355 Mass. 774, 247 N. E. 2d 599; In re Nevil's Estate, 414 Pa. 122, 199 A. 2d 419.

Independent of the statute a trial court may allow intervention as a matter of discretion in a proper case. See, State v. Farmers State Bank, 103 Neb. 194, 170 N. W. 901; Department of Banking v. Stenger, 132 Neb. 576, 272 N. W. 403; First Trust Co. v. Thompson, 147 Neb. 366, 23 N. W. 2d 339. In the latter case intervention was allowed by "permission of the court." The record here shows no abuse of discretion in denying leave to intervene.

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

AFFIRMED.

WHITE, C. THOMAS, J., dissenting.

I would reverse. I agree that the intervener does not have a "direct and immediate interest" in this dissolution proceeding so as to require intervention as a matter of right. § 25-328, R. R. S. 1943.

However, in view of the rather checkered course of trust administration especially where, as here, substantial evidence exists of misappropriation of trust funds, the assertion of the trustees that it should be their exclusive right to nominate beneficiaries is rather tenuous.

It may well be that the statutory framework and the budgetary realities do not permit the Attorney General an ongoing supervision of charitable trusts, but the result is that until dissolution by court procedure, no representation of the public interest is effected.

In view of the unique posture of the participants in this case, it was an abuse of discretion not to allow intervention by the applicant the Lutheran Family and Social Service of Nebraska, Inc.

CHRISTINE M. LIEBSACK, APPELLANT, V. RICKIE D. LIEBSACK, APPELLEE, EMMANUEL LIEBSACK ET AL., INTERVENERS-APPELLEES.

258 N. W. 2d 130

Filed October 12, 1977. No. 41142.

Divorce: Minors: Parent and Child. 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 Hall County: Donald H. Weaver, Judge. Affirmed.

Cronin, Shamberg & Wolf, for appellant.

No appearance for appellee.

Luebs, Tracy, Dowding, Beltzer & Leininger, for interveners-appellees.

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

CLINTON, J.

This cause arises upon an application for change of custody of a male child from respondent father to the petitioner mother. The paternal grandparents of the child intervened and custody was awarded to them. On appeal the mother urges that she is entitled to custody because she has not been shown to be unfit and that when a controversy as to custody arises between a parent and third persons, the determination is to be based upon the best interests of the child with due regard to the superior rights of a fit, proper, and suitable parent.

The petitioner, Christine M. Liebsack, and the respondent, Rickie D. Liebsack, were married on June 6, 1970, and one child, Chad J. Liebsack, whose custody is here involved, was born on October 9, 1971. The marriage was dissolved on November 14, 1973, and at that time, pursuant to stipulation of the parties and confirmed by the court after hearing, the custody of Chad was awarded to the father, Rickie. The mother, Christine, made no personal appearance in the dissolution action and her request for restoration of her maiden name was granted at that time. At the time of the dissolution of the marriage Rickie was living with his parents, having resided with them from the time the parties separated about 1 year earlier, and they, apparently with the acquiescence of Christine, had largely assumed full responsbility for the raising of Chad. After the dissolution Rickie obtained employment in another city and thereafter saw his son only occasionally. The

grandparents, as a practical matter, were the acting parents of the child from the time of the separation of the parents until the hearing on the custody change approximately 4 years later.

On October 9, 1974, Christine married John Bieber and they now have an infant daughter. The application for change of custody was filed in August of 1976 and was heard on August 31 and September 23 of that year.

At the time of dissolution Christine was not granted any right of visitation by the court, but such rights were voluntarily given by the grandparents and she exercised such rights apparently eight times during the period involved, on some occasions taking the child with her for a period of a few days. She has not at any time been determined to be an unfit parent. She attributed her original agreement to place custody in the father to her financial inability to take care of the child at that time and an immature unwillingness to assume responsibility. She testified at the custody hearing that her present husband has good employment, that they have a good and stable home, and that she is able and anxious to assume responsibility for Chad. Her husband testified to his willingness to support and care for the child. At the time of the hearing Christine was 26 years of age, the intervener grandmother was 60, and the grandfather 61. Both grandparents are employed full time and are in good health. The grandmother indicated her willingness to terminate her employment if the interests of Chad require it. The evidence shows that Chad is left with a responsible babysitter from about 8 o'clock a.m. until 4 p.m., 5 days a week. He has now started school, attending half days, and is taken to and returned from school by the babysitter. His grandfather picks him up from the babysitter's home at about 4 o'clock. The babysitter, who has children in the same school with Chad, testified that Chad states he likes his mother

and father, but he loves his grandparents. The evidence is that Chad is happy and well cared for in his present situation. The evidence is that the grandparents treat, love, and discipline Chad as if he were their own child and not a grandchild.

The trial judge recognized the difficulty and importance of the custody decree and founded it upon a finding that the placing of the child in the custody of the interveners would afford the most stable environment for the child. The custody order granted to Christine reasonable rights of visitation.

The evidence establishes that the interveners have afforded the child a normal, stable environment and normal associations with other children, and that for all practical purposes they have been the child's parents for the past 4 years. The trial court's conclusion that in this case the best interests of the child are met by granting custody to the grandparents is supported by the evidence, even after giving due regard to the natural right of custody of a fit parent.

AFFIRMED.

DEALERS ELECTRICAL SUPPLY, APPELLEE, V. UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION, APPELLANT.

258 N. W. 2d 131

Filed October 12, 1977. No. 41174.

1. **Contracts: Bonds: Principal and Surety: Contractors.** The right of a subcontractor or materialman to recover from the surety on a contractor's bond depends upon whether the language of the bond shows an intention of the parties to the bond to protect the subcontractor or materialman. Where the construction contract is referred to or incorporated in the bond, however, the contract and the bond must be read together in determining whether a subcontractor or materialman is afforded protection by the bond.
2. _____: _____: _____: _____. A subcontractor or materialman is entitled to recover on a surety's bond where the construction contract requires the contractor to pay for the cost of labor and

materials needed to fulfill the contract, and where the bond is conditioned on performance of the contract by the contractor. This rule is applicable in regard to both public and private construction contracts.

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

Daniel A. Martin of Kerrigan, Line, Martin & Hanson, for appellant.

John L. Cutright, for appellee.

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

Brodkey, J.

Dealers Electrical Supply ("Dealers"), plaintiff and appellee herein, filed a petition in the District Court for Dodge County alleging that defendant United States Fidelity and Guaranty Company ("USF&G") was liable to it under a construction bond for the value of labor and materials supplied by Dealers to a prime contractor on a private construction project. USF&G denied liability in its answer, alleging that the bond it issued afforded protection only to the project owner, and not to subcontractors or materialmen. Dealers filed a motion for summary judgment, which was sustained by the District Court. USF&G has now appealed, and the sole issue presented to this court is whether Dealers was protected by the bond issued by USF&G, or whether the bond afforded protection only to the project owner. We affirm the judgment of the trial court.

The facts relevant to this appeal are as follows. In March 1974, Duckwall Stores Co., Inc., entered into a contract with the C. V. D. Corporation for construction of a building on certain real estate. The contract price for the building was $460,000, including all labor and materials except the cost of a lift station. The prime contract specifically required the

contractor to provide a performance bond and a payment bond, the latter "conditioned that the Contractor as principal, shall pay all indebtedness incurred for labor, supplies, equipment and materials furnished in performing the work called for by the contract documents."

USF&G, in connection with the construction contract, executed a bond on the behalf of the C. V. D. Corporation. Duckwall Stores Co., Inc., was the obligee designated in the bond, and the C. V. D. Corporation was the principal. The bond specifically referred to the construction contract, which was annexed to the bond. The bond provided: "NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the said Principal shall well and truly perform and fulfill all and every (sic) the covenants, conditions, stipulations and agreements in said contract mentioned to be performed and fulfilled, and shall keep the said Obligee harmless and indemnified from and against all and every claim, demand, judgment, lien, cost and fee of every description incurred in suits or otherwise against the said Obligee, growing out of or incurred in, the prosecution of said work according to the terms of the said contract, and shall repay to the said Obligee all sums of money which the said Obligee may pay to other persons on account of work and labor done or materials furnished on or for said contract, and if the said Principal shall pay to the said Obligee all damages or forfeitures which may be sustained by reason of the non-performance or mal-performance on the part of the said Principal of any of the covenants, conditions, stipulations and agreements of said contract, then this obligation shall be void; otherwise the same shall remain in full force and virtue."

Subsequent to the execution of the contract and bond, Duckwall Stores Co., Inc., deeded the real estate and assigned the contract to the Trans-Ameri-

ca Theatres Co. As a result of this assignment, the bond was, on July 10, 1974, extended by a rider executed by USF&G. The rider referred to the bond as a "Performance and Payment Bond," and named Trans-America Theatres Co. as an additional obligee on the bond.

In November and December 1974, Dealers, as a subcontractor to the C. V. D. Corporation, installed an electrical lighting system in the building. C. V. D. Corporation thereafter took bankruptcy and failed to pay Dealers for its work. The amount owed Dealers for its work was $8,225, and Dealers brought this action against USF&G to recover that amount. As previously stated, the trial court sustained Dealers' motion for summary judgment, and awarded it a money judgment of $8,225, plus interest.

There is no dispute in this case as to any material facts, and only a question of law is presented. Therefore it was appropriate for the District Court to decide the case on a motion for summary judgment. See, C. C. Natvig's Sons, Inc. v. Summers, 198 Neb. 741, 255 N. W. 2d 272 (1977).

USF&G contends that no right of action exists in favor of a materialman for labor against the surety on a private contractor's bond conditioned merely to indemnify and save harmless the owner from any pecuniary loss resulting from breach of the contract between the contractor and owner. See, 17 Am. Jur. 2d, Contractors' Bonds, § 20, p. 205; Great American Ins. Co. v. Busby, 247 Miss. 39, 150 So. 2d 131 (1963). It also contends that the plain language of the bond shows that it affords no protection to materialmen, that the provisions of the prime contract are immaterial, and that this court must refer solely to the bond in determining whether USF&G is liable to Dealers. For the reasons that follow, we find these contentions to be without merit.

As a general rule, the right of a subcontractor or

materialman to recover from the surety on a contractor's bond depends upon whether the language of the bond shows an intention of the parties to the bond to protect the subcontractor or materialman. Fowler v. Doran, 123 Neb. 37, 241 N. W. 759 (1932); Royal Indemnity Co. v. Alexander Industries, Inc., 58 Del. 548, 211 A. 2d 919 (1965); Engert v. Peerless Ins. Co., 53 Tenn. App. 310, 382 S. W. 2d 541 (1964); 17 Am. Jur. 2d, Contractors' Bonds, § 17, p. 203. Where the prime contract is referred to or incorporated in the bond, however, the contract and the bond must be read together in determining whether a subcontractor or materialman is afforded protection by the bond. Royal Indemnity Co. v. Alexander Industries, Inc., *supra;* Engert v. Peerless Ins. Co., *supra;* Schlanger v. Federal Ins. Co., 44 N. J. 17, 206 A. 2d 874 (1965). In the present case the bond specifically refers to the contract, which was annexed to the bond. Therefore, in determining whether the bond afforded protection to Dealers, the bond and the contract must be read together. USF&G's contention to the contrary is erroneous.

USF&G is correct in stating, as a general rule, that no right of action exists in favor of a materialman against the surety on a private contractor's bond conditioned merely to indemnify and save harmless the owner from any pecuniary loss resulting from the breach of any of the terms of the contract between the contractor and the owner. 17 Am. Jur. 2d, Contractors' Bonds, § 20, p. 205. The rule, however, is not applicable to the facts of this case. It is true that the bond is conditioned on the contractor keeping the owner harmless and indemnified from loss, but it is also further conditioned on the contractor performing and fulfilling all the conditions of the contract. A bond that secures performance of the contractor as well as holding the owner harmless against loss is not merely an indemnity bond. Amelco Window Corp. v. Federal Ins. Co., 127 N. J. Super.

342, 317 A. 2d 398 (1974). We believe the bond in the present case clearly falls within that category, as hereinafter demonstrated.

Generally, laborers and materialmen "may avail themselves of a bond conditioned merely upon the faithful performance of the contract, and containing no express and direct provision for their payment, where the contract expressly requires the contractor to pay such persons or to satisfy all claims for labor and materials." 17 Am. Jur. 2d, Contractors' Bonds, § 19, p. 204. Although there are no prior Nebraska cases precisely on point, there are numerous cases from other jurisdictions holding that a subcontractor or materialman is entitled to recover on a surety's bond where the contract required the contractor to pay for the cost of labor and materials needed to fulfill the contract, and where the bond was conditioned on performance of the contract by the contractor. See, Amelco Window Corp. v. Federal Ins. Co., *supra;* Engert v. Peerless Ins. Co., *supra;* Royal Indemnity Co. v. Alexander Industries, Inc., *supra;* Westinghouse Electric Corp. v. Mill & Elevator Co., 254 Iowa 874, 118 N. W. 2d 528 (1962); Gibbs v. Trinity Universal Ins. Co., 330 P. 2d 1035 (Okla., 1958). The above cases reflect the general rule and are supported by Restatement, Security, § 165, p. 457, which provides: "Where a surety for a contractor on a construction contract agrees in terms with the owner that the contractor will pay for labor and materials, or guarantees to the owner the promise of the contractor to pay for labor and materials, those furnishing labor or materials have a right against the surety as third party beneficiaries of the surety's contract, unless the surety's contract in terms disclaims liability to such persons."

The above rule has been adopted in Nebraska in cases involving public construction contracts, and it has been held that materialmen may recover on a bond securing faithful performance of a public con-

tract which requires the contractor to provide all materials and work necessary to complete the building. See, Korsmeyer Plumbing & Heating Co. v. McClay, 43 Neb. 649, 62 N. W. 50 (1895); Sailling v. Morrell, 97 Neb. 454, 150 N. W. 195 (1914). USF&G contends that this court should not apply this rule in cases involving private construction contracts because in such cases the materialman can protect himself by obtaining a lien, and therefore it is inappropriate to afford him protection under the surety's bond unless the bond specifically obligates the surety to pay materialmen.

USF&G's reliance on a distinction between public and private contracts is not persuasive, as this court rejected such a distinction in Fowler v. Doran, 123 Neb. 37, 241 N. W. 759 (1932). Although the facts in that case were not precisely the same as the facts in the present case, in the opinion in that case this court approved cases from other jurisdictions which held that a materialman may sue on a construction bond where the prime contract requires the contractor to pay for labor and materials used in the work, and where the bond is conditioned on faithful performance of the contract by the contractor. The court specifically rejected the contention that this rule should not apply in cases involving private construction contracts and bonds.

There is no dispute in this case that the prime contractor, the C. V. D. Corporation, was obligated to pay for labor and materials needed to complete the building under its contract with the project owner. The bond was conditioned, in part, on the faithful performance of the contract by the contractor. Therefore, under the authorities cited above, Dealers was entitled to sue on the bond under the rule that a subcontractor or materialman may recover on a surety's bond where the contract requires the contractor to pay for the cost of labor and materials needed to fulfill the contract, and where the bond is

conditioned on performance of the contract by the contractor.

It should also be noted that the contract in this case specifically required the contractor to provide a payment bond conditioned that it would "pay all indebtedness incurred for labor, supplies, equipment and materials furnished in performing the work called for by the contract documents." The contract was referred to in the bond, and annexed thereto. It has been held in some jurisdictions that where the prime contract requires the contractor to provide a bond conditioned on the payment of laborers and materialmen, but where the bond does not explicitly contain the required condition, laborers and materialmen may nevertheless recover on the bond, particularly when the contract is made a part of the bond by reference. See 17 Am. Jur. 2d, Contractors' Bonds, § 22, pp. 206, 207. Having annexed the contract to the bond, USF&G cannot claim it was not aware of the contract provisions incorporated in the bond. Furthermore, USF&G referred to the bond as a "Performance and Payment Bond" when it executed the rider to the bond, a fact which indicates that the parties to the bond viewed it as one which fulfilled the requirements of the contract with respect to bonds. These circumstances further support the conclusion that the bond in question afforded protection to Dealers.

The contentions of the appellant USF&G are without merit, and therefore the judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GERALD L. BETTS, APPELLANT.

258 N. W. 2d 136

Filed October 12, 1977. No. 41226.

Criminal Law: Sentences: Restitution. At the time of pronouncing sentence a trial court may reserve for determination at a later date the matter of fixing the amount of restitution to be made by the defendant.

Appeal from the District Court for Merrick County: C. THOMAS WHITE, Judge. Affirmed.

Philip T. Morgan of Morgan & Morgan, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

BOSLAUGH, J.

The defendant, Gerald L. Betts, was charged in separate informations with two counts of grand larceny. Upon pleas of guilty to both counts the defendant was, on September 2, 1975, placed on 3 years probation and ordered to make restitution in an amount which was later determined to be $4,145.

On July 26, 1976, the defendant's probation was revoked and he was sentenced to 1 years imprisonment in the Nebraska Penal and Correctional Complex, the sentence to run concurrently with another sentence imposed in Hall County, Nebraska. The trial court further ordered that a hearing be held to determine the amount of restitution to be paid by the defendant. A further hearing was held and on November 10, 1976, the amount of restitution was fixed at $4,145 to be paid by the defendant within 90 days.

The defendant has appealed and contends the order of November 10, 1976, was invalid because the defendant was serving the sentence imposed on July

26, 1976, at the time the order of November 10, 1976, was made and entered. The defendant relies on the rule that the District Court has no authority to set aside, modify, amend, or revise a valid sentence after the sentence has been put into execution by commitment of the prisoner. See State v. Adamson, 194 Neb. 592, 233 N. W. 2d 925.

The order of November 10, 1976, was not a modification, amendment, or revision of the sentence of July 26, 1976, within the meaning of the rule stated above. At the time the sentence of imprisonment was pronounced the trial court reserved the matter of the amount of restitution to be paid for later determination. We find no error in this procedure and there was no prejudice to the defendant. Restitution was a part of the sentence imposed on July 26, 1976, and the order of November 10, 1976, merely fixed the amount.

The judgment of the District Court is affirmed.

AFFIRMED.

ALVIN LEROY BRODERSON, APPELLANT, V. FEDERAL CHEMICAL CO., APPELLEE.

258 N. W. 2d 137

Filed October 12, 1977. No. 41227.

Workmen's Compensation. An employee suffering a schedule injury falling under subdivision (3) of section 48-121, R. S. Supp., 1972, is entitled only to the compensation provided for in that subdivision, unless some unusual or extraordinary condition as to other members or other parts of the body has developed; and the presence or absence of industrial disability is immaterial.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Edward F. Fogarty of Guilfoyle, Fogarty & Lund, for appellant.

Theodore J. Stouffer and Patrick B. Donahue of Cassem, Tierney, Adams & Gotch, for appellee.

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

BRODKEY, J.

Alvin LeRoy Broderson, plaintiff and appellant herein, filed a petition in the Workmen's Compensation Court, alleging that he had suffered a disabling injury in the course of his employment with defendant Federal Chemical Co. In its amended answer, defendant alleged that its liability for plaintiff's injury should be limited to that provided for under subdivision (3) of section 48-121, R. S. Supp., 1972, which sets forth benefits to which employees are entitled in cases of specific member disability loss.

After a hearing and rehearing before the Workmen's Compensation Court, it was found that the plaintiff had suffered a 70 percent permanent partial disability to his right leg, a specific member disability. The court held that such a disability is compensable exclusively under subdivision (3) of section 48-121, except under unusual or extraordinary circumstances not present in the case, and that it was therefore immaterial whether an industrial disability was present. The court also found the plaintiff to be entitled to vocational rehabilitation services because he is presently unable to perform work for which he has previous training or experience as a result of his injury. Plaintiff has now appealed to this court, contending that the Workmen's Compensation Court erred in denying him permanent total disability benefits under subdivision (1) of section 48-121. We affirm.

It is undisputed that the plaintiff suffered an injury to his right leg during the course of his employment with the defendant and that although he has recovered to the fullest extent possible, his right leg is permanently, partially disabled. Two doctors who

treated the plaintiff testified that plaintiff incurred a permanent partial disability to his leg, one estimating that disability to be 75 percent, while the other believed it to be 50 percent. Both doctors indicated that the disability was limited to the right leg, and did not extend to other parts of the body or to the body as a whole. The doctors did not view plaintiff's case as unusual or extraordinary considering the type of injury he suffered. Both were of the opinion that plaintiff could not return to the type of manual labor for which he had previous training and experience. Plaintiff testified that he continues to suffer pain from his injury, and that he can no longer climb stairs, bend, walk, and lift objects in the manner required for jobs for which he has training and experience. Plaintiff's employment history consists of numerous manual labor jobs, all of which required strenuous physical activity on his part.

Plaintiff raises only a question of law in his brief. He contends that the fact an injury is confined to a specific member of the body does not limit a claimant under the Workmen's Compensation Act to specific member disability benefits under subdivision (3) of section 48-121 when the injury to the specific member results in the claimant's absolute inability to engage in work for which he has prior training and experience. Plaintiff argues that in such a case the claimant is entitled to total disability benefits under subdivision (1) of section 48-121.

This court recently reviewed the provisions of section 48-121 in regard to benefits for compensable disabilities in Jeffers v. Pappas Trucking, Inc., 198 Neb. 379, 253 N. W. 2d 30 (1977). Subdivision (1) of section 48-121 sets the amount of compensation for total disability; subdivision (2) sets the amount of compensation for disability partial in character, except in cases covered by subdivision (3); and subdivision (3) sets out "schedule" injuries to specified parts of the body with compensation established

therefore. Disability under subdivisions (1) and (2) refers to loss of employability and earning capacity, and not to body function or medical loss alone. Under subdivision (3), however, it is immaterial whether an industrial disability is present or not, for it was clearly the intent of the Legislature to fix the amount of the benefits for loss of specific members under subdivision (3) without regard to the extent of the subsequent disability suffered with respect to the particular work or industry of the employee. Jeffers v. Pappas Trucking, Inc., *supra.*

The question presented by the plaintiff is not a novel one, and it has long been the rule in Nebraska that compensation for permanent partial loss of a specific member, unaccompanied by other physical injury, cannot exceed the amount specified in subdivision (3) of section 48-121. See, Hull v. United States Fidelity & Guaranty Co., 102 Neb. 246, 166 N. W. 628 (1918); Bronson v. City of Fremont, 143 Neb. 281, 9 N. W. 2d 218 (1943). This rule, contrary to plaintiff's contention, has consistently been followed by this court. See, Jeffers v. Pappas Trucking, Inc., *supra;* Sopher v. Nebraska Public Power Dist., 191 Neb. 402, 215 N. W. 2d 92 (1974); Burrious v. North Platte Packing Co., 182 Neb. 122, 153 N. W. 2d 353 (1967); Runyan v. Lockwood Graders, Inc., 176 Neb. 676, 127 N. W. 2d 186 (1964). There is an exception to the rule. Where an employee has suffered a schedule injury to some particular member or members, and some unusual or extraordinary condition as to other members or any other part of the body has developed, he or she may be compensated under subdivision (1) or (2) of section 48-121, and is not limited to recovery under subdivision (3) of that section. See, Jeffers v. Pappas Trucking, Inc., *supra;* Mead v. Missouri Valley Grain, Inc., 178 Neb. 553, 134 N. W. 2d 243 (1965).

In the present case the plaintiff does not contend that he falls within the exception to the general rule

that benefits for a specific member disability are limited to those provided for in subdivision (3) of section 48-121, and the evidence does not support such a position. Plaintiff in effect urges this court to overrule the cases referred to above, and to adopt a statutory construction of section 48-121 contrary to that which has been accepted for almost 60 years. This we decline to do. If the compensation provisions in the Workmen's Compensation Act are in need of revision, it lies within the province of the Legislature to make any necessary changes.

The determination of the Workmen's Compensation Court was correct in all respects, and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PETER W. SCHMIDT, APPELLANT.

258 N. W. 2d 140

Filed October 12, 1977. No. 41272.

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

William Francis of Cunningham, Blackburn, Von-Seggern & Livingston, for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellee.

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

WHITE, C. THOMAS, J.

The 29-year-old defendant admits breaking and entering a Grand Island doctor's office in the nighttime. He pled guilty to a burglary charge and was sentenced to 2 to 6 years at hard labor in the Nebraska Penal and Correctional Complex. The sentence

included credit for jailtime the defendant served prior to sentencing.

Defendant has a history of criminal charges beginning in 1967 with a burglary charge in Chicago. The defendant was placed on probation. In 1968, defendant was sentenced to serve a 2-year term in the Texas Department of Corrections for forgery and burglary. He was released after serving 14 months.

The defendant was employed with a moving company in Grand Island at the time of his arrest. The record and presentence report indicate defendant has a drinking problem. Defense counsel argues that defendant had not been involved in any felony-related activities for almost 10 years and urged probation.

For the crime of burglary, section 28-532, R. R. S. 1943, provides a sentence of imprisonment in the Nebraska Penal and Correctional Complex of not more than 10 years nor less than 1 year or by a fine not exceeding $500, or imprisonment in the county jail not exceeding 6 months. The sentence given was within the statutory limits.

The sentence was not excessive in light of defendant's record. The defendant had received probation on a previous burglary charge which he violated by a burglary conviction resulting in confinement.

The judgment and sentence of the trial court are affirmed.

AFFIRMED.

CHARLENE MARKSBURY, APPELLEE, V. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF WINNEBAGO, APPELLANT. GARY WASHINGTON, APPELLEE, V. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF WINNEBAGO, APPELLANT.

258 N. W. 2d 242

Filed October 12, 1977. Nos. 41278, 41279.

1. **Supersedeas.** Generally, a supersedeas is not a prerequisite to an appellate review.

2. **Supersedeas: Judgments.** A supersedeas does not operate against the judgment itself but rather against its enforcement.
3. **Supersedeas: Judgments: Appeal and Error.** In the absence of a supersedeas, a judgment or final order shall retain its vitality and be capable of execution during the pendency of an appeal.
4. **Courts: Appeal and Error.** When a cause is remanded by this court to the District Court with directions for its disposition, the District Court must obey and perform the mandate of this court.

Appeals from the District Court for Thurston County: WALTER. G. HUBER, Judge. Reversed and remanded with directions.

Rodney R. Smith of Smith, Smith & Boyd, for appellant.

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

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

SPENCER, J.

These are teacher contract termination cases. On April 19, 1976, following a hearing, the Board of Education voted to terminate the appellees' contracts at the end of the 1975-76 school year. The cases were consolidated for trial in the District Court. On December 16, 1976, the District Court reversed the decision of the Board and ordered the teachers reinstated. Appellant Board of Education prosecutes this appeal. We reverse.

Appellees had been employed for several years as teachers in the Winnebago school system. Their contracts, however, were terminated for cause at the end of the 1974-75 school year along with the contracts of several other teachers. From that decision, error proceedings were commenced in the District Court and the Board was ordered to reinstate the teachers. The Board appealed that decision to this court but did not file a supersedeas. To comply with the decision of the District Court restraining the Board from interfering with the rights of appel-

lees, the Board took them back to work pending appeal, with a letter of reservation of rights. Appellees denied the right of the Board to reserve rights pending appeal.

On December 22, 1976, this court reversed the judgment of the District Court in that appeal. We remanded the causes to the District Court with directions to dismiss the actions. Alexander v. School Dist. No. 17, 197 Neb. 251, 248 N. W. 2d 335 (1976). This was 6 days after the decision of the District Court herein reversing the order of the Board terminating the contracts for the 1975-76 school year. The Board filed a motion for rehearing, directing the trial court's attention to the Alexander decision. The District Court overruled the motion and reaffirmed its general findings for the teachers. It specifically found in each case:

"The evidence fails to show just cause for the termination, to-wit: in specifically failing to show affirmatively that there was no position available which plaintiff-in-error was qualified to teach.

"Plaintiff-in-error was a teacher with tenure under Section 79-1254, R. S. Supp. 1976 of Nebraska and the action of defendant-in-error in terminating her (his) contract was arbitrary and capricious.

"Such action by the defendant-in-error did not involve an administrative decision as to which teacher to terminate with which the court could not interfere, upon the record herein.

"The plaintiff-in-error did have a property interest under Section 79-1254, R. S. Supp. 1976 of Nebraska and that the case of Mulder v. Sherrill, et al, decided on November 9, 1976 in the United States District Court for the District of Nebraska by Chief Judge Urbom does not apply.

"Defendant-in-error did not seek a SUPERSEDEAS under Section 25-1916, R. R. S. 1943 of Nebraska and applicable case law. As a result the status quo was not maintained by it pending its successful ap-

peal to the Supreme Court in Alexander v. School District No. 17, 197 Neb. 251, [248] N. W. [335] (1976) involving Case Nos. 6941 and 6955 (6957) in this court."

Alexander v. School Dist. No. 17, *supra,* reversed the judgment of the District Court and directed it to dismiss the appellees' appeals. This had the effect of sustaining the Board's action in terminating the contracts of the appellees at the end of the 1974-75 school year. Appellees' position, which was accepted by the trial court, is that the Board, by failing to supersede the District Court reversal of the contract terminations, continued those contracts in force. In effect, they are contending our decision reversing the judgment of the District Court and dismissing the appeals from the Board was a nullity.

Appellees are confused on the purpose of a supersedeas. The failure to file a supersedeas does not divest this court of jurisdiction. As stated in Reid v. Slepicka, 182 Neb. 485, 155 N. W. 2d 799 (1968), generally, a supersedeas is not a prerequisite to an appellate review. A supersedeas does not operate against the judgment itself but rather against its enforcement.

The Board, in accordance with the order of the District Court, continued the appellees in employment for the 1975-76 school year. Before doing so, it notified the appellees as follows: "You are further informed that the School District has appealed your case to the Supreme Court of Nebraska and that this action of the Board in complying with the Court's decision shall in no way be construed as waiving any such appeal rights or relinquishing any demands that you make every effort to mitigate any claim you may have for back pay or damages."

In the absence of a supersedeas, a judgment or final order shall retain its vitality and be capable of execution during the pendency of an appeal. Hall v. Hall, 176 Neb. 555, 126 N. W. 2d 839 (1964). No super-

sedeas having been filed, the trial court directed the retention of the appellees during the 1975-76 school year. The Alexander judgment, which is a final judgment, reinstated the order of the Board terminating appellees' contracts of employment at the end of the 1974-75 school year.

The action of the Board pursuant to the decision of the District Court to continue the appellees on the payroll for the 1975-76 school year did not have the effect of continuing the appellees as teachers with tenure. They were continued as conditional employees pending the determination of the appeal to this court.

The District Judge misconstrued the intent of the mandate in Alexander. That case determined that appellees were properly terminated and he was directed to dismiss their appeals. Under no circumstances was he permitted to relitigate the issue as to whether or not they had been terminated for proper cause. As we said in Plischke v. Jameson, 181 Neb. 887, 152 N. W. 2d 119 (1967): "When a case is remanded by this court to the district court with directions for its disposition, the district court must obey and perform the mandate of this court."

In passing, we observe that the appellees in their argument on good cause ignore the following portion of section 79-1254, R. R. S. 1943: "* * * or a change in circumstances necessitating a reduction in the number of administrators or teachers to be employed by the board of education." The evidence clearly indicated that a substantial and material change in the circumstances within the Winnebago school system necessitated a reduction in the number of teachers to be employed by the Board. The appellees were terminated for cause within the ambit of the statute. This action was not, as found by the District Judge, arbitrary and capricious.

The most that can be said for the position of the appellees is that they were employed in essence un-

der a new contract for the 1975-76 school year. This did not have the effect of reinstating their tenure which was terminated at the end of the 1974-75 school year. They were subject to termination herein under section 79-1254, R. R. S. 1943, without a finding of just cause. However, in this instance, the Board gave them due notice and a hearing and made a finding the termination was for good cause.

The District Court was in error in each of the conclusions reached in reversing the Board of Education of the School District of Winnebago. The judgments are reversed and the causes are remanded to the District Court with directions to dismiss each action.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. WALTER ANTHONY CAREY, APPELLANT.

258 N. W. 2d 141

Filed October 12, 1977. No. 41286.

1. **Criminal Law: Presentence Reports.** It is an abuse of discretion for the trial court to deny defendant or his counsel access to that part of the presentence investigation report relating to prior arrests and convictions.
2. _____: _____. The discretion of the trial court in denying a request to examine the presentence report is reviewable in this court, but the record must show that a request to examine the report was made and that the defendant or his attorney were denied an opportunity to examine the presentence report.
3. _____: _____. A silent record does not create a presumption that a defendant has not had an opportunity to inspect the presentence report, much less that he has affirmatively requested inspection and had the request denied.
4. **Criminal Law: Sentences.** A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion.

Appeal from the District Court for Keith County: HUGH STUART, Judge. Affirmed.

Padley & Dudden, for appellant.

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

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

MCCOWN, J.

The defendant, William Anthony Carey, pleaded guilty to a charge of unlawful possession of marijuana with intent to distribute. The District Court imposed a sentence of not less than 1 year nor more than 2 years imprisonment and a fine of $2,000. In this appeal the defendant contends that the sentence was excessive; that it was based upon erroneous information in the presentence report; and that he was therefore denied due process.

At the time of his arrest the defendant was the driver of a pickup camper which contained 43 burlap bags of marijuana weighing 2,086 pounds. The defendant knew that the truck contained marijuana and told officers he was to receive $5,000 for driving. Following his guilty plea and the filing of a presentence investigation report, the defendant was sentenced to 1 to 2 years imprisonment and fined $2,000. The statutory penalty provides for a sentence of not less than 1 year and not more than 5 years imprisonment, or a fine of not more than $2,000, or both.

The defendant was 26 years old, single, and a resident of Vermont at the time of his arrest. He worked as a carpenter during the summer months and took odd jobs during the off-season. The presentence investigation report discloses one prior conviction for petit theft in California in 1972, for which the defendant was placed on 6 months probation.

The focus of defendant's argument on appeal rests on the assertion that the presentence investigation report erroneously failed to mention that the Cali-

fornia conviction had been set aside after successful completion of probation. There is nothing in the record to substantiate the claim that the California conviction was, in fact, set aside. There is nothing in the record to indicate that the defendant or his counsel asked to inspect the presentence investigation report, nor that a request was ever denied. The record does establish that the sentencing court treated the offense now before us as a first offense.

It is an abuse of discretion for the trial court to deny defendant or his counsel access to that part of the presentence investigation report relating to the record of prior arrests and convictions. State v. Richter, 191 Neb. 34, 214 N. W. 2d 16.

The statute makes the inspection of a presentence report by the defendant or his attorney discretionary with the trial court. That discretion is reviewable in this court, but the record must show that a request to examine the report was made and that the defendant or his attorney were denied an opportunity to examine the presentence report. See State v. Keller, 195 Neb. 209, 237 N. W. 2d 410.

Many District Judges extend an opportunity to inspect the presentence report even without a request. Under such circumstances it is only reasonable to assume that a defendant and his attorney have been given an opportunity to inspect the presentence report. A silent record does not create a presumption that a defendant has not had an opportunity to inspect the presentence report, much less that he has affirmatively requested inspection and had the request denied. In the absence of a record the only reasonable assumption is that the District Court performed its duties according to law.

The defendant contends that his sentence is excessive in any event. The quantity of marijuana involved here, its street value in the illicit drug trade, and the defendant's deliberate involvement in large scale criminal activity for financial gain are more

than sufficient to justify a denial of probation. The sentence of 1 to 2 years was well within statutory limits. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Wounded Head, 198 Neb. 58, 251 N. W. 2d 668. There was no abuse of discretion here.

AFFIRMED.

JOHN A. RYAN, APPELLEE AND CROSS-APPELLANT, V. DOUGLAS COUNTY BOARD OF EQUALIZATION ET AL., APPELLEES AND CROSS-APPELLEES, IMPLEADED WITH FIRST NATIONAL OF NEBRASKA, INC., ET AL., APPELLANTS AND CROSS-APPELLEES.

258 N. W. 2d 626

Filed October 19, 1977. No. 41078.

Declaratory Judgments: Taxation: Counties. A declaratory judgment action is not an appropriate remedy to attack an act of the county board of equalization where the plaintiff has an adequate remedy at law by direct appeal from the act of the board of equalization by virtue of the provisions of section 77-1510, R. R. S. 1943.

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

Robert A. Skochdopole of Kennedy, Holland, DeLacy & Svoboda, Andrew E. Grimm of Gaines, Spittler, Otis, Mullen & Carta, Edward Shafton, Baird, Holm, McEachen, Pedersen, Hamann & Haggart, Hugh C. McMahon, and Donald L. Sturm, for appellants.

Michael C. Washburn, for appellee Ryan.

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

CLINTON, J.

Ten defendant taxpayers, appellants herein, appeal from a decree of the District Court for Douglas

County in an action for declaratory judgment in which the court held void the action taken by the Douglas County board of equalization on May 31, 1974, reducing the valuations of all the defendant taxpayers' separate properties. The decree of the court, although holding that the action of the board was void (apparently because untimely under the provisions of section 77-1502, R. R. S. 1943), nonetheless held that constitutional due process required all defendant taxpayers be granted another hearing on the valuation question within 60 days.

On this appeal appellant taxpayers urge that an action for declaratory judgment is not an appropriate remedy, and also that the action taken by the board on May 31, 1974, was not void because May 30th being a holiday, the board had until May 31st to act under the provisions of section 25-2221, R. R. S. 1943. The plaintiff has filed a cross-appeal asserting that the portion of the decree which directed that the board of equalization hold an additional hearing on the valuation issues is void because the power of the board to act expired on May 30, 1974.

On May 31, 1974, the Douglas County board of equalization reduced the valuations of improvements on the lands and/or the actual value of the lands owned by all defendant taxpayers. Prior to such action, each defendant taxpayer had timely filed a complaint before the board seeking a reduction of actual valuation. Section 77-1502, R. R. S. 1943, authorizes the county board of equalization to hold sessions of 3 to 60 days, "commencing on April 1 of each year and ending on May 30." After the board's May 31 action, Ryan filed five direct appeals in the District Court from the order of the board, involving the separate properties of appellants Woodmen of the World Life Insurance Society; First National of Nebraska, Inc.; D. J. Witherspoon; Barton H. Ford; and Downtown Development Limited. Those appeals were pending when this declaratory

judgment action was commenced in the District Court. One defendant property owner appealed from the board's action, apparently contending that the reduction was insufficient. The other property owners did not appeal. Ryan did not appeal in the cases involving these last defendants. This action was filed by him on December 6, 1974. He brings this action as a taxpayer owning real estate, representing himself and all other taxpayers similarly situated.

We hold that an action for a declaratory judgment is not an appropriate remedy in these cases.

Under the provisions of section 25-21,150, R. R. S. 1943, "Any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder." The statutes also provide: "The court may refuse to render . . . a declaratory judgment . . . where such judgment . . . , if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." § 25-21,154, R. R. S. 1943. We have previously held that the Uniform Declaratory Judgments Act is not properly maintainable where the plaintiff had a specific remedy at law by direct appeal under the provisions of section 77-1510, R. R. S. 1943. Scudder v. County of Buffalo, 170 Neb. 293, 102 N. W. 2d 447; State ex rel. Mickey v. Drexel, 75 Neb. 751, 107 N. W. 110; Phelps County v. City of Holdrege, 133 Neb. 139, 274 N. W. 483. See, also, Hahn System v. Stroud, 109 Neb. 181, 190 N. W. 572. We have also said that an action for a declaratory judgment is not a substitute for a new trial or appeal when other action is already pending. State ex rel. Meyer v. Sorrell, 174 Neb. 340, 117 N. W. 2d 872. Any taxpayer may appeal from an order of a county board

of equalization sustaining another taxpayer's complaint that his property has been assessed too high. In re Assessment of Bankers Life Ins. Co., 88 Neb. 43, 128 N. W. 661.

The matters sought to be raised by plaintiff in this declaratory judgment action and by him on his cross-appeal in this court, that is, the legality of the action of the board of equalization on May 31st, may be determined in the pending cases as to the parties involved in those cases. As to the others, this is not a case where the plaintiff was prevented from making a timely appeal because he had no notice of the board's "untimely" action. See Fromkin v. State, 158 Neb. 377, 63 N. W. 2d 332.

Neither is this a case where the board of equalization completely failed to act upon a timely protest as in Sumner & Co. v. Colfax County, 14 Neb. 524, 16 N. W. 756. Whether, as the trial court in this case held, due process requires another hearing before the board of equalization or whether the hearing held on May 31st satisfies due process may also be determined in the pending cases.

REVERSED AND DISMISSED.

SPENCER, J., dissenting.

I am not persuaded that declaratory judgment is not a proper remedy in the posture of this case. There is no equally serviceable remedy available to litigate the question before the court.

I agree with the trial court in its finding that the action of the county board on May 31, 1974, reducing values was void. The jurisdiction and authority of the county board terminated on May 30, 1974. It could take no action of any nature after that date.

I believe, however, the board had a duty to act upon the applications pending before it. Its failure to do so within the time limited was to all legal and practical intents and purposes a denial or rejection of the pending claims. Those claims then should have been considered rejected and an appeal lay

from the result. See Sumner & Co. v. Colfax County, 14 Neb. 524, 16 N. W. 756 (1883).

I disagree with the order of the trial judge that the taxpayers were entitled to a hearing before the Douglas County board of equalization on the subject of the valuation of their respective real estate within 60 days from the date of the decree. The authority of the county board had terminated. The trial court could not confer jurisdiction on it to hold a further hearing. Failure to act by May 30, 1974, was a denial of the claims pending before the board and appeal lay from that result.

BOSLAUGH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. GEORGE MILLS, APPELLANT.

258 N. W. 2d 628

Filed October 19, 1977. No. 41181.

1. **Criminal Law: Evidence: Verdicts.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Criminal Law: Evidence: Forgery.** In a prosecution for uttering a forged instrument under section 28-601, R. R. S. 1943, knowledge that the instrument is forged, and intent to prejudice, damage, or defraud another person may be inferred from the nature of the act of cashing a forged instrument and the circumstances surrounding it.
3. **Criminal Law: New Trial: Evidence.** A motion for new trial on the ground of accident or surprise under section 29-2101, R. R. S. 1943, is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion.
4. **Criminal Law: New Trial: Continuances.** A motion for new trial on the ground of accident or surprise under section 29-2101, R. R. S. 1943, is properly overruled when a request for a continuance on that ground was not made at or prior to trial.

5. **Criminal Law: Records.** Authenticated judicial records establishing prior convictions of a defendant with the same name are prima facie sufficient to establish identity for the purpose of enhancing punishment under section 29-2221, R. R. S. 1943, and, in the absence of any denial or contradictory evidence, are sufficient to support a finding by the trial court that the accused has prior convictions.
6. _____: _____. Certified copies of official records showing fingerprints may be received in evidence in a habitual criminal proceeding, and an expert may compare such fingerprints with the known prints of the defendant to establish identity.

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

Charles Plantz, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

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

BRODKEY, J.

In an amended information filed in the District Court for Sheridan County, George Mills, the defendant and appellant herein, was charged with uttering a forged bank check under section 28-601, R. R. S. 1943; and with being a habitual criminal under section 29-2221, R. R. S. 1943. Trial commenced on August 16, 1976, before a jury, which found the defendant guilty of uttering a forged bank check. After a separate hearing before the trial court on the charge of being a habitual criminal, as provided for in section 29-2221 (2), R. R. S. 1943, the defendant was found guilty on that charge. Defendant's motions for new trial on both charges were overruled, and he was sentenced to a term of 10 years imprisonment in the Penal and Correctional Complex pursuant to section 29-2221, R. R. S. 1943. Defendant has now appealed to this court, contending that neither conviction was sustained by sufficient evidence, that his motions to dismiss the charges should have been sustained, and that the trial court erred in over-

ruling his motions for new trial. We affirm the judgment of the District Court.

The facts relevant to this appeal are as follows. On April 24, 1976, the defendant and several of his acquaintances traveled to Whiteclay, Nebraska. They had been drinking, and the defendant testified that he was intoxicated. They drove to the Jumping Eagle Inn, where the defendant cashed a $30 check, and bought some beer. The check, introduced in evidence as an exhibit, was payable to the order of the defendant, and the drawer was purportedly one Herbert Hauck. Under the drawer's signature, the word "Lease" was written. A proprietor of the Inn, Mrs. Lillie Norman, cashed the check after the defendant endorsed it in her presence. Mrs. Norman testified the defendant told her that his "leasor" had just given him a check. She also stated that the defendant did not appear to be intoxicated at the time he cashed the check.

An employee of the bank on which the check was drawn testified that Herbert Hauck had no account at that bank. Herbert Hauck, a rancher in the area, testified that he did not write the check, that he had no account in the bank on which it was drawn, that he did not know the defendant prior to the preliminary hearing in this case, and that he does not lease any land from the defendant.

The defendant admitted cashing the check, but testified he did not know that the drawer's name was forged. He stated that one of his companions in the car, whom he did not know, gave him the check to buy beer, and that he thought the person was Hauck. Defendant also stated that he thought the person who gave him the check went by the name of "Running Hawk," and that he assumed that the check was good. The defendant admitted that he owns no land which he leases, and could not recall telling Mrs. Norman that he had just acquired the check from his "leasor."

After the jury returned a verdict of guilty on the

charge of uttering a forged bank check, defendant moved for a new trial on various grounds, including the ground of accident or surprise. Defendant's attorney submitted an affidavit in support of the motion, which is summarized as follows. As part of his preparation for trial, defendant's counsel engaged an investigator to interview potential witnesses, including Joe Charging, who was one of defendant's companions on the day the check was cashed. Charging allegedly gave the investigator a statement which was corroborative of the testimony given by the defendant at the trial. Although Charging was subpoenaed, defendant's attorney was unable to locate him for a personal interview prior to trial. Charging appeared on the day of the trial, but at that time made statements which contradicted his prior statement to the investigator. For tactical reasons, defendant's attorney did not call Charging to testify. Defendant's attorney stated that he had not attempted to locate other witnesses because he had relied on the statements made by Charging to the investigator, and therefore was unable to produce any testimony at trial other than defendant's testimony. It is contended that the above situation resulted in accident or surprise which ordinary prudence could not have guarded against, and was not due to neglect or lack of diligence. There is no indication in the record that the defendant or his attorney requested a continuance before or during trial due to the alleged accident or surprise. Defendant's motion for new trial was overruled by the trial court.

Two hearings were held on the habitual criminal charge. At the first hearing, defendant was found to be a habitual criminal, however his motion for new trial on that issue was sustained. After a second hearing, the court again found defendant to be a habitual criminal, and his second motion for new trial was overruled.

The primary evidence consisted of authenticated

judicial records of the United States District Court, District of South Dakota. The records showed that in 1968 the defendant was convicted of assault of an employee of the United States government, and sentenced and committed to imprisonment for a period of 3 years, although the sentence was later reduced by 3 months to a period of 2 years and 9 months. The records also showed that the defendant was convicted of unlawful transportation of firearms in interstate commerce in 1972. Defendant was sentenced and committed to imprisonment for a period of 4½ years upon this conviction.

Also introduced in evidence was a certified copy of FBI records which reflected convictions, for the crimes described above, of one George Mills. These records contained fingerprints which were compared with fingerprints taken from the defendant in connection with the crime charged in the present case, and an expert witness testified that the fingerprints were identical. Defendant presented no evidence at the hearing on the habitual criminal charge.

We first address the question of whether the evidence was sufficient to sustain defendant's conviction of uttering a forged bank check. It must be noted at the outset that in determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. State v. Brown, 195 Neb. 321, 237 N. W. 2d 861 (1976). The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Johnsen, 197 Neb. 216, 247 N. W. 2d 638 (1976).

Section 28-601, R. R. S. 1943, provides that whoever shall utter or publish as true and genuine or cause to be uttered or published as true and genuine a forged bank check, knowing the same to be false, altered,

or forged, with intent to prejudice, damage, or defraud any person, shall be imprisoned in the penal complex not less than 1 nor more than 20 years. One may be guilty of uttering a forged instrument although he was not the forger. State v. Fox, 192 Neb. 424, 222 N. W. 2d 121 (1974). Knowledge that the instrument is forged, and intent to prejudice, damage, or defraud another person are clearly elements of the crime of uttering a forged instrument. § 28-601 (2), R. R. S. 1943; Nelson v. State, 167 Neb. 575, 94 N. W. 2d 1 (1959); State v. Fox, *supra*. Defendant contends the State did not produce sufficient evidence to prove beyond a reasonable doubt that the defendant had knowledge the check was forged, and that he had the intent to prejudice, damage, or defraud the proprietors of the Jumping Eagle Inn. This contention is without merit.

Intent can rarely be established by direct proof, and must be inferred from the nature of the act itself and the circumstances surrounding it. State v. Jungclaus, 176 Neb. 641, 126 N. W. 2d 858 (1964). The meaning of "knowingly" in a criminal statute commonly imports a perception of facts required to make up the crime. R. D. Lowrance, Inc. v. Peterson, 185 Neb. 679, 178 N. W. 2d 277 (1970). Knowledge, like intent, may be inferred from the circumstances surrounding the act. State v. Jungclaus, *supra*. Therefore the question presented is whether the jury could properly infer knowledge and intent on the part of the defendant from the circumstances surrounding the cashing of the forged check by the defendant.

There is no question in this case that the defendant cashed a forged check, and that the word "lease" was written on the check under the drawer's signature. Mrs. Norman testified as follows in regard to what the defendant told her when he cashed the check: "He said that he had been down to Rosebud for a little while and came back and that his leasor owed him some money. So, he had stopped and

picked up his check. * * * He asked if we could cash the check that he had got from his leasors." Defendant admitted at trial that he owned no land which he leased. In view of the circumstances of this case, this evidence was sufficient to support the inference and finding by the jury that the defendant acted knowingly and with intent to prejudice, damage, or defraud the Normans. Although the defendant stated that he did not know that the check was forged, and that he had no intention of cheating the Normans, it is the province of the jury to weigh the credibility of witnesses and judge the plausibility of explanations. State v. Brown, *supra*. The evidence was sufficient to send the case to the jury, and defendant's contention to the contrary is without merit.

Defendant's next contention is that it was error to overrule his motion for new trial on the ground of accident or surprise. Section 29-2101, R. R. S. 1943, provides that a new trial may be granted for the reason of "accident or surprise which ordinary prudence could not have guarded against." The affidavit supporting defendant's motion, as required by section 29-2102, R. R. S. 1943, has previously been summarized.

Essentially, defendant's claim is that he did not have sufficient time to procure witnesses who would corroborate his testimony because of the "surprise" of one potential witness changing a prior statement shortly before trial. There is no indication in the record, however, nor in defendant's brief, that there are in fact other potential witnesses who could be produced at a second trial. Defendant has not made a showing as to what such witnesses, if they do exist, would testify to at a second trial. Finally, defendant made no showing that ordinary prudence could have guarded against the alleged "surprise" other than a statement by his attorney that no other potential witnesses were located because of the reliance on Joe Charging's original statement to the investigator.

A motion for new trial pursuant to section 29-2101, R. R. S. 1943, is addressed to the sound discretion of the trial court, and its ruling will not be disturbed in the absence of a showing of abuse of discretion. State v. Crawford, 195 Neb. 181, 237 N. W. 2d 140 (1976); State v. Haynes, 186 Neb. 238, 182 N. W. 2d 199 (1970). Under the facts of this case, it cannot be said that the trial court abused its discretion in overruling defendant's motion. There was no convincing showing that the alleged "surprise" could not have been guarded against by the exercise of ordinary prudence. Furthermore to warrant the granting of an application for a new trial, it must appear that the moving party has been injured by the surprise, and that if a retrial is ordered he can make out a good defense. 58 Am. Jur. 2d, New Trial, § 159, p. 369. Defendant made no such showing in the present case. Therefore, defendant's contention that the trial court erred in overruling his motion for new trial on the charge of uttering a forged check is without merit.

It should also be noted that defendant did not move for a continuance when he discovered the alleged surprise, and the trial court was not aware, either prior to or during the trial, of defendant's contention that he needed more time to procure additional witnesses. While we have been unable to find any criminal cases in this state deciding the issue, we have held in a civil case that a motion for a new trial on the ground of surprise is properly overruled when a request for a continuance on that ground was not made at trial. Kehm v. Dumpert, 183 Neb. 568, 162 N. W. 2d 520 (1968). The general rule in other jurisdictions is that a defendant in a criminal case must ask for a continuance when confronted with surprise if he wishes to preserve that point. See 24 C. J. S., Criminal Law, § 1431, p. 31. The reason for this rule is that a party will not be permitted to remain silent, claim no surprise in the trial, speculate

on the verdict, and, when it is found against him, claim the right to a new trial on the ground of surprise. This rule is a sound one, and is particularly applicable in cases such as the present one, where the defendant discovered the surprise shortly before trial and claims that he needed additional time to procure other witnesses, yet did not move for a continuance. Defendant's failure to move for a continuance is a further reason for upholding the trial court's overruling of his motion for new trial on the ground of surprise.

The final issue in this case is whether the trial court erred in finding the defendant to be a habitual criminal. Defendant contends that section 29-2221, R. R. S. 1943, is unconstitutional, that the evidence produced by the State was insufficient, and that the FBI records were erroneously admitted in evidence because they are hearsay and such admission violated defendant's right to confront witnesses against him.

It has long been held that the habitual criminal law is constitutional, and defendant's contention to the contrary is erroneous. State v. Fowler, 193 Neb. 420, 227 N. W. 2d 589 (1975). Section 29-2221, R. R. S. 1943, provides that whoever has been twice convicted of crime, sentenced and committed to prison for terms of not less than 1 year shall, upon conviction of a felony committed in this state, be deemed a habitual criminal. Section 29-2222, R. R. S. 1943, provides that at "the hearing of any person charged with being an habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment. Section 25-1285, R. R. S. 1943, provides that a judicial record of a federal court "may be proved by the producing of the original, or

by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one."

The United States District Court records introduced in evidence in the present case met the requirements of the above sections, and constituted sufficient evidence to find the defendant to be a habitual criminal. See, State v. Addison, 197 Neb. 482, 249 N. W. 2d 746 (1977); State v. Micek, 193 Neb. 379, 227 N. W. 2d 409 (1975). As stated in State v. Roan Eagle, 182 Neb. 535, 156 N. W. 2d 131 (1968): "An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto." The records in this case did establish prior convictions of a defendant with the same name, and under the above authorities and statutes, the evidence adduced by the State was sufficient to support the finding of the District Court that the defendant is a habitual criminal.

Defendant also contends that it was error to admit in evidence the FBI records because those records were hearsay evidence and their admission denied him the right to confront witnesses against him. Although there are no Nebraska cases precisely on point, numerous courts in other jurisdictions have held that certified copies of official records showing fingerprints may be received in evidence in a habitual criminal proceeding, and an expert may compare such fingerprints with the prints taken from the defendant at the time he was arrested on the habitual criminal charge. See Annotation, Evidence of Identity for Purposes of Statute as to Enhanced Punishment in Case of Prior Conviction, 11 A. L. R. 2d, § 11, at p. 892. We also note that under sections 27-1005 and 27-902, R. R. S. 1943, the contents of an

official record may be proved by a certified copy of such record. Finally, a record made by a public official of facts required to be observed and recorded pursuant to a duty imposed by law does not constitute hearsay evidence under section 27-803 (7), R. R. S. 1943. In the present case the FBI records were certified, and such records are required to be recorded pursuant to Title 28 U. S. C., § 534. The records were properly admitted in evidence under these circumstances. In any event, even if it were error to admit the FBI records in evidence, it was at most harmless error under section 29-2308, R. R. S. 1943, as such records were simply cumulative evidence in regard to defendant's guilt, which was already sufficiently established by the records of the United States District Court. State v. Roan Eagle, *supra*. See, also, State v. Addison, *supra*.

The contentions of the defendant are without merit, and the judgment of the District Court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROOSEVELT PARTEE, APPELLANT.

258 N. W. 2d 634

Filed October 19, 1977. No. 41195.

1. **Criminal Law: Evidence: Homicide.** In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification to show the condition of the body, the nature and extent of wounds or injuries, the mechanism of death, and to establish malice or intent. The probative value of such evidence should be weighed against its possible prejudicial effect before it is admitted.
2. **Criminal Law: Evidence.** The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt.
3. **Criminal Law: Evidence: Verdicts.** In determining the sufficiency of evidence to sustain a conviction it is not the province of

this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

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

Thomas M. Kenney and Stanley A. Krieger, for appellant.

Paul L. Douglas, Attorney General, and Robert F. Bartle, for appellee.

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

BRODKEY, J.

In an information filed in the District Court for Douglas County on August 19, 1976, Roosevelt Partee, the defendant and appellant herein, was charged with murder in the second degree under section 28-402, R. R. S. 1943. Defendant pled not guilty and not guilty by reason of insanity. Trial commenced on November 15, 1976, and a jury found the defendant guilty as charged. Defendant's motion for new trial was overruled, and he was sentenced to a term of 25 years imprisonment in the Penal and Correctional Complex. Defendant has now appealed to this court, contending that the District Court committed reversible error in admitting into evidence photographs of the deceased; and in overruling motions for a directed verdict on the grounds that the evidence was insufficient as a matter of law and that the State failed to prove the essential elements of second degree murder. We affirm.

On August 5, 1976, Lela Partee, wife of the defendant, died in her home as the result of a brutal beating. At approximately 2:30 a.m. on that date, a rescue squad and police were called to the home, apparently by the defendant. Defendant told police

that he had been sleeping, and awoke to find his wife lying on the floor in a pool of blood. He stated that he then went to his daughter's home to call an ambulance. The victim was dead when the police arrived, and although rigor mortis had not occurred, the body was cool.

The evidence adduced at trial showed that the defendant had beaten his wife on more than one occasion in the months preceding her death. One such beating had occurred on July 30, 1976, 6 days before the crime herein, and as a result Mrs. Partee required emergency treatment in a hospital. Assault charges were filed against the defendant, who was temporarily placed in jail and released from custody on the day before his wife died.

Flora Phillips, a friend of the defendant, testified that she had seen the defendant on his front porch at approximately 10:15 p.m., on the night of the crime. She stated that the defendant was wearing a white shirt which was bloody, and she observed the defendant ripping the shirt off and throwing it on the porch. Police discovered a white shirt with blue pinstripes on the front porch after they arrived on the scene. The shirt was damp with bloodstains, and the buttons were ripped off. Blood was also found on the shirt, slacks, and shoes worn by the defendant when police arrived.

Photographs of the scene of the crime, introduced in evidence, indicated that a fight of some duration preceded the victim's death. Blood was found in three different rooms, and the mattress in the bedroom was soaked with blood. Several photographs of the deceased taken at the scene were introduced and received in evidence over defendant's objection. These photographs, many of which are gruesome, indicate that the victim was severely beaten about the head and upper body, and that numerous blows would have been required to inflict such a beating.

Richard B. Wilson, the doctor who performed an

autopsy on the deceased, testified that she suffered from lacerations of the scalp, with a large loss of scalp tissue; multiple abrasions and contusions of the face, shoulders, and arms; a fracture of the left arm; lacerations of the lip; and fractured ribs. He stated that the cause of death was a massive hemorrhage from scalp wounds. Photographs of the deceased taken at the morgue were received in evidence over defendant's objections, and Dr. Wilson referred to them in explaining the nature of the deceased's injuries and testifying that in his opinion a blunt instrument was used to inflict some of the wounds. The State introduced in evidence a broomstick which was found at the scene of the crime, which was broken, and which had bloodstains on it.

Witnesses for the defense testified that when the defendant was intoxicated he would pass out and not wake up for hours, even when one tried to arouse him. The evidence showed that the defendant was intoxicated on the night of the crime, as was the victim. Testimony was adduced to show that Flora Phillips, whose testimony has previously been referred to, had an altercation with the victim several days before her death, and had threatened the victim. Other evidence showed that an intruder could have entered the house, in which defendant and his wife lived, through a basement window which had been broken during the week before the crime.

Finally, there was evidence from psychiatrists that the defendant suffered from alcohol addiction, a seizure disorder, and schizophrenia. There was no evidence that the defendant was unable to distinguish between right and wrong either at the time of the crime or subsequent thereto.

Defendant first contends that the District Court erred in receiving in evidence the photographs of the deceased. A total of 18 photographs of the deceased were admitted in evidence over the objection of the defendant. Six of these were taken at the time of the

autopsy, and referred to by the doctor who performed the autopsy and testified in regard to the nature of the victim's injuries and the cause of death. The remaining 12 were taken at the scene of the crime from different angles and distances. Thirteen of the photographs are unquestionably gruesome, although five are not.

Defendant acknowledges the general rule that photographs, although of a gruesome nature, are admissible in evidence if they are relevant and a true representation of what they purport to represent. State v. Record, 198 Neb. 530, 253 N. W. 2d 847 (1977); State v. Wilbur, 186 Neb. 306, 182 N. W. 2d 906 (1971). "Although it is true that the probative value of such evidence should be weighed against its possible prejudicial effect before it is admitted, if a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if it is gruesome." State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849 (1977). See, also, State v. Robinson, 185 Neb. 64, 173 N. W. 2d 443 (1970); Washington v. State, 160 Neb. 385, 70 N. W. 2d 378 (1955). The admission of photographs of a gruesome nature rests largely in the sound discretion of the trial court. State v. Wilbur, *supra*; State v. Blackwell, 184 Neb. 121, 165 N. W. 2d 730 (1969).

In his brief, defendant appears to concede that some of the photographs were admissible to illustrate the nature and extent of the deceased's injuries, but argues that the number of pictures introduced in evidence was unnecessary. He contends that the cumulative effect of the gruesome photographs was highly prejudicial in this case, and that the trial court should have limited the number of photographs received in evidence.

It appears to be beyond dispute that at least some of the photographs were properly received in evidence. "In a homicide case, photographs of the vic-

tim, upon proper foundation, may be received in evidence for purposes of identification to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent." State v. Dittrich, 191 Neb. 475, 215 N. W. 2d 637 (1974). A photograph of the deceased may be admitted in evidence if it shows the mechanism of death. State v. Wilbur, *supra*. In this case, the photographs of the deceased taken at the scene were introduced to show condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent. Malice and intent to kill are essential elements of the offense of second degree murder. State v. Walle, 182 Neb. 642, 156 N. W. 2d 810 (1968), cert. den. 393 U. S. 880, 89 S. Ct. 182, 21 L. Ed. 2d 153; State v. Hizel, 179 Neb. 661, 139 N. W. 2d 832 (1966). The photographs taken of the deceased at the morgue were introduced in conjunction with the testimony of the doctor who performed the autopsy, which dealt with the condition of the body and the mechanism of death. Therefore, under the rules cited above, the probative value of some photographs would appear to outweigh their prejudicial effect, particularly since the State had to establish malice and intent to kill by circumstantial evidence because there were no witnesses to the crime. See, State v. Blackwell, *supra;* State v. Walle, *supra*.

Defendant's contention that the number of photographs introduced in evidence was unnecessary and had a highly prejudicial cumulative effect presents a close question. It is certainly arguable that the State could have made out its case with the admission of fewer photographs. The admission of cumulative evidence of this nature, however, rests within the sound discretion of the trial court. State v. Blackwell, *supra*. In Blackwell, a total of nine photographs of the deceased were admitted in evidence, and this court found no abuse of discretion on the part of the trial court in admitting the photo-

graphs in evidence. In other jurisdictions, courts have upheld the admission in evidence of from 6 to 23 photographs of the deceased in homicide cases. See, Commonwealth v. Sullivan, 371 A. 2d 468 (Pa., 1977); Cowell v. State, 331 N. E. 2d 21 (Ind., 1975); Bauldree v. State, 284 So. 2d 196 (Fla., 1973); People v. Alsteens, 49 Mich. App. 467, 212 N. W. 2d 243 (1973). The number of photographs, in and of itself, is not dispositive, but rather all the circumstances of each case must be considered in determining whether the admission in evidence of a significant number of photographs was so prejudicial that it constitutes reversible error. An important consideration is whether a witness can effectively testify to the pertinent facts without the need of numerous photographs, or any photographs at all. This latter consideration is particularly relevant to photographs taken in conjunction with an autopsy, as a pathologist can often testify in regard to the autopsy without the need for photographs. See Commonwealth v. Scaramuzzino, 455 Pa. 378, 317 A. 2d 225 (1974).

In the present case, where it is clear that some of the photographs were properly admitted in evidence to prove intent, malice, and condition of the victim's body, and where the total number of photographs received was not prejudicial on its face, we cannot say that the trial court abused its discretion such that a new trial is required. A word of caution is, however, appropriate at this point. In State v. Robinson, *supra,* another borderline case involving the admission in evidence of gruesome photographs, this court noted that "our trial courts should be ever vigilant and guarded in dealing with such evidence. Except in cases of absolute necessity, prosecuting attorneys should avoid the use of doubtful evidence of this character." See, also, People v. Alsteens, *supra.* This caveat is particularly appropriate in cases where it is proper to admit some gruesome photographs in evidence; in such cases care should

be taken that no more photographs than are absolutely necessary are admitted. In cases, unlike the present case, where photographs are not necessary to enable the State to satisfy its burden of going forward with the evidence and establishing all the elements of the crime charged, gruesome photographs should be excluded entirely. State v. Robinson, *supra*.

Defendant's second assignment of error is that the trial court erred in overruling his motions for a directed verdict on the grounds that the evidence was insufficient as a matter of law and that the State failed to prove the essential elements of second degree murder. One is guilty of second degree murder when one purposely and maliciously, but without deliberation and premeditation, kills another person. § 28-402, R. R. S. 1943.

The evidence in this case was clearly sufficient to support a jury finding that the person who killed the victim acted purposely and maliciously, and with intent to kill. The victim was brutally and relentlessly beaten, and part of her scalp was torn away. The evidence negated any theory that the victim died accidently, or that the perpetrator meant only to injure her and not kill her. Under circumstances such as those presented in this case, the jury could properly infer that the perpetrator acted with malice and intent to kill. See, State v. Marion, 174 Neb. 698, 119 N. W. 2d 164 (1963); State v. Blackwell, *supra*.

The evidence is also sufficient to support the jury finding that the defendant was the perpetrator, although the evidence presented by the State was largely circumstantial. "The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt."

State v. Bartlett, 194 Neb. 502, 233 N. W. 2d 904 (1975). See, also, State v. Swayze, 197 Neb. 149, 247 N. W. 2d 440 (1976). In determining the sufficiency of evidence to sustain a conviction, however, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Spidell, 194 Neb. 494, 233 N. W. 2d 900 (1975); State v. Brown, 195 Neb. 321, 237 N. W. 2d 861 (1976). The verdict of a jury must be sustained, if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Johnsen, 197 Neb. 216, 247 N. W. 2d 638 (1976).

The State presented evidence that the defendant had beaten the victim several times prior to her death. One such beating occurred only 6 days before the crime, and assault charges were filed against the defendant as a result of that beating. The defendant was seen wearing a bloody shirt 4 hours before discovery of the body. The shirt, slacks, and shoes worn by the defendant when police arrived were bloody. Defendant admitted being in the house at the time his wife died, but stated that he was asleep and awoke to find his wife lying on the floor. Although the defendant presented evidence that he could not be aroused from sleep after he had been drinking, that another person had threatened his wife during the week before her death, and that an intruder could have gained access to the apartment through a window, it is the province of the jury to weigh the evidence and credibility of witnesses, and to determine the plausibility of explanations. State v. Spidell, *supra*. There can be little doubt that the evidence presented by the State, and obviously believed by the jury, tended to connect the defendant with the crime charged and was conclusive of his guilt. Under such circumstances, it was not error for the trial court to overrule defendant's mo-

tion for a directed verdict, and the verdict of the jury must be sustained.

The contentions of the defendant are without merit, and therefore the judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN M. HARDIN, APPELLANT.

258 N. W. 2d 245

Filed October 19, 1977. No. 41343.

Criminal Law: Sentences: Double Jeopardy. The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction, is whether the offense charged in one count involves any different elements than an offense charged in another count.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

John M. Hardin, pro se.

Paul L. Douglas, Attorney General, and Robert F. Bartle, for appellee.

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

CLINTON, J.

This is a post conviction proceeding under the provisions of section 29-3001, et seq., R. R. S. 1943, in the application for which the appellant, John M. Hardin, alleged that the consecutive sentences imposed upon him for conviction of two counts of armed robbery were in violation of the double jeopardy provisions of the Fifth Amendment to the Constitution of the United States. The District Court for Douglas County, after examination of the files and records in the case, determined that the defendant

was entitled to no relief, and accordingly denied an evidentiary hearing and the relief requested.

We affirm the holding of the District Court.

The question presented to us is wholly one of law. The files and records in the case show the defendant was originally charged with three counts of armed robbery and one count of the use of a firearm in the commission of a felony. As a consequence of a plea bargain, the third robbery count and the count involving the use of a firearm in the commission of a felony were dismissed. The defendant entered a plea of guilty to the two remaining charges of robbery and was sentenced to a term of 3 years on the first count and a term of 3 to 5 years on the second count, said terms to run consecutively, with credit given for jail time served while awaiting trial and sentence. The record further establishes that all four counts with which defendant was charged grew out of the same incident. On March 7, 1975, the defendant and three companions, using a firearm, robbed the participants of a gambling game, taking money from three different victims.

The defendant argues that since all charges grew out of one transaction, he is being twice punished for the same offense in violation of the Fifth Amendment to the Constitution of the United States. To support this contention he relies primarily upon the holding of the United States Supreme Court in Ashe v. Swenson, 397 U. S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469. We believe his reliance is misplaced. In that case the defendant had been, in the Missouri courts, acquitted of a robbery charge. The defense was alibi. There the robbery was of six poker players and, as here, one transaction was involved. The State of Missouri retried the defendant after his acquittal, this time charging him with the robbery of one of the victims not included in the charge of which he was acquitted. He was found guilty. The United States Supreme Court held that the acquittal

of the defendant on the charge of robbery of one of the gamblers prohibited, under principles of former jeopardy, subsequent prosecution for robbery of the others. The reason was collateral estoppel. Only a single transaction was involved and the sole issue was the identity of the perpetrator. The first acquittal determined that issue. That is not this case. Ashe v. Swenson, *supra,* would apply to such cases as Jeppesen v. State, 154 Neb. 765, 49 N. W. 2d 611; or even this case if the defendant had been acquitted of one of the charges growing out of the transaction and if he had been found by the jury not to have been one of the participants in the transaction, for then the principle of collateral estoppel would apply. In the case before us the defendant pled guilty to robbery of two different people. There were two victims, two crimes, and no collateral estoppel by reason of a prior acquittal. The situation here is not different than if the defendant had been convicted of killing two persons in one transaction.

The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction, is whether the offense charged in one count involves any different elements than an offense charged in another count. The test is whether some additional evidence is required to prove one of the offenses than is necessary to prove one of the other offenses. State v. Chapple, 197 Neb. 4, 246 N. W. 2d 714.

Neither North Carolina v. Pearce, 395 U. S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656, nor Harris v. Washington, 404 U. S. 55, 92 S. Ct. 183, 30 L. Ed. 2d 212, also cited by the appellant, prohibits this result. The latter case is simply an application of collateral estoppel as in Ashe v. Swenson, *supra.*

AFFIRMED.

KATHRYN M. YUNGHANS ET AL., APPELLEES, V. JAMES P. O'TOOLE, APPELLANT, IMPLEADED WITH PAWNEE COUNTY BANK, PAWNEE CITY, NEBRASKA, ET AL., APPELLEES.

258 N. W. 2d 810

Filed October 26, 1977. No. 41104.

1. **Continuances: Motions, Rules, and Orders.** A motion for a continuance is addressed to the sound discretion of the court, and, in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal.
2. **Partition.** Once joint title in real estate has been established, partition may be had as a matter of law.
3. **Partition: Joint Tenancy.** Joint tenancy may be terminated or severed by any act which destroys one or more of its unities, and may also be severed by the act of joint tenants in destroying unity of possession, as by partition.
4. _____: _____. A joint tenant's act which destroys one or more of the coexisting unities necessary to existence of joint tenancy operates as a severance of the joint tenancy and extinguishes the right of survivorship.
5. **Motions, Rules, and Orders: Pleadings.** The grant or denial of a motion to amend the pleadings in the furtherance of justice rests in the sound discretion of the trial judge.
6. **Motions, Rules, and Orders: Summary Judgments.** In the absence of some mitigating factors which would justify the raising of new issues by a party after a motion for summary judgment has been heard and submitted, it is not an abuse of discretion to deny a motion to amend pleadings.

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

Griffiths & Gildersleeve, for appellant.

Richard R. Endacott of Knudsen, Berkheimer, Endacott & Beam, for appellees Yunghans.

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

MCCOWN, J.

The plaintiff, Kathryn M. Yunghans, brought this action against the defendant, James P. O'Toole, her brother, to partition 560 acres of farmland in Pawnee County, Nebraska. Kathryn's husband, Robert Yung-

hans, was joined as a plaintiff solely because of the marital interest. The District Court sustained plaintiffs' motion for summary judgment, and entered judgment that plaintiff Kathryn M. Yunghans and her brother were owners of the real estate as joint tenants with right of survivorship and not as tenants in common, and that plaintiff Kathryn Yunghans had the right to have the real estate partitioned equally between her and the defendant. The defendant has appealed.

In the summer of 1973 plaintiffs filed this partition action alleging that plaintiff Kathryn Yunghans and the defendant were joint owners of the real estate by virtue of a warranty deed dated November 6, 1958, conveying the property to them "as joint tenants and not as tenants in common with right of survivorship." A copy of the deed was attached to the amended petition. Some 2 years later, after numerous preliminary motions, the defendant filed his answer generally denying plaintiffs' allegations and alleging that if the plaintiff, Kathryn Yunghans, had an ownership in the real estate, it was subject to an indestructible right of survivorship of the defendant which could not be destroyed or nullified without defendant's consent. Plaintiffs filed an amended motion for summary judgment on the ground that the pleadings showed that there was no genuine issue as to any material fact, and that plaintiffs were entitled to judgment as a matter of law partitioning the real estate equally between Kathryn M. Yunghans and James P. O'Toole. Hearing on the motion for summary judgment was held on February 11, 1976, and the court took the matter under advisement.

On March 26, 1976, while the court had the motion for summary judgment under advisement, the defendant filed a motion for leave to file an amended answer. The proposed amended answer alleged that defendant had paid the entire consideration for the purchase of the real estate; that inclusion of plaintiff

Kathryn M. Yunghans' name was through misunderstanding and error; and that any title plaintiffs may appear to have by reason of the deed was held, if at all, in trust for the defendant. It also alleged that defendant had claimed and exercised the sole and exclusive ownership and possession of the real estate. The amended answer also alleged that defendant's right of survivorship was indestructible without defendant's consent and demanded that defendant's right of survivorship be preserved.

On May 14, 1976, the trial court held a hearing on defendant's motion for leave to file the proposed amended answer and denied the motion. The District Court then granted plaintiffs' motion for summary judgment and entered judgment that plaintiff, Kathryn M. Yunghans, and defendant, James P. O'Toole, were owners of the real estate as joint tenants with right of survivorship and not as tenants in common; and that plaintiff, Kathryn M. Yunghans, had the right to have the real estate partitioned equally between them.

The defendant contends that plaintiffs' motion for summary judgment should have been construed and treated as a motion for judgment on the pleadings, and that the District Court erred in denying defendant's oral motion for a continuance at the hearing on the motion.

The evidence offered and received at the hearing on the motion for summary judgment was a certified copy of the 1958 warranty deed conveying the land to "James P. O'Toole and Kathryn M Yunghans as joint tenants and not as tenants in common with right of survivorship." The defendant objected to the introduction of any evidence at the hearing on the ground that he construed plaintiffs' motion for summary judgment as a motion for judgment on the pleadings, and that he did not anticipate the introduction of evidence.

Section 25-1332, R. R. S. 1943, requires a motion for

summary judgment to be served at least 10 days before the time fixed for hearing and grants the adverse party the right to serve opposing affidavits prior to the day of hearing. The section specifically provides in part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The title of the amended motion for summary judgment was specific and unambiguous and the body of the motion is phrased in almost the exact language of the summary judgment statute. The motion specifically stated that "the pleadings show that there is no genuine issue as to any material fact and that the Plaintiffs are entitled to judgment as a matter of law." There can be no serious doubt that the motion was a motion for summary judgment rather than a motion for judgment on the pleadings. The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of those cases where there is no issue of fact or defense without the necessity, expense, and delay of trial. See Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152.

The amended motion for summary judgment was served and filed on January 9, 1976. On January 27, 1976, the District Court, on its own motion, ordered that "plaintiffs' Motion for Summary Judgment" be set for hearing on February 11, 1976. The amended motion for summary judgment was served on the defendant's counsel and the order of the court setting that motion for hearing was also served on him. That was sufficient to put the defendant and his counsel on notice as to the nature of the proceedings, and that is all the statutes require. See §§ 25-910 and 25-1330 to 25-1336, R. R. S. 1943.

The defendant also contends that the District Court

abused its discretion in denying defendant's oral motion for a continuance of the hearing on February 11, 1976, on the ground that the defendant was surprised at the court's interpretation of the plaintiffs' motion for summary judgment. In response to defendant's contention that the motion for summary judgment was actually a motion for judgment on the pleadings and that defendant was, therefore, surprised, the District Court said: "* * * I cannot believe that counsel would not be aware of the fact that if he did not prevail on that issue that the matter would move forward on the Motion for Summary Judgment in the normal manner."

Counsel cannot rely solely upon his own interpretation of an opponent's motion and ignore the possibility that the court may rule against that interpretation and counsel may be required to proceed. It is the duty of counsel to prepare for that possibility and his failure to do so does not require that a continuance be granted. A motion for a continuance is addressed to the sound discretion of the court, and, in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal. Korte v. Betzer, 193 Neb. 15, 225 N. W. 2d 30.

The defendant's underlying contention throughout this litigation has been that there should be a distinction between a grant in "joint tenancy" and a grant in "joint tenancy with right of survivorship," and that the addition of the words "with right of survivorship" indicates an intention to make the survivorship right indefeasible. As early as 1913 this court declined to make such a technical distinction because such a rule would only invite confusion and create havoc with existing deeds. Sanderson v. Everson, 93 Neb. 606, 141 N. W. 1025. Once joint title in real estate has been established, partition may be had as a matter of law. See, §§ 25-2170 and 2170.01,

R. R. S. 1943; Dixon v. Dixon, 189 Neb. 212, 202 N. W. 2d 180.

This court has very recently decided the basic issue adversely to the defendant. Joint tenancy may be terminated or severed by any act which destroys one or more of its unities, and may also be severed by the act of joint tenants in destroying unity of possession, as by partition. A joint tenant's act which destroys one or more of the coexisting unities necessary to existence of joint tenancy operates as a severance of the joint tenancy and extinguishes the right of survivorship. Cofer v. Perkins, *post* p. 327, 258 N. W. 2d 807. That case is controlling here.

Finally, the defendant contends that the District Court abused its discretion in refusing to allow the defendant to amend his answer after the motion for summary judgment had been argued and submitted. The motion for summary judgment was submitted on February 11, 1976, and the defendant's motion for leave to file the proposed amended answer was not filed until March 26, 1976, approximately 6 weeks later. The additional "facts" alleged in the proposed amended answer were that defendant had paid the entire consideration for the property; Kathryn M. Yunghans' name as grantee had been included in the deed by error; that her ownership interest in the property, if any, was held in trust for the defendant; that she was not in possession of the property and was not entitled to bring the action; and that the cause was barred by the statute of limitations.

There is nothing in the record to indicate that any of those proposed defenses were newly discovered or that counsel had not been aware of their existence for the more than 2½ years the action had been pending. The proposed amended answer appears to be a belated effort to inject some issues of material fact into a proceeding where previously the plead-

ings revealed none. The grant or denial of a motion to amend the pleadings in the furtherance of justice rests in the sound discretion of the trial judge. Stungis v. Union Packing Co. of Omaha, Inc., 196 Neb. 126, 241 N. W. 2d 660. In the absence of some mitigating factors which would justify the raising of new issues by a party after a motion for summary judgment has been heard and submitted, it is not an abuse of discretion to deny a motion to amend pleadings. See Ogallala Fertilizer Co. v. Salsbery, 186 Neb. 537, 184 N. W. 2d 729. There was no abuse of discretion here.

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

AFFIRMED.

UNITED WAY OF THE MIDLANDS, A CORPORATION, APPELLANT, V. DOUGLAS COUNTY BOARD OF EQUALIZATION, DOUGLAS COUNTY, NEBRASKA, APPELLEE.

259 N. W. 2d 270

Filed October 26, 1977. No. 41106.

1. **Taxation: Appeal and Error: Time.** In appeals under section 77-202.04, R. R. S. 1943, the giving of the notice of appeal and the furnishing of an appeal bond are the only jurisdictional requirements which must be completed within the 20-day period.
2. **Taxation: Appeal and Error: Case Overruled.** Insofar as there may be language in Knoefler Honey Farms v. County of Sherman, 193 Neb. 95, 225 N. W. 2d 855 (1975), which conflicts with this opinion on the construction of section 77-202.04, R. R. S. 1943, it is overruled.

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

John K. Boyer and Michael L. Johnson of Fraser, Stryker, Veach, Vaughn & Muesey, for appellant.

Donald L. Knowles and Rockford G. Meyer, for appellee.

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

SPENCER, J.

Plaintiff, a nonprofit charitable corporation, appeals from an order of the District Court sustaining a demurrer to its appeal from a tax exemption determination by the Douglas County Board of Equalization. The only issue on appeal is whether plaintiff's appeal to the District Court was timely because the transcript on appeal was not filed within 20 days. We reverse.

On May 5, 1976, the Board of Equalization granted a partial tax exemption on certain real property owned by the plaintiff. On May 25, 1976, plaintiff filed a notice of appeal and an appeal bond with the county clerk. On June 10, 1976, plaintiff filed a petition and a transcript of the board proceedings with the clerk of the District Court. The defendant board demurred on the ground that the appeal was not taken within 20 days as provided by section 77-202.04, R. R. S. 1943. The demurrer was sustained.

Section 77-202.04, R. R. S. 1943, reads as follows: "Persons, corporations, or organizations denied exemption from taxation for real or tangible personal property, including motor vehicles, by a county board of equalization may appeal de novo to the district court of the county where such real or tangible personal property, including motor vehicles, is located in the same manner and under the same procedure as provided by sections 77-1510 and 77-1511, in the case of appeals from other actions of a county board of equalization, except that such appeal shall be taken within twenty days after the certification of the decision, determination, or order made by such board of equalization and except that the court on appeal shall make its decision on the law and equity and may reverse the action of such board even though it is not established that the action of the board was

unreasonable or arbitrary. The Tax Commissioner may at his discretion intervene in any such appeal."

Section 77-1510, R. R. S. 1943, so far as material for discussion herein, provides as follows: "Appeals may be taken from any action of the county board of equalization to the district court within forty-five days after adjournment of the board, in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county."

Section 77-1511, R. R. S. 1943, covers procedure in the District Court and is not material to the discussion herein.

It is clear that section 77-202.04, R. R. S. 1943, adopts the procedure provided by sections 77-1510 and 77-1511, R. R. S. 1943, except that it makes mandatory the taking of the appeal within 20 days after the certification of the decision, determination, or order made by the board of equalization. In other words, it is adopting the procedures provided by sections 77-1510 and 77-1511, except as to the time provided for appeal.

Pertinently, section 77-1510, R. R. S. 1943, provides that such appeals may be taken in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county. This procedure is covered by section 23-135, R. R. S. 1943.

Section 23-135, R. R. S. 1943, provides, so far as material herein: "When the claim of any person against the county is disallowed in whole or in part by the county board, such person may appeal from the decision of the board to the district court of the same county, by causing a written notice to be served on the county clerk, within twenty days after making such decision and executing a bond to such county * * * conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant."

Section 23-137, R. R. S. 1943, provides the procedure on the preparation of the transcript. It is as follows: "The clerk of the board, upon such appeal being taken, and being paid the proper fees therefore, shall make out a complete transcript of the proceedings of the board relating to the matter of their decision thereon, and shall deliver the same to the clerk of the district court, and such appeal shall be entered, tried, and determined the same as appeals from justice courts, and costs shall be awarded thereon in like manner."

It is to be noted that the clerk of the board delivers the transcript to the District Court after the payment of his fees. We note also section 23-137, R. R. S. 1943, uses the language "upon such appeal being taken." To harmonize these provisions and to give effect to all portions of the statutes cited requires us to conclude they do not require the transcript on appeal to be filed within 20 days after the decision.

As we interpret the statutes mentioned, in appeals under section 77-202.04, R. R. S. 1943, the giving of the notice of appeal and the furnishing of an appeal bond are the only jurisdictional requirements which must be completed within the 20-day period. The clerk of the board then is required to make out a complete transcript of the proceedings and after being paid his fees, to deliver the same to the clerk of the District Court.

While section 23-137, R. R. S. 1943, does not specifically mention the time limited for the filing of the transcript in the District Court, it does refer to the procedure required in appeals from the justice courts. The statutes governing appeals from justice courts, sections 27-1301 to 27-1315, R. R. S. 1943, were repealed in 1972. In Knoefler Honey Farms v. County of Sherman, 193 Neb. 95, 225 N. W. 2d 855 (1975), we held: "Where one statute refers to another, which is subsequently repealed, the statute repealed becomes a part of the one making the reference and

remains in force so far as the adopting statute is concerned."

Section 27-1303, R. R. S. 1943, provided for the filing of the transcript in the District Court within 30 days following the rendition of the judgment. With reference to section 77-202.04, R. R. S. 1943, for the future we interpret this to mean the appellant shall tender the fees for the transcript within that period and the clerk of the board has the responsibility to file the transcript in the District Court.

Insofar as there may be language in Knoefler Honey Farms v. County of Sherman, 193 Neb. 95, 225 N. W. 2d 855 (1975), which conflicts with this opinion on the construction of section 77-202.04, R. R. S. 1943, it is overruled.

The demurrer herein was improperly sustained. The judgment is reversed and the cause remanded to the District Court for further proceedings.

REVERSED AND REMANDED.

MAURINE COFER, CONSERVATOR FOR ARTHUR M. QUALLEY, A SINGLE MAN, APPELLEE, V. WILLADEAN PERKINS, A SINGLE WOMAN, APPELLANT.

258 N. W. 2d 807

Filed October 26, 1977. No. 41158.

1. **Partition.** Partition, if well-founded, is an absolute right, and a conservator need not obtain a license to bring such a suit.
2. **Partition: Appeal and Error.** An action for partition is triable de novo on the record in the Supreme Court.
3. **Appeal and Error.** On appeal in equity cases, the Supreme Court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying.
4. **Partition: Joint Tenancy.** Joint tenancy may be terminated or severed by any act which destroys one or more of its unities, and may also be severed by the act of joint tenants in destroying unity of possession, as by partition.
5. _____: _____. A joint tenant's act which destroys one or more of the coexisting unities necessary to existence of joint tenancy oper-

ates as severance of the joint tenancy and extinguishes the right of survivorship.

6. **Appeal and Error: Rules of Supreme Court.** Generally, a case in the Supreme Court on appeal will be limited to errors assigned and discussed and an assignment of error not discussed will be considered waived.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Gregory J. Beal of Beal & Jensen, for appellant.

Murphy, Pederson & Piccolo and LeRoy Anderson, for appellee.

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

WHITE, C. THOMAS, J.

This is an action brought by a conservator to partition property held by her ward in joint tenancy with the defendant. The defendant brings this appeal from the judgment of the District Court for the County of Lincoln ordering the partition.

Defendant's principal assignments of error concern the District Court's granting of the partition solely upon the conservator's petition without obtaining a license from the county court to bring the action. The defendant also contends that the District Court erred in not finding that at least one of the statutorily recognized justifications for a sale of the ward's real estate existed before granting partition. Due to the related nature of these issues, they will be discussed and decided together.

Under the Nebraska Probate Code, a conservator may bring a partition action and may do so without first securing a license. Section 30-2653, R. R. S. 1943, provides: "(c) A conservator * * * may act without court authorization or confirmation to * * * (7) * * * manage, develop, improve, exchange, *partition,* change the character of, or abandon an estate asset." (Emphasis supplied.) However, the deci-

sion of the District Court on September 17, 1976, was prior to January 1, 1977, the operative date of section 30-2653, R. R. S. 1943.

Under prior law, a conservator had the authority to bring a partition action. Section 25-2170.01, R. R. S. 1943, provides that a "joint owner of any real estate * * * may compel a partition thereof * * *."

Section 38-903, R. R. S. 1943, provided: "Every conservator shall give bond as provided in section 38-110, and all provisions of law for the managing of estates as provided in articles 5, 6, and 7, Chapter 38, and the sale of real estate as provided in article 6, Chapter 38, shall apply to such conservator."

Thus, the statutory enactments concerning the rights and duties of guardians also apply to a conservator. Section 38-502, R. R. S. 1943, provided that a guardian shall appear and represent his ward in all legal suits and proceedings. Section 38-503, R. R. S. 1943, stated that a guardian may sell a ward's real estate after obtaining a license to do so.

A license is not a condition precedent to a conservator's right to bring a partition action. In Windle v. Kelly, 135 Neb. 143, 280 N. W. 445, this court held that partition, if well-founded, is an absolute right, and a license to bring a suit is unnecessary. The facts and evidence of Windle establish that the partition action was well-founded. The necessity of partition to provide income for the support of the ward satisfied this court that the partition was warranted.

There is no evidence as to the needs of the ward on which we might resolve the issue. However, the basis of a well-founded partition action by a conservator may be judged by other criteria. The hearing before the District Court in a partition action by a conservator serves essentially the same purpose as that of a petition of a guardian in the county court to obtain a license to sell a ward's property. Since the direct result of a partition may be a sale under sections 25-2179 to 25-2183, R. R. S. 1943, a partition ac-

tion should require a showing of necessity similar to that required in a real estate sale action. The Windle court's rationale, although not so expressly stated, appears to have some basis in the fact that there was present one of the reasons found in former section 38-601, R. R. S. 1943, for which a guardian or conservator could seek a license to sell real estate.

Applying this license to sell analogy, an action in partition by a conservator is well-founded if there is evidence present that the action was brought for a reason stated in former section 38-601, R. R. S. 1943. Section 38-601 stated a guardian may seek a license for the ward's needs or when improvements on the said real estate of the ward are not in use and are deteriorating in value to the injury of the ward's estate.

There is evidence in the record that the land in issue is deteriorating and not realizing its income potential. While the sole source of such evidence is the plaintiff's testimony, defendant offered no evidence to dispute such testimony.

An action for partition is triable de novo on the record in the Supreme Court. Frankenberger v. Holm, 154 Neb. 80, 46 N. W. 2d 901; § 25-1925, R. R. S. 1943. On the record we have the undisputed testimony of the plaintiff as to the deteriorating condition of the land. On appeal in equity cases, the Supreme Court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying. Riggs v. Hroch, 133 Neb. 260, 274 N. W. 598. On consideration of the record and with the deference we accord the trial court, we uphold the District Court's order of partition.

The defendant further assigns as error the failure of the District Court to qualify its judgment in line with the rule of law enunciated in Arthur v. Arthur, 115 Neb. 781, 215 N. W. 117, with respect to the incidents of joint tenancy of real estate. We assume the

rule is the language of the court which stated: "When a joint tenancy exists, each joint tenant is entitled to a partition of the estate that continues during the life of all the tenants, and if there are but two joint tenants, on the death of one, the entire estate goes to the survivor." The result of such a rule would be that, following partition, each of the joint tenants would take a one-half interest as tenants in common in the real estate with a remainder contingent on survivorship. This is an incorrect rule. Joint tenancy may be terminated or severed by any act which destroys one or more of its unities, and may also be severed by the act of joint tenants in destroying unity of possession, as by partition. Stiff v. Stiff, 184 Neb. 432, 168 N. W. 2d 273. A joint tenant's act which destroys one or more of the coexistent unities necessary to existence of joint tenancy operates as severance of the joint tenancy and extinguishes the right of survivorship. Whiteside v. Whiteside, 159 Neb. 362, 67 N. W. 2d 141. To the extent the statement in Arthur v. Arthur, *supra,* is inconsistent with the above statements, it is overruled.

Defendant also assigns as error certain evidentiary rulings of the District Court. These errors are merely assigned without being discussed. Generally, a case in the Supreme Court on appeal will be limited to errors assigned and discussed and an assignment of error not discussed will be considered waived. Rule 8 a 2 (3), Revised Rules of the Supreme Court, 1974; Johnson v. Richards, 155 Neb. 552, 52 N. W. 2d 737.

The judgment of the District Court is affirmed.

AFFIRMED.

IN RE CHANGE OF NAME OF AMY M. SPATZ, JENNIFER A. SPATZ, AND KRISTINE L. SPATZ, ALL MINORS, BY AND THROUGH THEIR MOTHER AND NEXT FRIEND, DEBORAH ANN LAFLAN. AMY M. SPATZ ET AL., BY THEIR MOTHER AND NEXT FRIEND, DEBORAH ANN LAFLAN, APPELLANTS, V. PAUL A. SPATZ, INTERVENER-APPELLEE.

258 N. W. 2d 814

Filed October 26, 1977. No. 41162.

1. **Minors: Parent and Child: Names.** The determination as to whether the name of a minor child should be changed rests within the sound discretion of the trial court.
2. _____: _____: _____. The question of whether the name of a minor child should be changed is to be determined by what is in the best interests of the child.
3. _____: _____: _____. As a general rule a change of name should be granted only when the substantial welfare of the child requires that the name be changed.

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

Stephen Greenberg, for appellants.

Frederick M. Deutsch of Deutsch, Jewell, Otte, Gatz, Collins & Domina, for intervener-appellee.

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

BOSLAUGH, J.

This is an appeal from an order denying relief in a proceeding under section 61-101, R. R. S. 1943, to change the names of three minor children. The action was brought by Deborah Ann Laflan, their mother and next friend. The minor children are Amy M. Spatz, born July 21, 1968; Jennifer A. Spatz, born October 31, 1969; and Kristine L. Spatz, born January 21, 1972.

Paul A. Spatz, the father of the children, intervened in the proceeding and opposed the relief sought by the plaintiff.

The intervener and the plaintiff were divorced in California in 1972. Custody of the children was awarded to the plaintiff with rights of visitation in Spatz. Child support was fixed at $40 per month per child. The plaintiff married Dr. Douglas Laflan on August 6, 1973, and now resides in Creighton, Nebraska.

The plaintiff produced evidence that the children are known as the Laflan children and that they feel uncomfortable with any other name. Dr. Richard Sanders, a psychologist, testified that based upon his observation of the children it was his opinion they were sensitive children who were in need of a stable home situation and identity and it would be detrimental to their personality growth and development for them to be called by a name other than Laflan. A psychiatrist testified that it was his opinion it would be in the best interests of the children that their legal name be made Laflan because the children considered they were a part of the Laflan family, and if they were called by some other name the effect was to suggest they were not a part of the family. He further testified that the children did not conceptualize Spatz as their father.

At the time of the hearing in the District Court, the intervener was 27 years of age and a student at the University of South Dakota. He has paid the child support required by the California judgment and has exercised his visitation rights although on some occasions the oldest child has refused to go with him. There was some evidence that the intervener had said he would not object to the change in names if the child support payments were terminated, but the intervener denied having made the statement.

The question of whether the name of a minor child should be changed is to be determined by what is in the best interests of the child. The cases which have considered this question have granted a change of name only when the substantial welfare of the child

requires that the name be changed. See Annotation, 53 A. L. R. 2d 914. Generally, where the father has supported the children and exercised his visitation rights relief has been denied. A change of name has been granted where the father's name was positively deleterious to the child because of the father's misconduct and notoriety. Generally, minor embarrassment or emotional upset has been held not sufficient to require that a change of name be granted.

In Robinson v. Hansel, 302 Minn. 34, 223 N. W. 2d 138, the Supreme Court of Minnesota, in reversing a judgment granting a change of name, said: "Society has a strong interest in the preservation of the parental relationship. Even though a divorce decree may terminate a marriage, courts have traditionally tried to maintain and to encourage continuing parental relationships. The link between a father and child in circumstances such as these is uncertain at best, and a change of name could further weaken, if not sever, such a bond."

The determination as to whether the names of the minor children should have been changed rested within the sound discretion of the trial court. We find no abuse of discretion. The judgment of the District Court is affirmed.

AFFIRMED.

JAMES L. BRUNO, BY AND THROUGH JAMES BRUNO, HIS FATHER AND NEXT FRIEND, APPELLEE, V. TIMOTHY KELLY, A MINOR, ET AL., APPELLANTS, IMPLEADED WITH MR. & MRS. BRAD KELLY ET AL., APPELLEES.

258 N. W. 2d 816

Filed October 26, 1977. No. 41164.

1. **Courts: Jurisdiction.** In a civil action for money judgment in a court of limited jurisdiction, it is the amount claimed by the plaintiff which determines the jurisdiction of the court over the subject matter.

2. **Courts: Jurisdiction: Judgments.** Where the sum in question is not specified in the petition or the summons, the court has jurisdiction, but may not render judgment for a sum in excess of the jurisdictional amount even though damages in excess of that amount might be proved.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Robert H. Beach, for appellants.

Dolan & Dinsmore by Daniel G. Dolan, for appellee Bruno.

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

CLINTON, J.

This action for damages for an assault and battery was commenced in the municipal court of Omaha, Douglas County, Nebraska. After trial judgment was rendered for the plaintiff in the sum of $1,016.83. An appeal was taken to the District Court where, upon the record made in the municipal court, the judgment against four of the defendants was affirmed. On appeal to this court the following alleged errors have been assigned: (1) The municipal court erred in not sustaining the demurrer of the defendants which was founded upon the premise that the municipal court had no jurisdiction because the amount of the damage prayed for exceeded the jurisdiction of the municipal court under the provisions of section 26-117, R. R. S. 1943, which grants the municipal court jurisdiction in civil actions where the "sum in question does not exceed five thousand dollars." (2) The amount of damages rendered is excessive. We affirm.

In his petition the plaintiff prayed for special damages in the amount of $516.83, plus general damages in an amount unspecified, plus costs. The defendants argue that, since the prayer is open-ended, the plaintiff in effect asks damages in an unlimited

amount, hence the monetary jurisdictional limit of $5,000 of the municipal court was exceeded, and that as a consequence that court had no jurisdiction. It would follow, of course, that if the municipal court had no jurisdiction, then the District Court on appeal acquired no jurisdiction. Bates & Co. v. Stanley, 51 Neb. 252, 70 N. W. 972.

In a civil action for money judgment in a court of limited jurisdiction, it is the amount claimed by the plaintiff which determines the jurisdiction of the court over the subject matter. Johnson v. Washburn, 146 Neb. 335, 19 N. W. 2d 563. The amount claimed is normally determined by the prayer of the petition, or the summons, or both. Bates & Co. v. Stanley, *supra.*

We hold that where the sum in question is not specified in the petition or the summons, the court has jurisdiction, but may not render judgment for a sum in excess of the jurisdictional amount even though damages in excess of that amount might be proved. In such circumstances the plaintiff, by choosing the forum, waives whatever right he may have had to recover more than the jurisdictional amount. Bates & Co. v. Stanley, *supra;* Ker v. Stern, 107 Misc. 4, 175 N. Y. S. 475.

As to the defendants' second assignment of error, an examination of the evidence considered by the municipal court and District Court indicates no grounds for holding the judgment excessive. Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. Brandt v. Mayer, 196 Neb. 751, 246 N. W. 2d 203.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND V. WAHRMAN, APPELLANT.

258 N. W. 2d 818

Filed October 26, 1977. No. 41257.

1. **Motor Vehicles: Blood, Urine, and Breath Tests: Evidence.** If a person charged under the provisions of section 39-669.07, R. R. S. 1943, requests that he have a physician of his choice evaluate his condition and perform, or have performed, laboratory tests he deems appropriate following the test administered at the direction of the arresting officer and is denied such opportunity, the results of the test made by the State are, if objected to by the defendant, inadmissible.
2. **Motor Vehicles: Blood, Urine, and Breath Tests: Waiver.** Section 39-669.09, R. R. S. 1943, which provides that if the officer directs that the test shall be of the person's blood or urine, such person may choose whether the test shall be of blood or urine, does not require the officer to notify the person of his option, and if the person takes one or the other of these tests, then he has waived his right to insist that the test to be made by the State be the one of his choice.

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

Owens & Owens, for appellant.

Paul L. Douglas, Attorney General, and Melvin K. Kammerlohr, for appellee.

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

CLINTON, J.

Defendant was charged in the county court of Red Willow County with having, on March 10, 1976, operated a motor vehicle on a public highway while having more than .10 of 1 percent by weight of alcohol in his body fluid in violation of the provisions of section 39-669.07, R. R. S. 1943. Trial was held before the county judge, a jury having been waived. Defendant was found guilty by the judge and sentenced to a term of probation and fined $100. He then appealed to the District Court where, on the record of the tes-

timony in the court below, the judgment was affirmed. § 29-613, R. R. S. 1943; State v. Clark, 194 Neb. 487, 233 N. W. 2d 898.

Having perfected his appeal to this court, defendant makes the following assignments of error: (1) The court erred in admitting and considering, under the provisions of section 39-669.09, R. R. S. 1943, the results of a body fluid test which showed alcoholic content of .29 of 1 percent of alcohol, for the reason that the defendant was denied the right to have a physician evaluate his condition and perform whatever laboratory tests the physician deemed appropriate, all in violation of the provisions of section 39-669.09, R. R. S. 1943. (2) The court erred in admitting and considering the results of the body fluid test because the State failed to prove that a choice of tests was accorded defendant as provided in section 39-669.08, R. R. S. 1943. (3) The evidence was insufficient to sustain the charge because the testing officer did not deny the testimony of the defendant requesting a physician, but merely stated he did not recall such demand.

Section 39-669.09, R. R. S. 1943, among other things, provides: "The person tested shall be permitted to have a physician of his choice evaluate his condition and perform or have performed whatever laboratory tests he deems appropriate in addition to and following the test administered at the direction of the law enforcement officer. If the officer shall refuse to permit such additional test to be taken, then the original test shall not be competent as evidence." If the defendant was refused the presence of a physician after the test, either to evaluate his condition or to perform further tests, then the results of the test performed by the State were clearly inadmissible.

If an examination of the record disclosed that such refusal was made by the arresting officer, the test results would be inadmissible and the conviction

would have to be set aside. However, an examination of the record discloses that whether such was the case is a disputed question of fact. The defendant and another jail inmate testified that the officer denied defendant's request for a physician. An examination of the police officer's testimony on that point, given only on cross-examination in response to leading questions, discloses that, while as part of his testimony he stated he recalled no such request, he also testified that no such request was made and if it had been made he would have honored the request. The nature of the testimony was such that it was for the county judge in the first instance to determine the purport of the testimony, i.e., whether it was a denial that a request was made or a failure to recall whether the request was made. If the latter, of course, then the evidence would be insufficient to contradict defendant's evidence and would be insufficient to present a fact question. The District Court on review interpreted the officer's testimony as a denial of defendant's testimony. Our examination of that testimony does not lead us to conclude that that construction is clearly incorrect. The defendant's first assignment of error is not well taken.

On the second assignment defendant argues that he was not offered a choice as to whether the sample to be given would be of his urine or his blood.

Section 39-669.09, R. R. S. 1943, provides that the officer may direct whether the test be of blood, breath, or urine and then goes on to state: "Provided, that when the officer directs that the test shall be of a person's blood or urine, such person may choose whether the test shall be of his blood or urine."

The record discloses that the defendant voluntarily gave the urine sample. It does not show that he made any request that a blood sample be given instead. The statute does not by its terms require that the arrested person be informed of his choices. In

this respect it is the same as his right to an additional test by a physician of his own choice, where we have held that the officer is not required to notify the arrested party of his right. Zadina v. Weedlun, 187 Neb. 361, 190 N. W. 2d 857. The evidence clearly shows that the defendant was not denied a choice. In addition, the record discloses that this issue was never raised by objection in the trial court. An alleged error in the reception of evidence must ordinarily be preserved by proper objection below. State v. Schwade, 177 Neb. 844, 131 N. W. 2d 421. If that is not done, the issue may not be raised in this court. State v. Bayless, 186 Neb. 530, 184 N. W. 2d 634.

Since the results of the chemical test were admissible, the evidence is sufficient to support the conviction.

The defendant has made other assignments of error, but has not argued them in his brief. We have nonetheless examined them and found they are unmeritorious.

AFFIRMED.

WHITE, C. THOMAS, J., dissenting.

At the time of an arrest for driving while intoxicated, the defendant is required to submit to the taking of body fluids or a breath sample, under pain of loss of his operator's license for refusal to do so. § 39-669.08, R. R. S. 1943.

The defendant is usually requested to perform physical acts, and his reactions are testified to, generally by an officer, who has already made the determination of probable cause. The tests are used to reinforce that determination. The defendant is not entitled to the Miranda warnings during this procedure. Schmerber v. California, 384 U. S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

In an attempt to place a disinterested person within the police station scenario, the Legislature in passing section 39-669.08, R. R. S. 1943, allowed the defendant to have a physician present to "evaluate his

condition and perform or have performed whatever laboratory tests he deems appropriate."

Doubtless operating under the fiction that "everyone may be presumed to know the law," we have inappropriately held that the defendant need not be informed of that right. Zadina v. Weedlun, 187 Neb. 361, 190 N. W. 2d 857. The majority further restricts section 39-669.09 by this decision. We now hold, in the face of an assertion that a request was made and refused, that the evasive response, "I don't recall," or "Yes, I would have informed him," creates a factual question as to whether the request was made and refused.

The least protection this section ought to provide, it seems to me, is the requirement that the State meet a positive assertion of request and denial, with an equally positive assertion that the request was not made. Anything less, and an already crippled statute will be rendered useless.

McCOWN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. RICHARD J. JABLONSKI, APPELLANT.

258 N. W. 2d 918

Filed October 26, 1977. No. 41374.

1. **Motor Vehicles: Blood, Urine, and Breath Tests: Evidence.** Before the result of a chemical test of the blood, urine, or breath for the purpose of ascertaining the amount of alcoholic content in the body fluid may be introduced in evidence under section 39-669.11, R. R. S. 1943, it must be shown that the test was performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose.
2. **Appeal and Error.** Alleged errors not assigned and discussed in appellant's brief will not ordinarily be considered on appeal.
3. **Words and Phrases: Blood, Urine, and Breath Tests.** Section 39-669.07, R. R. S. 1943, defines but one offense which can be the result of being under the influence of alcoholic liquor, being under the in-

fluence of any drug, or having ten-hundredths of one percent or more by weight of alcohol in the body fluid.

4. **Criminal Law: Presentence Reports.** Under section 29-2261, R. R. S. 1943, the use of a presentence report is only required for sentencing if the offense is a felony.

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

William E. Pfeiffer of Spielhagen, Spielhagen & Pfeiffer, for appellant.

Paul L. Douglas, Attorney General, Herbert M. Fitle, Gary P. Bucchino, and Richard M. Jones, for appellee.

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

BRODKEY, J.

Richard J. Jablonski, defendant and appellant herein, was charged in the municipal court of the City of Omaha under section 39-669.07, R. R. S. 1943, with operating a motor vehicle while under the influence of alcohol. Defendant was adjudged guilty, and the trial court imposed a fine of $100 and revoked his driver's license for a period of 6 months. Defendant appealed to the District Court for Douglas County, which affirmed the conviction and sentence. He has now appealed to this court, contending that his conviction was not sustained by sufficient evidence, and that the trial court abused its discretion in not ordering a presentence investigation before imposing sentence.

Defendant was arrested after the vehicle he was driving collided with an automobile driven by Christine Huntzinger. Huntzinger and a police officer who came to the scene of the accident testified that the defendant appeared to be intoxicated. The police officer testified that the defendant was unsteady when he walked, that there was a strong odor of alcohol on his breath, and that his speech was slurred.

The officer was of the opinion that the defendant was too intoxicated to operate a motor vehicle safely. It was stipulated that a second police officer, who also observed the defendant at the scene of the accident, would testify to the same facts and was of the same opinion as the first officer.

Defendant was taken to police headquarters, where he was given a gas chromatograph test by an identification technician who held a valid permit from the State of Nebraska to operate a gas chromatograph. The technician identified a copy of rules and regulations pertaining to the analysis for the determination of alcoholic content of body fluids and of the breath as adopted by the Nebraska Department of Health. A copy of the Revisor of Regulations' certification that such rules and regulations had been approved and had been filed in his office was attached to the copy of the rules. The technician stated that he had followed the rules with respect to testing the defendant on the gas chromatograph. The rules were admitted in evidence over defendant's objection that they were hearsay and not the best evidence.

Also admitted in evidence was the technician's test report, which indicated that the defendant had thirteen-hundredths of one percent by weight of alcohol in his body fluid at the time he was tested. Defendant objected to admission of this report on the grounds that the technician had no personal knowledge of the contents of the nalco bottle, which contains the "known substance" used in testing for alcoholic content on a gas chromatograph. The technician stated that the State of Nebraska provides the nalco bottle, which is stamped.

Section 39-669.07, R. R. S. 1943, provides that it "shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or when that person has ten-hundredths of

one per cent or more by weight of alcohol in his body fluid as shown by chemical analysis of his blood, breath, or urine." Section 39-669.08, R. R. S. 1943, establishes procedures for the administration of a chemical test of the blood, urine, or breath for the purpose of ascertaining the amount of alcoholic content in the body fluid. Section 39-669.11, R. R. S. 1943, provides that any test made under the provisions of section 39-669.08 shall be competent evidence in any prosecution for driving while under the influence of alcohol, but requires that: "Tests to be considered valid shall have been performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose."

It is defendant's contention on appeal that the gas chromatograph test results were improperly received in evidence because the State did not prove that such a test method has been approved by the Department of Health. The rule is clear that the result of a chemical test may not be admitted in evidence unless it was performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose. § 39-669.11, R. R. S. 1943; Otte v. State, 172 Neb. 110, 108 N. W. 2d 737 (1961); State v. Fox, 177 Neb. 238, 128 N. W. 2d 576 (1964). Defendant concedes that the technician in this case possessed a valid permit and had the necessary qualifications to administer gas chromatograph tests. Therefore the only question presented is whether there was sufficient evidence that a gas chromatograph test is a method of testing approved by the Department of Health.

Defendant objects to the fact that there was no testimony by the State's witnesses concerning what testing methods have been approved by the Department of Health. However, he ignores the rules and regulations adopted by the Department of Health,

which were properly received in evidence under sections 84-906.05 and 27-1003, R. R. S. 1943. Rule (4) provides that the "granting of a permit for performance of any specific test or technique shall be construed as Departmental approval of said test or method of analysis." Since the defendant concedes that the technician had a permit to operate a gas chromatograph, there can be no question that, under Rule (4), such a method of testing has been approved by the Department of Health. It is clear that there was compliance with the statutory requirements set forth in section 39-669.11, R. R. S. 1943, in this case.

It should be noted that at trial defendant objected to the admission in evidence of the test results on the grounds of lack of foundation for the reason that the technician had no personal knowledge in regard to the "known chemical substance" used in the ampule in testing on a gas chromatograph, and that there was no evidence that the gas chromatograph was in proper working condition when the test was administered. Although defendant alludes to this issue in his statement of facts in his brief on appeal, he does not discuss the issue, and cites no cases or authorities relevant to it. This court has not previously determined what foundational facts other than those set forth in section 39-669.11, R. R. S. 1943, may be required before a breath test is admissible in evidence. Courts in other jurisdictions, either on the basis of a statute or a rule of evidence, have held that before a breathalyzer test may be admitted in evidence, there must be a foundational showing that the machine used was in good working order, and that any chemicals used in conjunction with the test and machine are what they purport to be and have been approved by the person or agency responsible for providing them. See, State v. Ghylin, 222 N. W. 2d 864 (N. D., 1974); Wester v. State, 528 P. 2d 1179 (Alaska, 1974); State v. Coffman, 11 Ore. App. 307,

502 P. 2d 605 (1972); French v. State, 484 S. W. 2d 716 (Tex Cr. App., 1972); State v. McGeary, 129 N. J. Super. 219, 322 A. 2d 830 (1974); State v. Hood, 155 W. Va. 337, 184 S. E. 2d 334, (1971); cases cited in 22A C. J. S., Criminal Law, § 645 (3), p. 528, n. 23.55. Some states permit a foundational showing to be made by presentation of certified documents, and the cases cited above indicate that strict rules concerning foundation, as established in older cases, should be relaxed somewhat in light of the increased scientific reliability of breath tests. As stated in People v. Gower, 42 N.Y. 2d 117, 397 N. Y. S. 2d 368 (1977): "Breathalyzer equipment and procedures have become familiar and their use is now commonplace. Reliability has been demonstrated and the results of such testing where properly performed are universally accepted. This is not to say, however, that no foundation should be any longer required for introduction of breathalyzer evidence. It is to say that there may now appropriately be some relaxation of the rigorous prerequisites properly required to authenticate the reliability of the scientific equipment and procedures where they were first employed. Based on a wealth of practical experience greater dependence can now properly be placed on according full opportunity, through pretrial discovery and other means, to test and challenge the probative worth of the evidence. Thus, emphasis may be shifted from technical issues of admissibility of evidence to means for measuring its persuasive weight. No precise or even general guidelines can be laid down in advance; necessarily the requirements in each case will depend on the peculiar circumstances of that case."

In the present case we need not resolve this issue for two reasons. First, defendant did not discuss the issue in his brief, and alleged errors not assigned and discussed will not ordinarily be considered on appeal. Rule 8 a 2 (3), Revised Rules of the Su-

preme Court, 1974; Minor v. Bickford, 195 Neb. 402, 238 N. W. 2d 243 (1976). More importantly, the evidence adduced at trial, other than the results of the breath test, as described above, was sufficient to sustain defendant's conviction. See, State v. Haile, 185 Neb. 421, 176 N. W. 2d 232 (1970); State v. Schwade, 177 Neb. 844, 131 N. W. 2d 421 (1964); State v. Lewis, 177 Neb. 173, 128 N. W. 2d 610 (1964). Section 39-669.07, R. R. S. 1943, defines but one offense, and this offense can be the result of three different conditions: Being under the influence of alcoholic liquor, being under the influence of any drug, or having ten-hundredths of one percent or more by weight of alcohol in the body fluid. State v. Weidner, 192 Neb. 161, 219 N. W. 2d 742 (1974). The testimony of the police officers and the person with whom the defendant collided, based on personal observation of the defendant, was sufficient to sustain a finding that he was under the influence of alcoholic liquor. See O'Neill v. Henke, 167 Neb. 631, 94 N. W. 2d 322 (1959). Therefore the evidence was sufficient to sustain defendant's conviction, even without the results of the breath test.

Defendant's second contention is that the trial court committed reversible error in not ordering a presentence report prior to sentencing. The record does not indicate that the defendant requested such a report, and he provides no explanation in his brief as to why a presentence report was needed.

Section 29-2261, R. R. S. 1943, provides that unless "it is impractical to do so, when an offender has been convicted of a *felony,* the court shall not impose sentence without first ordering a presentence investigation." (Emphasis supplied.) In State v. Cardin, 194 Neb. 231, 231 N. W. 2d 328 (1975), this court stated: "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 same rationale is applicable in the present case. Defendant has made no showing as to why the failure to order a presentence report constituted prejudicial error, and section 29-2261 does not require the trial court to order such a report in misdemeanor cases.

The contentions of the defendant are without merit, and the judgment and sentence of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH L. SHAY, JR., APPELLANT.

258 N. W. 2d 821

Filed October 26, 1977. No. 41478.

Sentences. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.

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

Kelly, Kelly & Kelly, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

SPENCER, J.

Defendant, Joseph L. Shay, Jr., as the result of a plea bargain pled guilty to the offense of attempted burglary. He prosecutes this appeal from a sentence of not less than 3 nor more than 9 years in the

Penal and Correctional Complex, alleging excessiveness of sentence. We affirm.

Defendant, who has a severe drinking problem, has a previous felony record. He has been convicted of burglary on three different occasions and has served time in the Penal Complex. An habitual criminal charge was dismissed pursuant to a plea bargain. The statutory penalty for the offense is 1 to 10 years. § 28-532.01, R. R. S. 1943. The penalty assessed is within the statutory limits and is not excessive on defendant's record.

As we said in State v. McCurry, 198 Neb. 673, 254 N. W. 2d 698 (1977): "A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion."

There has been no abuse of discretion herein. The judgment is affirmed.

AFFIRMED.

DEWEY R. FARR, APPELLANT, V. FRUEHAUF CORPORATION, A FOREIGN CORPORATION, APPELLEE.

258 N. W. 2d 821

Filed November 2, 1977. No. 41107.

Master and Servant: Pensions. Where there is no substantial change in the condition of a person from the date of an accidental injury to the date of certification of total and permanent disability, the person is totally and permanently disabled from the date of the accident and is not within the terms of a pension contract which conditions eligibility on becoming totally and permanently disabled after a specified date if injury occurred prior to that date.

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

Richard J. Dinsmore of Dolan & Dinsmore and Charles Nye of Garvey, Nye, Crawford, Kirchner & Moylan, for appellant.

Robert D. Mullin and Timothy J. Pugh of Boland, Mullin & Walsh, for appellee.

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

WHITE, C. THOMAS, J.

The plaintiff, appellant in this court, started work on May 23, 1956, with the defendant Fruehauf Corporation, appellee in this court, and worked continuously for the defendant until February 11, 1969, when the plaintiff suffered an injury to his right knee and back as the result of an automobile accident not connected with his employment. At the time of the accident the plaintiff was the age of 49 years and 1 month. The plaintiff was never able to return to work and at a date subsequent to his 50th birthday was determined to be totally and permanently disabled from pursuing his occupation as a welder for the Fruehauf Corporation and was finally terminated as an employee of the company on March 17, 1971, at the expiration of his seniority-benefit period as defined in the contract between the union representing the plaintiff and the defendant corporation.

Plaintiff brought this action in the District Court seeking recovery based on a disability-income contract that was part of the collective bargaining package between the plaintiff's union and the defendant corporation. The trial court found that the plaintiff was not entitled to the benefits of the income-disability payment contract and made the findings of fact in two principal areas: (1) That the plaintiff did not become totally and permanently disabled after his 50th birthday, a condition of Article III, Section 3 (a), of the contract, and (2) since the defendant had engaged in work for wage or profit after his active employment with the defendant corporation ceased, he was not eligible under the terms of the contract. We have determined that the trial court was correct in its determination that whatever disability the plaintiff suffered was incurred prior to his 50th birthday and affirm. It will not be necessary to discuss the second assignment of error.

The contract entitled "Pension Plan for Hourly Rated (Union) Employees of Fruehauf Trailer Company" and the provision in dispute here is contained in Article III, Section 3. "Section 3. *Total and Permanent Disability Retirement.* (a) Eligibility - - - - An Employee who on and after the Effective Date becomes totally and permanently disabled after his 50th birthday and after he has completed at least ten years of Credited Service shall be eligible for a disability retirement benefit as hereinafter provided."

At the time of the first examination of the plaintiff, a Dr. Maurice P. Margules diagnosed the plaintiff's injuries as a sprain of the lumbar spine and a torn medial meniscus of the right knee. The first examination took place on March 5, 1969, after referral to Dr. Margules, a neurosurgeon, from the plaintiff's personal physician. The testimony of Dr. Margules reflects that the plaintiff was treated conservatively, that there were some intervening medical problems with the plaintiff during the course of treatment unrelated to the accident and from which the plaintiff recovered. The plaintiff did not respond to the conservative treatment and on October 26, 1969, the plaintiff was admitted to Jennie Edmundson Hospital and surgery was performed. "The nature of the surgery was a complete resection of the posterior arch of L-5, which is an operation that is devised to reduce the compression of the nerves, cauda equina" and otherwise referred to in the examination as a lumbar laminectomy. The plaintiff did not respond well to the surgery and finally, on December 15, 1971, Dr. Margules determined that the plaintiff was permanently disabled from assuming his former duties as a welder.

At no time between the date of the accident on February 11, 1969, to March 5, 1969, when he first saw the plaintiff, and December of 1971, when he last saw the plaintiff, did Mr. Margules testify that the plaintiff was able to engage in his occupation of

a welder. Dr. Margules relates the permanent disability of Mr. Farr to the car accident of February 11, 1969. Although there was some reference in the evidence to a further back strain involving pushing a stalled vehicle, Dr. Margules testified that this did not significantly relate to either the disability or to his findings of disability.

Essentially the contention of the plaintiff is that the plaintiff was not disabled until the final determination of permanent disability, that of December 15, 1971. The defendant contends that the plaintiff was disabled as of the date of the accident since there was no substantial change in the condition of the plaintiff from the date of the accident to the date of the final determination. Since the date of disability is prior to plaintiff's 50th birthday anniversary, plaintiff is not eligible to receive benefits of the pension plan. We agree.

The operative words in the section of the pension plan are "*becomes*" *disabled*. To "become" means to pass from one state to another, to enter into some state or condition by a change from another state, or by assuming or receiving new properties or qualities, additional matter, or a new connection. State v. Laundy, 103 Ore. 443, 204 P. 958; Hislop v. County of Lincoln, 249 Ore. 259, 437 P. 2d 847.

This court has examined the question of whether total disability should be ascertained from the date of an accident or at a later point in time when the effects of that accident are manifest. In Rathbun v. Globe Indemnity Co., 107 Neb. 18, 184 N. W. 903, we said: "We think it may be said to be a matter of common knowledge that in a great many, perhaps in a large majority of, instances in which bodily injuries are received, the real nature and extent of said injuries do not reveal themselves until a greater or less time in the future and after the first pains from the hurt shall have passed away. The injured part often lies dormant for an indefinite period,

with but little or no consciousness of its existence by the person injured, although from the very moment of the accident, perhaps, the processes of nature may be busily engaged in developing what may have seemed to be but a slight hurt into a most serious and perhaps fatal injury. In such a case it cannot be said that the injury is not continuous and from the date of the accident, nor can it fairly or justly be said that the disability is not continuous and from date of the accident, because the injured party enjoys a brief respite from pain and suffering, only to be endured to a greater degree when perverted nature again asserts itself."

Here, the condition of the plaintiff did not substantially change over the period of time from the date of injury to the date of declaration of permanent disability. The determination from the first examination to the last examination of Dr. Margules was that the plaintiff was disabled from continuing his occupation as a welder. This condition, directly attributable to the accident, did not change.

The doctor's declaration of permanent disability was a formal confirmation of an already existing condition. Thus, the date of disability was the date of the accident and not the date of the doctor's determination that recovery would not be had from the injuries received in the accident. The plaintiff clearly did not come within the terms of the pension contract.

The judgment of the District Court is affirmed.

AFFIRMED.

MARILYN L. FITE, WIDOW OF LARRY I. FITE, DECEASED, APPELLANT, V. AMMCO TOOLS, INC., APPELLEE.

258 N. W. 2d 922

Filed November 2, 1977. No. 41160.

1. **Workmen's Compensation.** The Workmen's Compensation Act is

one of general interest, not only to the workman and his employer, but as well to the state and it should be so construed that technical refinements of interpretation will not be permitted to defeat it.

2. **Workmen's Compensation: Evidence.** The purpose of the nonapplicability of the Nebraska Rules of Evidence to the Workmen's Compensation Court was to allow the compensation court to make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of sections 48-101 to 48-190.
3. _____: _____. The Workmen's Compensation Court must permit the introduction of evidence which is admissible in the trial courts of this state.
4. **Evidence.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition such as intent, plan, motive, design, mental feeling, pain, and bodily health is not excluded by the hearsay rule.
5. _____. The statement of intent related to the destination and purpose of a journey is admissible only if it is made at or about the time of the act of departure.
6. **Evidence: Records.** When the condition of the record and the form of question itself shows that it is relevant and competent, no offer of proof is necessary.
7. **Workmen's Compensation: Courts: Appeal and Error.** The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that: (1) The court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the court do not support the order or award.

Appeal from the Nebraska Workmen's Compensation Court. Reversed and remanded with directions.

Yost, Schafersman, Lamme & Hillis, for appellant.

William M. Lamson, Jr., and John K. Green of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

WHITE, C. THOMAS, J.

This is an appeal from the Nebraska Workmen's

Compensation Court. The court held that plaintiff had failed to maintain the burden of proving by a preponderance of the evidence that her deceased husband Larry I. Fite was in the course of his employment at the time of his death on July 2, 1975. The decedent was killed as the result of a crash of a Cessna airplane near the Greenwood Interchange of Interstate 80 in Nebraska. The plaintiff appeals.

Plaintiff assigns as error the compensation court's refusal to admit into evidence certain statements of the decedent concerning his purpose or intent and which the plaintiff contends would tend to prove that the decedent was within the scope of his employment at the time of his death. The decedent was the district sales manager for the defendant-appellee Ammco Tools, Inc. The defendant corporation manufactures, sells, and services automotive equipment, particularly brake-service equipment. The decedent's territory was Nebraska, South Dakota, and western Iowa. The decedent owned an airplane that he used almost exclusively for business. The defendant was aware of and approved the use of his airplane to make sales and service calls. The plaintiff introduced evidence as to the work patterns of the decedent 2 days prior to the date of his death. No evidence was introduced as to the decedent's movements or work activities on the date of death, from the time he left his home in Fremont until he was seen at the Fremont Airport. The only evidence as to the decedent's activity on the date of death were the three declarations of intent. The court in each of the three instances excluded the evidence as proof of the principal issue: Was the decedent acting within the scope of his employment at the time of his death?

The testimony of the widow Marilyn L. Fite was that the decedent left his home on July 2, 1975, between 8 and 8:30 a.m. "Q- Did you have any conversation with him when he left? Just yes or no. A- Yes.

Q- And would you tell the Court what your husband said to you before he left home? MR. LAMSON: Your Honor, I'm going to object to that question as calling for a hearsay statement, also a self-serving declaration, * * *. I do not feel that the conversation falls within any accepted exception to the hearsay rule. * * * MR. YOST * * * So, this statement is offered as evidence of a material fact; that is, what the decedent indicated he was going to do, where he was going on that day, and it is more probative on that point than any other evidence * * *. I would conclude only by saying that this is precisely the type of a situation that the new rules are designed to cover, and the testimony is admissible. * * * PRESIDING JUDGE: Well, the objection will be overruled with this explanation and this qualification: That the statement made by the deceased, Larry Fite, will be received as evidence only that such statement was made by him at that time, and not as evidence of the truth of any such statement that he may have made at such time. Q- * * * Again, Mrs. Fite, what did your husband say to you as he left home that morning? * * * A- He said he was busy and had to go to Lincoln and Omaha."

The decedent's father Ansel Fite testified that at about 7:30 a.m. on July 2, 1975, he spoke on the telephone with the decedent. "Q- And who called — who made the call? You or your son? A- Larry made the call. Q- And with whom did he speak first? A- He spoke to me first. Q- And would you relate that conversation to the Court as best you can, please? MR. LAMSON: Your Honor, I'm going to object to that. It's hearsay. It does not fall within the exception of the hearsay rule. MR. YOST: This is the same argument we've been through before * * *. And we maintain it is admissible for the same reasons previously stated with regard to the testimony of Mrs. Fite. PRESIDING JUDGE: The objection will be overruled with the same limitation,

the same qualification as given earlier, namely, that any declaration of the deceased now given will be received as evidence only that such declaration was made and not as to the truth of the declaration. Q- * * * Would you relate that phone conversation, please, Mr. Fite? A- Well, he called me, approximately, at 7:30 in the morning. * * * And he wanted to know how we was. And the conversation, just normally, conversation talking to him. And he says, 'Well,' he says, 'I'm going to have to go.' He didn't talk too long. He says, 'I've got to go to work.' "

Mr. Eldon Nielsen, a friend of the decedent, testified that on July 2, 1975, as he was driving on U. S. Highway No. 30 past the Fremont Airport, he saw the decedent Larry Fite. The decedent was then standing in front of the hangar and waved at the witness. The witness turned around and went back to the hangar where he had a conversation with the decedent. It was between 10:30 and 11 o'clock in the morning. The witness was a serviceman for Amoco Oil Company. The decedent worked for Ammco Tools, Inc., and on occasion the decedent and the witness had worked together demonstrating equipment. The decedent and witness had flown together in the decedent's airplane on a prior occasion for a business trip to Wisconsin to work on front end and brake machines. The conversation generally related to the decedent's request that the witness fly with him. The question was asked: "Q- My next question, Mr. Nielsen, won't call for yes or no answer. You were asked whether or not there had been any indication given to you about whether the trip was business or pleasure. And you started to give your answer and to explain it as something more than yes or no terms. I'd ask you to do so now. A- The reason why I started to say this is, he asked me where I was going. And I was going on a service call. And I said, 'I have work to do.' And he says, 'So do I. We will go together some other

time.' " In response to a motion to strike, the court held: " * * * the conversation received on the same basis as previously, namely, that it was — as evidence — such statement was made but not as to the truth of the statement."

Other evidence was introduced by the plaintiff that the decedent had work appointments in Omaha and Lincoln during the week in which he was killed.

The Nebraska Rules of Evidence do not apply to proceedings before the Nebraska Workmen's Compensation Court. See, §§ 27-1101 (4) (d) and 48-168, R. R. S. 1943. Section 48-185, R. S. Supp., 1976, provides in appeals from the Workmen's Compensation Court: "The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award."

The case presents two questions for review: (1) Were the three statements by the decedent admissible under the Nebraska Rules of Evidence as exceptions to the hearsay rule and as proof of the truth of the matters asserted in the statements? (2) If admissible, what is the effect of the refusal to admit relevant and admissible evidence from the trial of the cause before the Nebraska Workmen's Compensation Court?

Section 27-803, R. R. S. 1943, states: " * * * the following are not excluded by the hearsay rule, even though the declarant is available as a witness: * * * (2) A statement of the declarant's then existing state

of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), * * *." Section 27-803 (2) is in the precise language of the Federal Rules of Evidence, section 803 (3). The Report of the House Committee on the Judiciary states: "Rule 803 (3) was approved in the form submitted by the Court to Congress. However, the Committee intends that the Rule be construed to limit the doctrine of Mutual Life Insurance Co. v. Hillmon, 145 U. S. 285 (12 S. Ct. 909, 36 L. Ed. 706), 295-300 (1892), so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." Rule 803 (3) did not change existing Nebraska law where statements evidencing an intent, design, or plan to do some specific act in the future are admissible. Sutter v. State, 102 Neb. 321, 167 N. W. 66; Kirkpatrick v. Chocolate Sales Corp., 127 Neb. 604, 256 N. W. 89. However, a statement of intent related to the destination and purpose of a journey is admissible only if it is made at or about the time of the act or departure. Gering v. School Dist., 76 Neb. 219, 107 N. W. 250.

At the time the first two statements were made to the decedent's father and to his wife, the decedent was in preparation for departure from his home. The statements evidenced a present intention to do a future act, and that act was to go to work. The statements were supportive of the plaintiff's claim in the compensation court tending to establish that the deceased's death was in the course of his employment. The third statement at the hangar at the Fremont Airport was again immediately prior to decedent's anticipated departure in the aircraft. This statement is capable of being interpreted as a simple response to a statement made by the companion or, as contended by the plaintiff, a declaration by decedent indicating that he also had to go to work. The statements offered were clearly exceptions to the general

prohibition against hearsay. Under sections 27-801 and 27-803 (2), R. R. S. 1943, such statements were admissible.

Counsel for the defendant suggests that the plaintiff cannot raise error in this court since she did not make an offer of proof in the trial court. The contention is without merit. It is elementary that the purpose of an offer of proof is to bring to the attention of the trier of fact and the appellate court on review the substance of the evidence offered so that both the trial court and the appellate court may determine whether the refusal to accept the evidence was error. Here the conversations were admitted into evidence but for a limited purpose only. The compensation court and this court have the answers from the witnesses themselves. When the condition of the record and form of the question itself shows that it is relevant and competent, no offer of proof is necessary. In re Estate of Johnson, 100 Neb. 791, 161 N. W. 429.

This jurisdiction has repeatedly held that the Workmen's Compensation Act is one of general interest, not only to the workman and his employer, but as well to the state and it should be so construed that technical refinements of interpretation will not be permitted to defeat it. Speas v. Boone County, 119 Neb. 58, 227 N. W. 87. We are concerned here with the refusal of the compensation court to admit evidence that would be admissible in all the trial courts of this state; evidence which would directly tend to prove the principal issue of the case, whether the decedent was acting within the course of his employment at the time of his death. Given the beneficent purposes of the Nebraska Workmen's Compensation Law in the exemption from the Rules of Evidence, section 27-1101 (4) (d), R. R. S. 1943, the compensation court is empowered to admit evidence not admissible in the trial courts of this state. It does not, as we understand it, grant to the compensation court

the right to establish rules of evidence which are more restrictive than the rules applicable to the trial courts of this state. Rather, their purpose was to allow the compensation court to "make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of sections 48-101 to 48-190." § 48-168, R. R. S. 1943. Thus, the compensation court, as we construe those sections, is permitted to admit evidence which over proper objection could not be introduced in a trial court in this state. We do hold that the parties litigating before a compensation court are permitted to introduce evidence which is admissible in the trial courts in this state. The evidentiary rules established by the compensation court may not be more restrictive than those of the trial courts.

Under the standard of review set forth in section 48-185, R. S. Supp., 1976, we are not permitted to make an independent determination in this court. Rather, in our review, as set forth above, we determine that the compensation court "acted without or in excess of its powers," in failing to admit, as evidence of the truth of the matter asserted, the statements offered by the plaintiff. We are unable to determine what the compensation court would have decided had the declarations been admitted in the first instance. Therefore, we must reverse the judgment and remand the cause to the compensation court with directions to reconsider its decision in light of the admissible character of the declarations which were excluded during the three-judge hearing.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. LARRY J. STEPHENSON, APPELLANT.

258 N. W. 2d 824

Filed November 2, 1977. No. 41166.

1. **Witnesses: Evidence: Juries.** It is not the province of this court on appeal to pass on the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence in a criminal case. These matters are for the jury.
2. **Trial: Evidence.** Photographs are admissible in evidence if shown to be true and correct representations of the places or subjects they purport to represent at times pertinent to the inquiry. Their admission is largely within the discretion of the trial court, and unless an abuse of discretion is shown error may not be predicated thereon.
3. _____: _____. A photograph proved to be a true representation of what it depicts may properly be received in evidence if a proper foundation is laid.
4. **Sentences.** A sentence within the statutory limits will not be disturbed on appeal absent an abuse of discretion.

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

Larry J. Stephenson, pro se.

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

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

SPENCER, J.

Defendant, Larry J. Stephenson, after a jury trial, was convicted of manslaughter in the death of his infant son. He prosecutes error, alleging the insufficiency of the evidence, the admission of certain photographs, and an excessive sentence. We affirm.

Defendant attacks the sufficiency of the evidence but does not indicate in what respect he believes it was deficient. He and his wife were quarreling. When their pickup arrived at the motel defendant got out and his wife locked the door behind him. Defendant was observed retrieving an object from the back of his pickup and throwing it through the win-

dow on the passenger side. The window was completely shattered and broken. Defendant was observed moving his arm up and down in the pickup through the window.

Defendant's 5-week-old son was on a pillow in the center of the seat. He was immediately injured and subsequently died from those injuries. One doctor testified the baby had a fractured skull. Another doctor testified it would have taken a tremendous amount of force to cause the injuries which caused the child's death. In his opinion the injuries were consistent with being struck by defendant's hammer. From the photographs it appears to be what is commonly called a sledge hammer.

Defendant testified he broke the window with his fist. The photographs in evidence indicate that the window was completely smashed and the seat was covered with glass. It tests credulity to believe the damage which resulted could have been accomplished with a blow by the fist.

The hurling of the hammer through the window was obviously an assault. It clearly constituted an unlawful act, as contemplated by section 28-403, R. R. S. 1943. It resulted in the death of the baby. The evidence was not only sufficient, it was conclusive.

Defendant is apparently claiming the testimony of the disinterested witness and the physical facts are rebutted by his testimony and that of his wife. "It is not the province of this court on appeal to pass on the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence in a criminal case. These matters are for the jury." State v. Andrews, *ante* p. 60, 255 N. W. 2d 875 (1977).

Defendant argues the admission of exhibits 1 to 17, photographs taken by a police photographer at the scene were prejudicial. Four of the photographs depict the area in front of the motel where the incident occurred. The remaining photographs show various exterior and interior views of the pickup

truck. The pickup had been moved to a different location on the premises before the photographs of it were taken. This in no way could have changed the views depicted.

The evidence also indicates that one of the prosecution witnesses, in the presence of a police officer, picked up the hammer from the floor of the truck and returned it to a different position on the floor. The evidence does not disclose that anything else was disturbed prior to the time the pictures were taken. This could not in any way have been prejudicial.

Photographs are admissible in evidence if shown to be true and correct representations of the places or subjects they purport to represent at times pertinent to the inquiry. Their admission is largely within the discretion of the trial court, and unless an abuse of discretion is shown error may not be predicated thereon. State v. Ell, 196 Neb. 800, 246 N. W. 2d 594 (1976).

A photograph proved to be a true representation of what it depicts may properly be received in evidence if a proper foundation is laid. State v. Williams, 182 Neb. 372, 155 N. W. 2d 189 (1967). The District Court did not abuse its discretion in receiving exhibits 1 to 17 in evidence.

Defendant's final contention is that the sentence imposed is excessive. Defendant was found to be an habitual criminal. He was sentenced to 15 years in the Penal and Correctional Complex. The habitual criminal charge was based upon two Kansas felony convictions, one in 1960 for larceny and another in 1963 for attempted robbery and felonious assault.

The penalty prescribed for an habitual criminal is not less than 10 nor more than 60 years. § 29-2221, R. R. S. 1943. Defendant's sentence, by virtue of section 83-1,105, R. R. S. 1943, is an indeterminate one of not less than 10 nor more than 15 years. A sentence within the statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Hat-

ridge, *ante* p. 142, 256 N. W. 2d 327 (1977). There was no abuse of discretion in this case.

The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, C. J., not participating.

RONALD F. LACY ET AL., APPELLANTS, V. TED DEYLE, APPELLEE.

258 N. W. 2d 826

Filed November 2, 1977. No. 41172.

Contracts: Specific Performance. A purchaser's right to specific performance may be lost by his failure to perform the contract, and whether specific performance should be granted in a particular case rests within the sound discretion of the trial court.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Tye, Worlock, Tye, Jacobsen & Orr and Patrick J. Nelson, for appellants.

Ross, Schroeder & Fritzler, for appellee.

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

BOSLAUGH, J.

This case arises out of a dispute concerning a provision in a lease which granted the lessees, Ronald F. Lacy and Mary L. Lacy, "the option to purchase the above property at any time during the life of this lease for the sum of $22,900.00." The plaintiffs lessees claimed that they had exercised the option and commenced an action for specific performance when the defendant lessor refused to perform.

The trial court found that the plaintiffs had exercised the option and their failure to tender the purchase price was excused by the defendant's refusal to perform. The judgment provided that the plaintiffs would have 40 days from March 31, 1976, to pay

the purchase price to the defendant, and upon payment the defendant was ordered to convey the property to the plaintiffs. The defendant did not file a motion for new trial and did not appeal from the judgment.

On June 24, 1976, the defendant moved that the judgment be vacated because the plaintiffs had failed to pay the purchase price within the time provided in the judgment. The motion was heard on September 27, 1976, and an order was entered on October 6, 1976, terminating the right of the plaintiffs to purchase the property. The plaintiffs have appealed.

The petition which was filed on July 31, 1975, alleged the plaintiffs were ready, willing, and able to pay $22,900 to the defendant on delivery of either a warranty deed or a quit claim deed to the property. The judgment awarding specific performance which was entered on March 31, 1976, gave the plaintiffs 40 days in which to pay the $22,900 to the defendant. The record shows the plaintiffs were not able to perform until June 30, 1976.

The evidence presented on the motion to vacate showed that the plaintiffs submitted a loan application to First Federal Savings and Loan Association of Lincoln on April 5, 1976. This loan was never completed because the plaintiffs failed to submit information requested by First Federal.

On April 6, 1976, the plaintiffs applied for a loan to Home Federal Savings and Loan Association of Lexington, Nebraska. A commitment for the loan was issued on April 12, 1976, and the plaintiffs notified Home Federal that they required the money on May 9, 1976. May 9 was the 39th day of the 40-day period specified in the judgment of March 31.

The record further shows that on or about April 30, 1976, the attorneys for the parties had a conversation about the case. In this conversation the defendant's lawyer stated that the defendant did not intend to appeal the case and would not require strict compli-

ance with the judgment by payment of the $22,900 within the 40-day period.

The defendant cooperated with the plaintiffs by furnishing an abstract of title to the property and executing a certificate required by the loan company although nothing in the contract or the judgment required the defendant to furnish an abstract of title or assist the plaintiffs to obtain a loan on the property.

The motion to vacate the judgment was filed on June 24, 1976, some 85 days after the judgment which granted the plaintiffs 40 days in which to pay the $22,900 to the defendant. On June 26, 1976, the plaintiffs' lawyer wrote to the defendant's lawyer stating: "We are ready to perform at any time." The plaintiffs' lawyer further stated that he would be away from the office until July 6 but would have one of his associates handle the matter in his absence. He suggested the defendant set a date and then contact his office so that the matter could be closed.

An employee of the loan company testified that the loan company was ready to disburse the money on June 30, 1976. So far as the record discloses, this was the first time the plaintiffs were able to pay the $22,900 to the defendant. There is no evidence the plaintiffs ever notified the defendant or his attorney after June 30, 1976, that they in fact could now perform and no tender of the purchase price was ever made.

The motion to vacate was not heard until September 27, 1976, 180 days after the judgment had been entered on March 31, 1976. The trial court found that although the defendant's attorney had assured the plaintiffs' attorney that the defendant would not insist upon strict compliance with the 40-day limitation, this did not bind the defendant to an indefinite extension. We think this finding is fully supported by the record.

Notwithstanding the plaintiffs' allegations and

statements that they were ready to perform, the evidence shows they had no capability to perform until June 30, 1976, some 50 days after the expiration of the original 40-day period granted in the judgment of March 31, 1976.

A purchaser's right to specific performance may be lost by his failure to perform the contract, and whether specific performance should be granted in a particular case rests within the sound discretion of the trial court. See Russell v. Western Nebraska Rest Home, Inc., 180 Neb. 728, 144 N. W. 2d 728.

The defendant in this case was not required to wait indefinitely for the plaintiffs to perform. At most, the plaintiffs were entitled to a reasonable time after May 10, 1976, in which to perform. When the plaintiffs failed to perform within a reasonable time it was within the discretion of the trial court to terminate the plaintiffs' right to purchase the property. The record shows no abuse of discretion and the judgment must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, CITY OF GRAND ISLAND, APPELLEE, v. RAYMOND E. SMITH, APPELLANT.

259 N. W. 2d 16

Filed November 2, 1977. No. 41276.

1. **Criminal Law: Appeal and Error.** The standard of review of criminal cases in the District Court is limited to an examination of the record presented for error or abuse of discretion. § 29-613, R. R. S. 1943.
2. _____: _____. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.
3. **Constitutional Law: Appeal and Error.** Where the standard of review is limited to error on the record, oral argument on appeal is not an essential element of the right to be heard under the federal

or state Constitution where the standard of review is limited to the record.

4. **Constitutional Law: Criminal Law: Appeal and Error.** A defendant has no constitutional right to be present on appeal.
5. **Evidence: Appeal and Error.** Rights of parties are determined by appellate courts solely on the record made by the tribunal whose action is being reviewed, and no new facts or evidence can enter into consideration of the court.

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

Gerald B. Buechler, for appellant.

James H. Truell, for appellee.

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

WHITE, C. THOMAS, J.

The defendant was convicted in the county court on a charge of operating a motor vehicle while intoxicated. The defendant appealed to the District Court and the judgment and sentence of the county court were affirmed. Defendant appeals to this court.

The defendant assigns as error the following: (1) The District Court permitted the defense counsel and the county attorney to waive oral argument and rendered a judgment without requesting the defendant's consent; (2) the District Court rendered its decision of affirmance without the presence of the defendant; (3) the decision was contrary to the evidence and the law; and (4) the District Court entertained defendant's motion for new trial without notice to defendant and his counsel to be present for argument and without the consent of the defendant or waiver by defendant or his counsel.

On May 26, 1976, the arresting officer was on patrol in the early morning hours in the City of Grand Island, Nebraska. His attention was directed to the sound of squealing tires in the area of Koenig and Eddy Streets in Grand Island. He drove to the

scene and observed a white Mustang, Mach I, at the south edge of the intersection of Clark and Koenig Streets, facing south. The officer testified that the vehicle accelerated rapidly southbound on Clark Street and squealed its rear tires as it proceeded. The officer drove his vehicle to Clark Street. The officer pursued the vehicle and overtook it on Louise Street at the intersection of Louise and Greenwich Streets. He pulled his vehicle to the left and slightly to the rear of the defendant's vehicle and observed the defendant seated behind the wheel of his vehicle. The defendant emerged from the car; a driver's license was produced; and a preliminary breath test was taken. The results were inconclusive as the defendant appeared unwilling or unable to breathe into the device long enough to produce a reaction. The defendant was arrested, brought to the police station, and there a breath test was completed. The results were stipulated as correct for the record in the trial at the county court. The test revealed .12 percent of alcohol by weight in the blood. The defendant did not deny that he had been drinking, but his evidence sharply contradicted that of the officer. Defendant asserted at trial that he was not driving the vehicle; that he and his wife and another passenger were out of the vehicle at the time the officer approached it; and that his wife Mrs. Smith was, in fact, the driver. At the conclusion of the evidence, the county judge found the defendant guilty as charged. Section 20-88.3 of the municipal code of Grand Island, Nebraska, provides, in substance, that it shall be unlawful for a person to operate or be in the actual physical control of a motor vehicle while under the influence of alcoholic liquor or to unlawfully operate or be in the actual physical control of a motor vehicle while having ten hundredths of one percent or more by weight of alcohol in his blood.

We will consider the assigned errors in their time sequence in the District Court rather than in the nu-

merical order as defendant assigns them. Section 29-613, R. R. S. 1943, states: "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 new trial." The review of criminal cases in the District Court is limited to an examination of the record presented for error or abuse of discretion. To the extent that any statement in the opinion of State v. Stone, 198 Neb. 721, 255 N. W. 2d 57, suggests a different standard of review from that stated herein, such statement is incorrect and is overruled. It is obvious that the defendant had a percent of alcohol in his bloodstream over the permissible limit permitted by the ordinance and that a factual dispute existed as to whether or not he was the operator of the motor vehicle. The county court resolved the issue against the defendant and the District Court agreed. In State v. Bartlett, 194 Neb. 502, 233 N. W. 2d 904, we said: "In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury". Here, where there was no jury, the trial judge became the trier of fact. Elm Creek State Bank v. Johnson, 195 Neb. 131, 236 N. W. 2d 838. It is obvious that there is no abuse of discretion or error. See State v. Clark, 194 Neb. 487, 233 N. W. 2d 898.

The defendant also asserts that the trial court erred in permitting defense counsel to waive oral argument without the consent of the defendant and in not notifying defendant so that he would have an opportunity to be present at the time of the submission and decision in the District Court. "The personal presence of the accused, from the beginning to

the end of a trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defense and cannot be dispensed with. * * *. ' * * * such deprivation (of personal presence) would be without that due process of law required by the Constitution.' * * * But neither reason nor public policy require that he should be personally present pending proceedings in an appellate court whose only function is to determine whether, in the transcript submitted to them, there appears any error of law to the prejudice of the accused; especially, where, as in this case, he had counsel to represent him in the court of review. * * * his presence is not essential to its jurisdiction to proceed with the case. * * * (This rule) is not only consistent 'with due process of law' - giving these words their most liberal interpretation - but is founded on wise public policy." Schwab v. Berggren, 143 U. S. 442, 12 S. Ct. 525, 36 L. Ed. 218. Due process would not require greater safeguards here where a misdemeanor is involved. The defendant had no personal right to be present in the District Court on an appeal proceeding and no obligation existed on the part of the District Court to advise him of the date of submission and of decision.

The more serious question addresses itself, however, to whether or not counsel had the right to waive oral argument. We find no Nebraska case dealing with a waiver by counsel of oral argument in an appellate court; however, in Wilwording v. Swenson, 439 F. 2d 1331, the Court of Appeals of the Eighth Circuit considered the matter. The Missouri Supreme Court allowed counsel, after filing a brief on appeal, to waive oral argument. The defendant filed an action in habeas corpus alleging denial of a federally protected right of counsel in criminal proceedings. The United States District Court held there was no violation of any federally protected

rights stated by these facts. Wilwording v. Swenson, 331 F. Supp. 1188 (W. D. Mo., 1969). The court of appeals affirmed. Wilwording v. Swenson, 439 F. 2d 1331.

Oral argument may be desirable but it is not indispensable. Price v. Johnston, 334 U. S. 266, 68 S. Ct. 1049, 92 L. Ed. 1356; nor is it an essential ingredient of due process. The determination of counsel to waive oral argument in an appellate proceeding, where there is no new evidence introduced and the review confined to the record, must be and is necessarily a tactical decision of trial counsel. The consent of the accused to waive oral argument is not an essential element of any due process rights guaranteed under the Nebraska or federal Constitution. Inherent to the appeal process is the right to be heard. Oral argument is not an essential element of this right to be heard. In reviewing Article I, section 24, Constitution of Nebraska, which grants the right to be heard in all civil cases, this court said: "So long as the mode provided for review is adequate, the requirements of the fundamental laws are satisfied. The constitutional provision * * * does not prohibit this court from prescribing such reasonable rules and regulations as are deemed essential to the prompt and orderly disposition of causes brought here by appeal or on error, nor does it forbid the denial of an oral argument in the cause." Schmidt v. Boyle, 54 Neb. 387, 74 N. W. 964. It is obvious the same standard applies in review of criminal cases. Defendant was afforded his right of review; the record was before the District Court and there is no evidence that defendant's counsel was denied the right to file a brief.

The last assignment of error deals with the alleged failure of the trial court to give notice to the defendant or to his counsel of the submission of the motion for new trial and the determination thereof. The only reference to said alleged denial or failure to notice

counsel or to give counsel or defendant an opportunity to appear at the motion for new trial is in the notice of appeal. The same is not in the form of an affidavit and there is nothing in the bill of exceptions or in the record to indicate whether the trial court did or did not give notice by ruling or otherwise of its consideration of the motion for new trial. This court therefore has nothing before it on which to consider this issue or to indicate that the trial court improperly set the motion for new trial without notice. This is not sufficient.

The judgment of the trial court is presumed to be correct and unless this court is directed to a record which suggests that error was committed, error will not be presumed. Rights of parties are determined by the appellate court solely on the record made by the tribunal whose action is being reviewed, and no new facts or evidence can enter into consideration of the court. Moser v. Turner, 180 Neb. 635, 144 N. W. 2d 192.

The judgment of the District Court is affirmed.

AFFIRMED.

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

259 N. W. 2d 19

Filed November 2, 1977. No. 41299.

1. **Evidence: Witnesses.** The credibility of the testimony of an expert witness is peculiarly for the trier of fact to determine.
2. **Criminal Law: Legislature: Controlled Substances.** It is within the prerogative of the Legislature to determine whether the possession of marijuana, including possession for personal use, is to be decriminalized.
3. **Constitutional Law: Legislature: Controlled Substances.** When the Legislature makes a determination that the use of some substance is harmful and that the use, act, or possession must be prohibited in the interest of the public welfare, the equal protection clause of the Constitution does not require that the State must choose between attacking every aspect of the problem, or not

attacking the problem at all. It is enough that the State's action has a rational basis.

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

Kirk E. Naylor, Jr., and Dennis R. Keefe of Naylor & Keefe, for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellee.

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

CLINTON, J.

Defendant was found guilty in the county court of Lancaster County of the offense of possession of marijuana weighing less than 1 pound in violation of section 28-4,125 (4), R. R. S. 1943. A fine of $300 was imposed in the county court. Upon appeal to the District Court the conviction was affirmed, but the fine was reduced to the sum of $50. On appeal to this court the defendant urges that the county court and District Court erred in rejecting the defendant's contention that section 28-4,125 (4), R. R. S. 1943, is unconstitutional and therefore also erred in overruling his motion to dismiss the complaint against him. We affirm.

In the county court the issues were tried upon a stipulation of facts and the testimony of an expert witness called by the defendant. In the District Court the record of the trial in the county court was offered and received in evidence and constitutes the bill of exceptions before us. That record shows that it was stipulated by the defendant and the State that on September 16, 1975, a quantity of marijuana, less than 1 pound, was found in the possession of the defendant in his home in Lancaster County, Nebraska; that the possession of this controlled substance by the defendant was for his own personal use in his home and was not possessed by him with the intent

to distribute or to sell; and that he was more than 19 years of age at the time.

The expert witness called by the defendant stated his opinion as to the psychological, physiological, and sociological effects of the use of marijuana. Received in evidence in connection with the opinion were certain studies and reports as follows: (1) Marihuana: A Signal of Misunderstanding, First Report of the National Commission on Marihuana and Drug Abuse, 1972; (2) Drug Use in America: Problem in Perspective, Second Report of the National Commission on Marihuana and Drug Abuse, 1973; and (3) Ganja in Jamaica, by Vera Rubin and Lambros Comitas, 1975. The witness classified marijuana as a psychoactive drug, that is, one capable of altering human mental states. The ultimate gist of this expert's opinion was that the effects produced by the "normal use," or "dosage," which he failed to define, of marijuana was not psychologically, physiologically, or sociologically harmful. He further rendered his opinion that marijuana use has certain beneficial effects, e.g., "A. Strengthened family ties, social ties, decreased aggression and violence, decreased consumption of numerous other drugs such as alcohol, barbiturates, phencycladine, cocaine and amphetamine, and of course indirect effects of such effects. . . . In my opinion the consumption of marijuana, the normal consumption of marijuana generally decreases the amount of a variety of other drugs such as alcohol, barbiturates, cocaine, amphetamine, phencycladine. . . . It is my opinion that there are not generally accepted long-term effects. It is my firm opinion that none have been demonstrated of any significance. . . . Yes, marijuana usage characteristically decreases aggressive behavior and its tendencies. There are extensive numerous indications of that in every one of these studies, not including the last one."

He denied knowledge of any studies which might

indicate the existence of a dispute concerning the possible harmful effects from the use of marijuana. He did agree that the physiological, psychological, and sociological effects of the use of marijuana might vary widely from individual to individual. He stated that his opinion was based upon the following: "A. That opinion is based upon extensive experience in counselling, interviewing, data collecting, reading of the literature, attending conventions, discussions, and research with colleagues, in other words every possible form of foundation that I can think of right now. . . . Yes, naturalistic observation is a fundamental first step in scientific procedure. This contrasts with experimental research in that the variables in that actually are manipulated. For example, I do not actually administer marijuana. That would be experimental. Administering marijuana and perhaps observing its effects. Experiments are based upon in many cases naturalistic observations. Naturalistic observations include formats for collecting certain kinds of information on the phenomenon of interest as it actually happens without the experimenter making it happen." He also founded his opinion upon information contained in the publications described earlier in this opinion and which he described as the only authoritative ones.

Section 28-4,125 (4), R. R. S. 1943, is a part of the Uniform Controlled Substances Act and makes it unlawful and a misdemeanor to possess marijuana weighing 1 pound or less. The maximum penalty for such possession is a fine of not more than $500, or imprisonment in the county jail for not more than 7 days, with confinement to be separate and apart from other prisoners, or both such fine and imprisonment. Marijuana is classified by the act as an hallucinogenic substance. § 28-4,117, Schedule I (c) (11), R. R. S. 1943.

To support his contention of unconstitutionality,

the defendant makes two arguments: (1) The enforcement of section 28-4,125 (4), R. R. S. 1943, against an adult person who possesses marijuana for personal use in his own home, is a violation of that person's fundamental right to privacy claimed as guaranteed by the federal and state Constitutions. (2) That such enforcement under the circumstances above violates the due process and equal protection clauses of the state and federal Constitutions.

The substance of the defendant's first argument is that since the record establishes that the act of possession of marijuana in one's own home is harmless, it bears no relationship to any legitimate exercise of the police power of the State, that is, the protection of the public health, safety, or morals. Thus statutorily authorized interference with such activity is a violation of a fundamental right to privacy. He cites and relies upon numerous cases, including Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042; Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510; Stanley v. Georgia, 394 U. S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542. He contends that where, as is here claimed, there is a significant encroachment on a fundamental personal liberty, the State must show that the prohibition is necessary to serve a compelling State interest rather than merely showing there is some rational relationship between a legitimate State purpose and the prohibition of the conduct in question. Stanley v. Georgia, *supra*; Griswold v. Connecticut, *supra*. He does not contend that the State may not prohibit the public use of marijuana.

He alternatively urges that we adopt the position taken by the Supreme Court of Alaska in Ravin v. State, 537 P. 2d 494, where that court declared the marijuana possession statute of that state unconstitutional on the ground that it constituted an invasion of privacy insofar as it prohibited the private use of marijuana. That court adopted a new test which re-

quired that where the government interferes with the right of privacy, the "relationship between means and ends be not merely reasonable but close and substantial."

The defects in the defendant's factual argument are found in the supporting documentation upon which he relies and which his witness said was authoritative. The first report of the national commission above mentioned had among its purposes the making of recommendations to the policy makers, that is, the Congress and the state legislatures, as to the appropriate social policy to be adopted in handling the "marijuana problem." That report concludes with a recommendation to the Congress that the possession of marijuana for personal use no longer be prohibited, but that possession of marijuana in public be subject to immediate seizure as contraband; and that marijuana intoxication not constitute a defense to any crime, including those requiring a specific intent. Its recommendations to the states goes a bit further. In their case it would also permit distribution of small amounts of marijuana in private for no remuneration, or insignificant remuneration not involving profit. It recommends that absolute liability be imposed upon persons for damages caused while under the intoxicating influence of marijuana. Among the numerous reasons for its recommendations are the excessive costs of enforcement compared with the benefits gained.

Its recommendations for statutory changes are not founded upon a finding that the use of marijuana is a harmless activity. We illustrate with a few quotations from the report, Marihuana: A Signal of Misunderstanding, First Report of the National Commission on Marihuana and Drug Abuse, 1972. "It is wrong to assume, as many have done, that a particular statement of marihuana's effects compels a given social or legal implementation. An accurate

statement of the effects of the drug is obviously an important consideration, but it is conclusive only if the effects are extreme one way or the other. For example, if the use of a particular drug immediately causes the user to murder anyone in his presence, we have no doubt that a vigorous effort to eliminate use of that drug would be in order. On the other hand, if the effects of the drug are purely benign, presenting no danger whatsoever to the user or society, no reason would exist to suppress it.

"We know of no psychoactive substance, including marihuana, which falls at either of these extremes. (p. 23) . . .

"Any psychoactive drug is potentially harmful to the individual, depending on the intensity, frequency and duration of use. Marihuana is no exception. Because the particular hazards of use differ for different drugs, it makes no sense to compare the harmfulness of different drugs. One may compare, insofar as the individual is concerned, only the harmfulness of specific *effects*. Is heroin less harmful than alcohol because, unlike alcohol, it directly causes no physical injury? Or is heroin more harmful than alcohol because at normal doses its use is more incapacitating in a behavioral sense?

"Assessment of the relative dangers of particular drugs is meaningful only in a wider context which weighs the possible benefits of the drugs, the comparative scope of their use, and their relative impact on society at large. (p. 65) . . .

"From what is now known about the effects of marihuana, its use at the present level does not constitute a major threat to public health. However, this statement should not lead to complacency. Marihuana is not an innocuous drug. The clinical findings of impaired psychological function, carefully documented by medical specialists, legitimately arouse concern. These studies identify marihuana-related problems which must be taken

into account in the development of public policy. Unfortunately, these marihuana-related problems, which occur only in heavy, long-term users, have been overgeneralized and overdramatized. (p. 90) . . .

"Social institutional spokesmen now commonly recognize that control of marihuana is only partially a law enforcement problem. Opinions cluster around the propositions that society should not be punitive on the one hand, but should not make the drug available, at least for now. Beyond these points, however, uncertainty prevails. There is no common vision of an appropriate social control policy.

"Each institution is going about the business of control in its own way. Parents emphasize mutual communication. The secondary schools emphasize health education. The colleges recognize personal freedom so long as it does not jeopardize the educational enterprise. Churches emphasize uncertainty about the moral implications of marihuana use. The medical fraternity stresses the need for further research into the health consequences of marihuana use. Uncertainty is the common denominator. (p. 120) . . .

"Society should not approve or encourage the recreational use of *any* drug, in public or private. Any semblance of encouragement enhances the possibility of abuse and removes, from a psychological standpoint, an effective support of individual restraint." (p. 129).

It is clear beyond question that the study, from which we have quoted and which is relied upon by the defendant in part to support his factual position that the private use of marijuana is without dispute innocuous, does not in fact support the position. Even though the defendant's witness gave his opinion that the use of marijuana was harmless, the trier of fact was not bound to accept that opinion. Dobry

v. State, 130 Neb. 51, 263 N. W. 681. See NJI No. 14.55. The quotations from the report and the report itself make the case that marijuana control is a social policy determination. That is a legislative function. The study does not support the position that marijuana use is a harmless activity which the legislatures have no right to prohibit or control and that, therefore, the courts must hold such legislation unconstitutional.

The cases upon which the defendant relies are distinguishable because they involve what have been referred to as "fundamental" rights, for example, Meyer v. Nebraska, *supra*, the right of the parent to have the child taught a particular foreign language; Stanley v. Georgia, *supra*, the first amendment right to be exposed to an idea, even a harmful one; Griswold v. Connecticut, *supra*, marital privacy. The Supreme Court of the United States has not recognized a separate constitutional right of privacy apart from some right recognized in our history and culture as "fundamental" or in connection with a right emanating from some right specifically recognized by the Constitution. Griswold v. Connecticut, *supra* (Goldberg, J., concurring). In Doe v. Commonwealth's Atty. for City of Richmond, 403 F. Supp. 1199, affirmed 425 U. S. 901, 96 S. Ct. 1489, 47 L. Ed. 2d 751, reh. den. 425 U. S. 985, 96 S. Ct. 2192, 48 L. Ed. 2d 810, the provisions of a sodomy statute were not found to violate penumbral rights to privacy, and in Paul v. Davis, 424 U. S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405, that court held reputation rights unprotected by a constitutional right to privacy.

The opinion in the Alaska case of Ravin v. State, *supra*, was founded in large measure on a specific right of privacy found in the Constitution of that state.

Constitutional challenges to legislation prohibiting the use of marijuana on the ground that such legislation violates a right of privacy have been rejected

in cases in which the issue has been raised. NORML v. Guste, 380 F. Supp. 404; Kreisher v. State (Del.), 319 A. 2d 31; State ex rel. Scott v. Conaty (W. Va. App.), 187 S. E. 2d 119; State v. Baker (Hawaii), 535 P. 2d 1394; Laird v. State (Fla.), 342 S. 2d 962; State v. Anderson, 16 Wash. App. 553, 558 P. 2d 307; and others.

Despite the recommendations of the national commission, all states and the federal government, at least up through 1976, still prohibited the use and possession of marijuana. See Marijuana: A Study of State Policies and Penalties, National Governors' Conference, Center for Policy Research and Analysis, Vol. 3, 1977.

The constitutional test which is to be applied in this case is whether the act of the Legislature, in prohibiting the possession of marijuana, can be said to have a rational relationship to some legitimate state purpose. Botsch v. Reisdorff, 193 Neb. 165, 226 N. W. 2d 121. It is within the prerogative of the Legislature to determine whether the possession of marijuana, including possession for personal use, is to be decriminalized.

The courts below were correct in rejecting the defendant's constitutional argument on the grounds of privacy.

The defendant's due process and equal protection arguments are founded essentially upon the contention that the record establishes that marijuana, if harmful, is no more so than alcoholic liquor or tobacco and that since the State only regulates, rather than prohibits, possession in those cases the defendant is denied equal protection and due process rights guaranteed by our Constitutions. This contention does not rest on solid constitutional ground.

When the Legislature makes a determination that the use of a substance or some conduct is harmful and that the use, act, or possession must be prohibited in the public welfare, it is under no constitu-

tional obligation to "cover the waterfront." It may attack different aspects of a problem in different ways, or go about the matter piecemeal. State v. Donovan (Me.), 344 A. 2d 401; State v. O'Bryan, 96 Idaho 548, 531 P. 2d 1193; State v. Leins (Iowa), 234 N. W. 2d 645; People v. Alexander, 56 Mich. App. 400, 223 N. W. 2d 750; United States v. Kiffer, 477 F. 2d 349; United States v. Maiden, 355 F. Supp. 743; Botsch v. Reisdorff, *supra*.

AFFIRMED.

WILLIAM GEORGE EUTZY, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

258 N. W. 2d 829

Filed November 2, 1977. No. 41333.

1. **Criminal Law: Sentences.** Where the sentence imposed together with the time spent in custody prior to sentencing is less than the maximum authorized by statute, the trial court may consider the time spent in custody prior to sentencing and deny credit for that time.
2. **Criminal Law: Statutes.** Section 83-1,106, R. R. S. 1943, held constitutional.

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

Kirk E. Naylor, Jr., for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

BOSLAUGH, J.

William George Eutzy was sentenced to 3 to 5 years imprisonment for forgery. Prior to sentencing he spent 135 days in confinement because he was unable to post bond. At the time sentence was imposed the trial court stated: "The court further

states that the time you have spent in custody in connection with this, awaiting trial in this case, was considered in passing this sentence and no credit will be given to you for that time." The commitment order also provides: "The time defendant spent in custody awaiting trial was considered by this Court in passing sentence."

Section 83-1,106, R. R. S. 1943, as amended, provides that at the time of sentencing the District Court may give a prisoner credit against the maximum term and any minimum term for time spent in custody prior to trial, during trial, and pending sentence. Eutzy commenced this action to obtain a declaration that section 83-1,106, R. R. S. 1943, was unconstitutional as in violation of the Equal Protection Clause of the state and federal Constitutions.

The trial court found that section 83-1,106, R. R. S. 1943, was constitutional and dismissed the action. Eutzy has appealed.

This case is similar to State v. Nelson, 189 Neb. 580, 203 N. W. 2d 785, in which the defendant was sentenced to imprisonment for 1 to 3 years for embezzlement. In that case the record was silent and a verbatim record of the sentencing hearing was not before this court. However, the trial court found that the time spent in custody had been considered in fixing the sentence. We held that a criminal sentence in which the court considered prior time spent in custody might be consistent with the federal constitutional guarantee of equal protection even though the record at the sentencing hearing was silent on the subject.

The sentence which was imposed here was much less than the statutory maximum of 20 years imprisonment authorized by section 28-601, R. R. S. 1943. Since the 135 days that Eutzy spent in confinement between the time of his arrest and the time that he was sentenced was considered by the trial court in fixing the sentence imposed, the result is the same

as if the sentence had been 3 years and 4½ months to 5 years and 4½ months imprisonment, with credit then being given for the 135 days confinement. Such a sentence would have been valid.

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

AFFIRMED.

McCOWN, J., concurring in result.

Under present provisions of section 83-1,106, R. R. S. 1943, the granting of credit for time spent in custody may be given to an offender in the discretion of the sentencing court. The granting of such credit should be made mandatory and not discretionary. Even under current statutes most Judges of the District Court grant credit for jail time as a matter of course. All Judges of the District Court should do so.

IN RE INTERESTS OF ANNETTE HERNANDEZ AND BETTY HERNANDEZ, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. EVA HERNANDEZ, APPELLANT.

259 N. W. 2d 272

Filed November 9, 1977. No. 41138.

1. **Parent and Child: Minors.** The court may terminate all parental rights between the parents and a child when the court finds such action to be in the best interests of the child and it appears by the evidence that the following condition exists: The parents have abandoned the child for 6 months or more immediately prior to the filing of the petition.
2. **Trial: Parent and Child: Minors.** Findings of the trial court as to the evaluation of evidence to have children adjudged to be neglected and dependent, and to terminate parental rights as well as determining the question of custody, will not be disturbed on appeal absent a showing of clear abuse of discretion.
3. **Parent and Child: Minors.** A bare assertion of parental natural right cannot prevail against the clear best interests of the children and overwhelming evidence of disinterest and abandonment.

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

Wayne E. Janssen, for appellant.

Leonard G. Tabor, for appellee.

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

WHITE, C. THOMAS, J.

This is an appeal from the District Court which affirmed the decision of the county court of Scotts Bluff County, Nebraska, in its juvenile court capacity, determining that Samuel Hernandez and appellant Eva Hernandez had abandoned two children, Betty Hernandez and Annette Hernandez, and terminating parental rights. Eva Hernandez appeals and assigns as error that the District Court and the juvenile court erred in finding that Eva and Samuel Hernandez had abandoned their children for 6 months or more immediately prior to the filing of the petition and in terminating the parents' parental rights.

Betty, born March 4, 1966, and Annette, born January 15, 1967, are two of the eight children of the appellant Eva Hernandez and her former husband Samuel Hernandez. On July 13, 1967, a petition was filed in the county court asking that the eight Hernandez children be adjudicated neglected children. On July 20, 1967, hearing was held on the petition in the county court. Upon the oral stipulation of the parties, consenting to the placement of the eight children in the care of the court on a temporary basis, the court so ordered. The court returned six of the Hernandez children to their parents, two immediately and four within 10 days, but granted temporary care, custody, and control of Betty and Annette to the Scotts Bluff County department of public welfare until further order of the court. Annette and Betty were undergoing medical treatment at this time and it is undisputed in the record that at the time of the temporary placement, the children were suffering from malnutrition, head lice, and various

body sores, and were considered to be in a very guarded medical condition. Betty is a retarded child. At the conclusion of the medical treatment, Betty and Annette were placed in the home of Gary and Barbara Richards, a licensed foster home in Scotts Bluff County. They have remained there until this time.

From the time of the placement, until December 30, 1975, appellant saw Betty and Annette on three occasions, on March 19, 1969, on December 16, 1969, and August 13, 1970. In January 1969, appellant asked to see the children but her request was denied by a physician for medical reasons.

The appellant knew the names of the foster parents, and where they lived, and the name of the social worker in charge of the case. Appellant explains the failure of visitation on unsuitable housing, on her former husband's alcoholism, and her reluctance to approach the welfare department.

Annette and Betty have lived in the home of the foster parents in excess of 10 years. Betty attends a special school for the handicapped. Annette is normal, has no memory of her mother and father, calls her foster parents her mother and father, and calls the natural children of the foster parents her brothers and sisters. Annette becomes frightened and is apprehensive when the possibility of her return to her natural parents is discussed. The foster parents hope to adopt Betty and Annette.

"The court may terminate all parental rights between the parents * * * and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exist: (1) The parents have abandoned the child for six months or more immediately prior to the filing of the petition; * * *." § 43-209, R. S. Supp., 1976.

No justification appears for the complete lack of interest or inquiry by the appellant for a period of

nearly 6 years. The attempted explanation cannot prevail in the face of the overwhelming lack of interest in the welfare of the children or in maintaining a relation of parent and child.

The long temporary placement of the children without determination of their status is regrettable and not to be commended but such delay only emphasizes that the appellant's interest in Betty and Annette is of recent origin. The court was correct in finding that Annette and Betty had been abandoned by appellant.

Would the termination of the parental rights of appellant be in the best interests of Betty and Annette? The single factor most prominent in this determination is that of the length of the present separation. The effect of a further separation from the foster parents is considered by psychologists to be of harm, and may impair goal orientation and identification with parental ideals. See generally 51 N. Y. U. Law Rev. 446, for a discussion of the factors to be considered in the termination of parental rights. At least two states, Michigan and New York, have recognized, by statute, extended separation without continuous contact to be a factor in this decision. Mich. Comp. Law Ann., § 722.23, 1977-78 Pocket Part; McKinney's Consolidated Laws of New York, Book 52A, § 384, 1976-77 Pocket Part.

It is, to say the least, unfair for the parent to leave the child in a legal limbo and regardless of length of time of separation to assert natural rights of the parent to custody. The paramount interests of the public and the court is the protection of the children, and where, as here, the finding of the juvenile court and District Court is not against the weight of the evidence or a clear abuse of discretion, their determination will be upheld. State v. Norwood, 194 Neb. 595, 234 N. W. 2d 601; State v. Randall, 187 Neb. 64, 187 N. W. 2d 586.

We said in Goodman v. Goodman, 180 Neb. 83, 141

N. W. 2d 445: "Children are not chattels." A bare assertion of parental natural right cannot prevail against the clear best interests of the children and the overwhelming evidence of disinterest and abandonment.

The judgment of the trial court is affirmed.

AFFIRMED.

ALBERT L. BERG, APPELLEE, V. JAMES R. PEARSON, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

259 N. W. 2d 275

Filed November 9, 1977. No. 41159.

1. **Administrative Law: Motor Vehicles: Evidence.** Under the Motor Vehicle Safety Responsibility Act the issue before the Director is not whether the operator was at fault in the accident but whether the evidence supports the finding that there is a reasonable possibility of a judgment being rendered against the operator involved in the accident.
2. **Administrative Law: Motor Vehicles: Appeal and Error.** Upon a petition for review of an order of suspension of an operator's license the issue is the same as that which was before the Director but the District Court must consider any additional facts developed in the hearing in the District Court.

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

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellant.

Charles I. Scudder, for appellee.

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

BOSLAUGH, J.

The Director of the Department of Motor Vehicles has appealed from an order of the District Court vacating an order suspending the motor vehicle operator's license of the appellee, Albert L. Berg, for fail-

ure to comply with the requirements of section 60-507, R. R. S. 1943, of the Motor Vehicle Safety Responsibility Act.

Berg was involved in an automobile accident on April 17, 1975, when the front of a truck he was operating collided with the rear of an automobile operated by Michele Lehotak. Although there was no damage to either vehicle, Ms. Lehotak claimed that she was injured in the accident. The Director determined there was a reasonable possibility of a judgment being rendered against Berg for damages claimed by Ms. Lehotak and suspended Berg's license for failure to supply proof of financial responsibility as required by section 60-507, R. R. S. 1943.

Berg filed a petition in the District Court to review the order of the Director, alleging that he had been deprived of due process of law and the equal protection of the law, and had been subjected to double jeopardy because an action against him for damages arising out of the accident was then pending in the District Court. At the hearing in the District Court, Berg testified that he was driving his pickup truck north on Abbott Drive in Omaha, Nebraska, when he came up behind the Lehotak vehicle which was proceeding in the same direction at a speed of not over 5 miles per hour. Berg concluded that the Lehotak vehicle was disabled so he drove "right up next to her and bumped her car, just barely touching her, and then hollered at her and asked her to just let it roll and get off the street." When the Berg truck bumped the Lehotak vehicle, "she applied her brakes, slammed on her brakes" and a second impact occurred.

The trial court found the first impact was not the result of negligence; that a contributing cause of the second impact was the negligence of Ms. Lehotak which was more than slight; and that the order of the Director should be vacated.

A transcript of the record, which was before the

Director, was introduced in the District Court. It includes the report of a police officer who investigated the accident. This report states that the driver of the Lehotak vehicle and witnesses to the accident said that the Berg truck was "tailgating" the Lehotak vehicle at a distance of inches, bumping the Lehotak vehicle at least twice. According to the driver of the Lehotak vehicle, her speed was about 25 m.p.h. The report further states that Berg admitted bumping the Lehotak vehicle to "let her know I was back there" and that "he just wanted to get her moving."

The issue before the Director was whether there was a reasonable possibility of a judgment being rendered against Berg as a result of the accident. § 60-507, R. R. S. 1943; Schetzer v. Sullivan, 193 Neb. 841, 229 N. W. 2d 550. The Director was required to determine this issue from the reports and information filed in connection with the accident.

A petition for review in the District Court is to be heard "summarily" by the District Court without a jury. § 60-503, R. R. S. 1943. The issue upon the petition for review is the same as that which was before the Director although the District Court must consider any additional facts developed in the hearing in the District Court.

Liability resulting from an automobile accident ultimately depends upon a resolution of many issues including the credibility of witnesses and a comparison of the negligence, if any, of the parties involved in the accident. These are not issues to be decided upon a petition to review an order of the Director. An order of suspension should not be set aside unless there is no reasonable possibility of a judgment being rendered against the operator in question.

The correct procedure is set out in Jennings v. Mahoney, 26 Utah 2d 128, 485 P. 2d 1404, affirmed 404 U. S. 25, 92 S. Ct. 180, 30 L. Ed. 2d 146. In that case the court said: "It should be emphasized that the

procedure provided under the Financial Responsibility Act is to determine whether security is required to assure financial responsibility and not to determine ultimate liability." The Utah court then quoted from Orr v. Superior Court of City & Co. of San Francisco, 71 Cal. 2d 220, 77 Cal. Rptr. 816, 454 P. 2d 712, in which the California court said: "The department need not decide as between conflicting versions of the accident whether the driver was in fact at fault; if there is any credible evidence on the basis of which he could reasonably be considered culpable, such evidence, which could be believed by the trier of fact in a lawsuit, will suffice to support a determination that it is reasonably possible that a judgment may be recovered against the driver. Neither is the department called upon to make sophisticated judgments upon any claims of contributory negligence or of last clear chance etc. which may arise; such claims commonly turn in the first instance upon determinations of disputed facts, and as stated such determinations are not the responsibility of the department. * * * The issue is not that indicated by the trial court in this case: whether the driver was actually without fault in the accident. Instead, the issue is only whether the evidence before the department supports its implied finding of the reasonable possibility of a judgment. Accordingly, it is appropriate to limit the scope of court review to a review of the department's action, rather than an unlimited new trial on the issue of fault."

It is apparent from the record that the findings made by the trial court in this case were based upon the testimony of Berg and disregarded the facts as stated in the police report which was before the Director. Although the question of liability may eventually be resolved as indicated by the findings of the trial court, that is not the issue in this proceeding.

The record established that there was a reasonable possibility of a judgment being rendered against

Berg. The judgment vacating the order of the Director was erroneous and must be reversed. The judgment is reversed and the cause remanded with directions to reinstate the order of the Director.

REVERSED AND REMANDED WITH DIRECTIONS.

NANCY L. BROWN, APPELLANT, V. MICHAEL W. BROWN, APPELLEE.

259 N. W. 2d 24

Filed November 9, 1977. No. 41185.

1. **Divorce: Alimony.** When dissolution of marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children.
2. _____: _____. In an action for dissolution of marriage, alimony may be ordered in addition to a property settlement award.
3. **Divorce: Attorney's Fees.** In an action for dissolution of marriage, the award of attorney's fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation.

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

Baylor, Evnen, Baylor, Curtiss & Grimit and Donald R. Witt, for appellant.

Healey, Healey, Brown, Wieland & Glynn, for appellee.

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

CLINTON, J.

This appeal arises from the dissolution of a mar-

riage and the issues raised in this court are: (1) Should the trial court have awarded to the petitioner wife alimony in addition to a share of the property of the parties? (2) Did the trial court err in directing that certain "family debts" be paid from the proceeds of the sale of the residence of the parties? (3) Did the trial court err in refusing to receive evidence of a vested, but undistributed, inheritance of the respondent husband, offered for the purpose of showing his future income and ability to pay alimony? (4) Was the award of fees for services to the petitioner wife's attorney inadequate, and should it be increased?

The parties were married on April 11, 1964. At the time of the marriage the wife was a practicing registered nurse, having received her nursing diploma in 1958. The husband, at the time of the marriage, was a student, nearing the completion of his junior year in the University of Nebraska School of Law. He completed his legal education the following year and began the practice of law in 1965. Two children were born to the marriage, a son and a daughter, who, at the time of trial on November 3, 1976, were 8 and 6 years of age respectively.

After the marriage the wife continued to work at her profession substantially full time until a few months after the birth of the second child in the year 1970. Thereafter she worked part time during the years 1974 and 1975. Prior to and during the first year of marriage the husband worked at summer employment and part time during the school year.

During the marriage the parties acquired a home which, at the time of trial, had an agreed fair market value of $78,000. The title to the residence was subject to a mortgage lien with an unpaid balance of approximately $31,000. The parties had also acquired during the marriage furniture and household goods of excellent quality and of substantial value. They also owned some additional nonincome-produc-

ing personal property which will be mentioned later. In addition, the husband had an interest in the capital account of a law partnership and a small equity in a building owned by the partnership and in which it had its law offices. The wife brought to the marriage about $660 in savings bonds, a car, and a small amount of household goods.

In the decree of dissolution the household goods and other personal property were divided largely in accordance with an agreement between the parties, the wife receiving most of the household goods and furnishings and a 1968 automobile. The husband received a small amount of household goods, his interest in the property of the partnership, a 1972 Datsun automobile, some sports equipment, and some nautical mementos which he specially valued. There is some dispute between the parties as to the value of the personal property received by each, but no dispute as to what items each should receive. The trial court directed that the home of the parties be sold and from the proceeds certain debts and expenses of sale, if any, be paid, and that the balance be divided 60 percent to the wife and 40 percent to the husband. The substantial equity of the parties in the residence arises from the profit of a sale of an earlier residence owned by the parties and acquired after the marriage, as well as to an increase in the value of the residence which was directed to be sold. The evidence also indicates that the husband did some work in the construction of the home, the exact value of such services not being shown by the evidence.

The wife was awarded custody of the two children of the parties and the husband was granted reasonable rights of visitation. The decree directs that the husband pay child support in the sum of $200 per month per child and that he maintain medical and hospital insurance comparable to the coverage which existed at the time of trial, the cost of which was then the sum of about $40 per month.

During the 6 years preceding the dissolution, the husband's average annual income from his law practice, after payment of income and self-employment tax, was approximately $18,200. The average for the last 3 years of that period was approximately $24,000. He hopes to earn a higher average income in the future, but points out the uncertainties of the income of the law practice which consists partially of handling personal injury cases on a contingent fee basis, and primarily of the defense of such cases on behalf of an insurance carrier. His income, of course, also depends upon the earnings of his partners.

After the separation of the parties, the wife obtained employment with the Department of Health of the State of Nebraska as a health facilities reviewer at an annual salary of $11,916, which, after 6 months, would be increased to $12,516. Future increases will depend upon merit and legislative appropriations. Her take-home pay at the time of trial was $772.60 monthly.

We now examine the assignments of error and in so doing will discuss such additional details of evidence which seem pertinent to us.

Section 42-365, R. S. Supp., 1976, provides in part: "When dissolution of marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, . . . and the ability of the supported party to engage in gainful employment without inferfering with the interests of any minor children . . . ." Section 42-366, R. R. S. 1943, provides for the implementation by court decree of any property settlement agreement made by the parties in writing, unless "the court finds the agreement unconscionable." In this case the parties made no written agreement, but, as indicated, did agree as to the division of personal property by item, but not by valuation. Sec-

tion 42-366, R. R. S. 1943, also provides: "(6) Alimony may be ordered in addition to a property settlement award."

We conclude that consideration of the following circumstances of the parties requires that some alimony should be awarded to the wife in addition to the award of property: (1) The marriage was of about 12½ years duration. (2) The wife made, through her labors, substantial financial contributions through the early years of the marriage. (3) The earning capacity of the wife, although substantial, does not seem to have the same prospect for increase as does that of the husband. (4) Care of the children during their minority will fall largely upon the wife. (5) The wife's net share of the sale of the home will not provide a great amount of cash for investment in a home or income-earning property. We therefore modify the decree to provide that the husband shall pay to the wife alimony as follows: $200 per month for a period of 5 years beginning with the issuance of the mandate from this court, and the sum of $100 per month for the 5-year period thereafter. Such alimony shall terminate upon the death of either party, or the remarriage of the wife.

At the time of the separation of the parties they had family debts of about $2,800 which they acknowledged ought to be paid from the proceeds of the sale of the family home. After the separation, the husband borrowed $6,000 to pay the 1975 income tax and the further sum of $1,300 to pay deficiency on that year's tax, but which latter sum he testified he used to make house payments and for other expenses, including support of his family. After separation he also borrowed another $1,000 to meet current expenses. At the time of trial the income tax deficiency above-mentioned had not been paid. All these items the court directed be paid from the proceeds of the sale of the home. The wife argues that the approximate $2,300 of debts last above-men-

tioned ought not be considered as family debt payable out of the proceeds of the sale of the residence, but that it be charged wholly to the husband. We can see no reason to modify the trial court's disposition in this respect.

The wife offered evidence to prove that the husband was the beneficiary of a one-sixth interest in the estate of his grandmother who had recently died. The estate apparently was in the process of administration and no distribution had been made. The trial court sustained the husband's objections to this evidence and to the offer of proof in connection therewith. The wife contends that such evidence was admissible for the unlimited purposes above-stated and cites in support thereof our holding in Person v. Person, 189 Neb. 329, 202 N. W. 2d 629. The husband, on the other hand, contends the evidence was inadmissible and cites in support of his position our holdings in Breiner v. Breiner, 195 Neb. 143, 236 N. W. 2d 846; and Bliven v. Bliven, 190 Neb. 492, 209 N. W. 2d 168. In Person v. Person, *supra,* the husband was currently receiving income from property held jointly with his mother and was permitted by his mother to use portions of the income therefrom as compensation for services rendered in managing the property. Breiner v. Breiner, *supra,* seems not at all applicable because there we simply disapproved setting child support in amounts which would vary as the husband's future income fluctuated. In Bliven v. Bliven, *supra,* we said that a mere prospect or possibility of inheritance was not to be considered in setting the amount of present child support, noting that such payments are subject to modification as circumstances change.

Under the circumstances of this case we hold that it was within the trial court's discretion to decide what evidence it will consider. The reason is that the determination of the amount of alimony is subject to the sound discretion of the trial court con-

sidering the circumstances and the facts in each case. Bliven v. Bliven, *supra;* Person v. Person, *supra.* While the court might have received the evidence offered without committing error, it was not required to do so, and we find it did not abuse its discretion.

The wife argues that the allowance of $750 for the services of her attorney in the trial court is inadequate and does not represent the value of the services of her attorney in that litigation. The evidence supports this latter contention. However, there is no rule which requires the court to necessarily award attorney's fees in accordance with the value of the services in a divorce case. The award of attorney's fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. Badberg v. Badberg, 193 Neb. 844, 229 N. W. 2d 552; Olson v. Olson, 195 Neb. 8, 236 N. W. 2d 618. We believe that there was no abuse of discretion in not requiring the husband to pay all the wife's attorney fees in the court below.

The decree is affirmed as modified. The wife is awarded the sum of $1,000 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

STITT CONSTRUCTION COMPANY, APPELLEE, V. CANINE'S CUPID, INC., A CORPORATION, ET AL., APPELLANTS.

259 N. W. 2d 29

Filed November 9, 1977. No. 41193.

1. **Courts: Judgments: Appeal and Error.** The review in the District Court of a judgment of the municipal court in a civil action is de novo upon the record together with any additional evidence that may be received in the District Court.

2. _____: _____: _____. It is the duty of the District Court to reach an independent conclusion and consider the matter as if there had not been a prior determination in the municipal court.
3. _____: _____: _____. A judgment of the District Court will not be set aside by this court on appeal unless it is clearly wrong and not supported by the evidence.

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

Thomas C. Emery, for appellants.

Erickson, Sederstrom, Johnson & Fortune, for appellee.

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

BOSLAUGH, J.

This case arises out of a dispute concerning a construction contract. The plaintiff agreed to construct an animal clinic for the defendants for the sum of $113,500. The contract provided that with the exclusion of laying asphalt on the parking lot, all work should be substantially completed on or before March 1, 1973. The contract further provided for liquidated damages at the rate of $1,000 per month in the event any of the work was not completed by March 1, 1973.

The defendants moved into the building on April 27, 1973. At the time of final settlement the defendants withheld $1,866.67 as liquidated damages for the period March 1, 1973, through April 26, 1973. The plaintiff then brought this action to recover the balance due on the contract. The municipal court found that the defendants were entitled to liquidated damages in the amount of $1,866.67 but that the plaintiff was entitled to recover $250 on another disputed item and entered judgment for that amount. The plaintiff then appealed to the District Court.

After trial de novo upon the record the District Court found that the plaintiff was entitled to recover the entire balance due on the contract. The defend-

ants have appealed to this court and contend, in substance, that the record does not support the judgment of the District Court.

Much of the defendants' argument is devoted to a discussion of the proper standard of review in the District Court. The defendants argue that the District Court should resolve every controverted fact in favor of the party who was successful in the municipal court. This argument ignores section 24-541, R. R. S. 1943, which provides that the review in the District Court in civil cases shall be de novo upon the record.

Upon trial de novo it is the duty of the District Court to reach an independent conclusion without reference to the decision of the county court. Phillippe v. Barbera, 195 Neb. 727, 240 N. W. 2d 50. Where, as in this case, no additional evidence is received in the District Court, the decision must be based upon the evidence which was presented in the municipal court. The District Court is required to make its own decision and consider the matter as if there had not been a prior determination in the municipal court. See Von Seggern v. Kassmeier Implement, 195 Neb. 791, 240 N. W. 2d 842.

The contract contained a provision that if the progress of the work was delayed by changes ordered in the work, unavoidable casualties, or causes beyond the contractor's control, the contract time should be extended by change order for such reasonable time as the architect might determine. The evidence shows that the contractor made requests for extensions of the contract time but the architect failed to act on them. There was evidence of a trade custom that if a request is not denied the contractor may assume it has been granted.

There were a number of other matters in dispute and upon which the evidence was in conflict. There was evidence that the plaintiff, and other contractors in the same area, were delayed by severe

weather conditions; that the plaintiff was delayed by improper zoning during a part of the construction time; that there was a delay in construction of an access road by the developer which at times prevented heavy equipment from reaching the construction site; and that changes in the building were made at the request of the defendants. There was also evidence that the defendants' claim for liquidated damages was based in part upon delay in the asphalt work, but the asphalt work was not covered by the liquidated damage provision. Upon this evidence the District Court concluded that the delay resulted from causes beyond the contractor's control and that the defendants were not entitled to recover liquidated damages.

The review in this court of a law action is not de novo. A judgment of the District Court will not be set aside by this court on appeal unless it is clearly wrong and not supported by the evidence. See Fauss Constr., Inc., v. City of Hooper, 197 Neb. 398, 249 N. W. 2d 478. The evidence in this case, although in conflict, sustains the judgment of the District Court. The judgment must, therefore, be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEPHEN H. HOPPER, APPELLANT.

259 N. W. 2d 31

Filed November 9, 1977. No. 41273.

Sentences: Probation and Parole. An order or sentence of the trial court which denies probation will not be overturned by this court on appeal unless there has been an abuse of discretion.

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

T. Clement Gaughan and Thomas L. Hagel, for appellant.

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

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

WHITE, C. J.

Defendant originally was charged with robbery. This charge was amended to one of assault with intent to commit robbery. Defendant entered a plea of guilty to the amended charge and was sentenced by the District Court to a term of 2 to 4 years imprisonment in the Nebraska Penal and Correctional Complex. Defendant appeals.

Defendant's contention on appeal is that his sentence is excessive and that he should have received probation.

An order or sentence of the trial court which denies probation will not be overturned by this court on appeal unless there has been an abuse of discretion. State v. Leal, 198 Neb. 233, 252 N. W. 2d 167 (1977).

The record and presentence report show that defendant came to the victim's apartment door and represented himself as a repairman sent by the manager of the apartment complex to work on some electricial wiring in the victim's apartment. After working on an electrical box for a few minutes he asked the victim for a screwdriver. The victim indicated that she did not have a screwdriver, but offered to give the defendant a kitchen knife. After the victim had given the defendant the knife, the defendant came up behind her and held the knife to her throat, demanding money and a car. The victim told defendant that she had no money, but that her roommate had a bicycle. The defendant then ordered the victim to undress. After she had undressed, defendant pushed her toward the bedroom. No sexual assault, however, took place. The defendant then demanded the bicycle and left the premises on it.

We find no abuse of discretion by the District Court in concluding that the defendant should be incarcerated instead of receiving probation.

Defendant's sentence was within statutory limits and as such will not be disturbed on appeal absent an abuse of discretion. State v. Gillham, 196 Neb. 563, 244 N. W. 2d 177 (1976).

The above narrative of this violent crime is sufficient to lay rest to the contention that defendant received an excessive sentence.

The judgment and sentence of the District Court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HARLEY KEETON, APPELLANT.

259 N. W. 2d 277

Filed November 9, 1977. No. 41280.

1. **Intent.** Intent is seldom capable of direct proof. It may, however, be inferred from the words and acts of the defendant, and from the facts and circumstances surrounding his conduct.
2. **Arson: Words and Phrases.** The corpus delicti in an arson case consists of two elements, the burning of the property and the criminal act of someone in causing the burning.
3. **Arson: Evidence.** In order to establish the corpus delicti in an arson case, it is necessary that the evidence disclose the burning of the property as charged, and that the burning was caused by the willful act of some person criminally responsible.
4. **Evidence: Criminal Law.** To justify a conviction on circumstantial evidence it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence.
5. **Criminal Law: Verdicts: Evidence.** After a jury has considered the evidence in the light of the rule concerning circumstantial evidence and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt.

Appeal from the District Court for Richardson County: WILLIAM F. COLWELL, Judge. Affirmed.

Douglas E. Merz of Weaver, Beekman & Merz, for appellant.

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

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

SPENCER, J.

Defendant, Harley Keeton, appeals his conviction for first-degree arson. He argues his conviction is contrary to the evidence and the law in that the evidence fails to show: (1) The fire was the result of arson; (2) the defendant intentionally set the fire; and (3) that a crime in fact had been committed. We affirm.

Defendant was charged with willfully, maliciously, and feloniously setting fire to a two-story frame dwelling house in Humboldt, Nebraska. A policeman testified when he drove past the house at 12:30 a.m. on September 28, 1976, there were no cars in front of it. Fifteen minutes later, when he again passed the house, he observed a 1969 or 1970 Chevrolet parked on the wrong side of the street, in front of the house. The car had a county 54 license plate. There was a small black and white dog sitting in the rear window.

The policeman was called to the scene of a fire at the house 20 minutes later. When he arrived he noticed a tan Chevrolet bearing county 54 license plates. There was a small black and white dog inside the car. He was "almost positive" this was the same car he observed earlier. When shown photographs of defendant's car, he stated it was the car he had seen on the night of the fire. When he saw the car the second time it had been moved, the engine was running, and the lights were on. He ob-

served a man whom he identified as the defendant walk from the house, which was unoccupied, and get into the car. When the defendant started to drive forward, the policeman stopped him and told him he could not drive over the fire hose. The policeman thought the defendant appeared to be confused.

The State Fire Marshal testified that, when he investigated the fire later that morning, he noticed the smell of gasoline where the fire had been. He gave the following opinion as to the origin of the fire: "It was started by flammable liquids poured on the side of the front of the house, underneath the porch, and it came down on the side of the house, down onto the floor, and it ignited and, the fire, the direction of the fire, on the floor, went up the side of the house and around the roof and on up to the peak."

The Fire Marshal interrogated the defendant later that day at the Humboldt police station. Defendant told him he could not sleep on the night of the fire, and had driven to Humboldt from his home in Table Rock. He was returning home and was about 4 miles from Humboldt when he heard the fire siren. He went back to Humboldt and watched the fire. When asked if he had set the fire, defendant replied that he could have but he didn't remember. This testimony was corroborated by the former chief of police of the City of Humboldt and a deputy state fire marshal, who were present at the questioning.

The chief of police testified he was present during the fire and noticed a strong smell of gasoline or some other petroleum product. The odor was strongest near the east side of the porch. He removed some wood fragments from the porch and sent them to the state criminalistics laboratory for analysis. The laboratory report reads in part: "From gas chromatographic examinations of the wood extracts from Q1, it was determined that a mixture of hydrocarbon residues were present.

These hydrocarbons were similar to partially burned gasoline residue."

The deputy state fire marshal was present during the questioning of the defendant. He heard the defendant say that he could have started the fire but that he didn't remember because he suffered from memory lapses. He testified defendant gave inconsistent statements when asked whether he had been in Humboldt prior to the fire.

The State introduced a funnel and a siphoning hose into evidence. These were discovered in the back seat of the defendant's car during a consent search. The State Fire Marshal testified defendant denied having these items. The funnel and hose both smelled of gasoline. The Fire Marshal testified that defendant's shoes also smelled of gasoline.

Defendant testified he could not sleep on the night of the fire and decided to take a drive, as he often did. When he arrived at the county line about 3 miles from Table Rock and 4 miles from Humboldt, he heard the fire siren and drove into Humboldt. He went to the scene of the fire and got out of his car to watch. When he was leaving he encountered a policeman who told him he could not drive over the fire hose. Defendant was acquainted with the house. He had stayed there for a few days several years previously. Defendant admitted he had driven by the house about a dozen times during the past year.

Defendant denied making a statement he had been in Humboldt that night prior to the fire. He admitted he told the investigators he did not have a funnel or hose in his car. His explanation was he had used the funnel 3 or 4 days earlier to fill a lawnmower and had thrown it in the back seat and forgotten about it. He testified the rubber hose which he said was in the trunk of the car had been used a year previously to feed gas into the car. He admitted it was possible he had gasoline on his shoes as he had been working

on a pickup that afternoon. He denied he could have set the fire but that he didn't remember. He had been treated for blackout spells. A week or 10 days before the fire he woke up in a driveway in Humboldt without knowing how he got there.

The record amply demonstrates a crime had been committed; the fire was the result of arson; and the evidence was sufficient to permit the jury to find the defendant was responsible for the act.

Intent is seldom capable of direct proof. It may, however, be inferred from the words and acts of the defendant, and from the facts and circumstances surrounding his conduct. The jurors were informed that before intent could be inferred from circumstantial evidence alone, it must be of such a character as to exclude every reasonable conclusion except that the defendant had the required intent, and if they had any reasonable doubt with respect to intent, they were required to find the defendant not guilty. The instruction given was No. 14.11 of the Nebraska Jury Instructions. It adequately submitted the question of intent to the jury.

The essential elements for conviction of arson are stated in Harms v. State, 147 Neb. 857, 25 N. W. 2d 287 (1946): "The corpus delicti in an arson case consists of two elements, the burning of the property and the criminal act of someone in causing the burning.

"In order to establish the corpus delicti in an arson case, it is necessary that the evidence disclose the burning of the property as charged, and that the burning was caused by the willful act of some person criminally responsible."

This case was proved by strong circumstantial evidence. In State v. Eickmeier, 187 Neb. 491, 191 N. W. 2d 815 (1971), we said: "To justify a conviction on circumstantial evidence it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence

beyond a reasonable doubt, and when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence.

"After a jury has considered the evidence in the light of the foregoing rule and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt."

From the evidence summarized above, the jury could determine beyond a reasonable doubt that the fire was of an incendiary origin. The presence of gasoline or a similar petroleum product in a large enough quantity to produce the heavy odor detected on the front outside walls and floor of the dwelling gives rise to a strong inference that the fire was started by the willful act of some person. Although the State did not produce the instrument that ignited the blaze, the frequent impossibility of such proof is obvious. The jury was properly instructed on the rules regarding circumstantial evidence. We find the evidence sufficient to sustain a rational theory of defendant's guilt.

The judgment is affirmed.

AFFIRMED.

FURMAN K. WARREN ET AL., APPELLANTS, V. PAPILLION SCHOOL DISTRICT NO. 27 ET AL., APPELLEES.

259 N. W. 2d 281

Filed November 9, 1977. No. 41314.

1. **Summary Judgments.** The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law.
2. **Schools and School Districts.** The power to determine the means of providing transportation for school attendance is discretionary with the board of education of each school district.

3. **Records: Evidence.** Official public records of governmental agencies which are not ambiguous ordinarily may not be modified by parol testimony in a collateral proceeding.
4. **Estoppel: Administrative Law.** The doctrine of equitable estoppel ordinarily cannot be invoked against a governmental entity in the exercise of governmental functions. Exceptions to the rule are made only where right and justice so demand; and the doctrine is to be applied with caution and only in exceptional cases under circumstances clearly demanding its application to prevent manifest injustice.
5. **Estoppel.** Estoppel is not a cause of action, nor does it give rise to one. Its purpose is to preserve rights already acquired and not to create new ones.
6. **Constitutional Law: Statutes.** In the area of economics and social welfare, a state does not violate the equal protection clause of the Constitution merely because a classification made by its laws is imperfect. If the classification bears a rational relationship to the legitimate purposes of the legislation, it is not in violation of the equal protection clause.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed.

L. W. "Jim" Weber and Stanley H. Foster, for appellants.

John P. Kelly and Dean F. Skokan, for appellees.

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

BRODKEY, J.

Plaintiffs and appellants in this case are taxpayers who reside in what was formerly the Ireland School District No. 35 of Sarpy County, Nebraska; and are the parents of students who presently attend the Papillion public schools and reside within a 4-mile radius of those schools. Defendants and appellees include the Papillion School District No. 27 and the members of the school board of that school district.

In September 1976, plaintiffs filed a petition in the District Court for Sarpy County, alleging that the defendants had illegally terminated school bus service to students residing in what was formerly the Ire-

land school district. Although five causes of action were set forth in the petition, plaintiffs' essential claim was that the former Ireland school district was merged into the defendant's school district in 1957; that at the time of the merger the school board of the Papillion school district orally promised that it would provide school bus service to students residing in the Ireland school district for an unlimited period of time; that the oral agreement to provide school bus service was in consideration of the Ireland school district's agreement to transfer their assets to, and merge with, the Papillion school district; and that the Papillion school district had continuously provided school bus service to students who reside in what was formerly the Ireland school district until 1976, when it terminated such service. Plaintiffs alleged that defendants had enjoyed the benefits of the oral agreement reached in 1957, and that they should now be estopped from denying the agreement or altering its terms.

Plaintiffs also alleged that section 79-490, R. R. S. 1943, is unconstitutional and contrary to public policy insofar as it provides for mandatory payment of transportation allowances for students only to those students who reside beyond a 4-mile radius of the schoolhouse in a school district. Although plaintiffs' petition included additional allegations that defendants' termination of school bus service was unlawful under various provisions of the Constitutions of Nebraska and the United States, the allegations described above are the ones pertinent to this appeal. The trial court sustained in part defendants' motion to strike certain allegations in the petition. These allegations referred to the irreparable harm plaintiffs would suffer if bus service was terminated, and to increased air pollution which would be caused by termination of bus service. Plaintiffs prayed for a judgment ordering defendants to provide school bus service to their children, or, in the alternative,

holding section 79-490, R. R. S. 1943, unconstitutional.

In their answer, defendants admitted that the former Ireland school district was merged into the Papillion school district in 1957, but denied the existence of an oral agreement as alleged by the plaintiffs. Attached to the answer as an exhibit were the written records of the merger which took place in 1957, and such records did not refer to any agreement in regard to the busing of students who reside in what was formerly the Ireland school district.

Both parties filed motions for summary judgment, and affidavits and testimony were introduced and received in evidence in support of the motions. Evidence introduced by plaintiffs indicated that in 1957 several school districts were interested in having the Ireland school district merged into their district because they wanted to broaden their tax base. School board members of the Papillion school district approached the school board of the Ireland school district to discuss merger, and subsequently the petitions were filed with the Sarpy County superintendent of schools requesting that the Ireland school district be permitted to merge with the Papillion school district. In their petitions, the qualified school electors and legal voters of the Ireland school district No. 35, and the school board members of the Papillion school district, requested that school district boundaries be changed to "add to and make a part of The School District of Papillion, in the County of Sarpy, in the State of Nebraska, all of the area included within the boundaries of School District No. 35 of Sarpy County, Nebraska, Provided that all bonded indebtedness incurred prior to the creation of the newly enlarged district shall remain the liability of the district which incurred it and shall not be a liability of the newly enlarged district." After finding that the petitions conformed to the requirements of the law, and holding a hearing, the Sarpy

County superintendent of schools ordered that the school districts be merged in the manner requested by the petitioners, but subject to the condition in regard to bonded indebtedness. The written records of the merger make no reference to any agreement by the Papillion school district to provide school bus service to students who reside in the former Ireland school district.

Witnesses testifying on behalf of the plaintiffs, including persons who were members of the two school boards at the time of the merger, indicated that at that time members of the Papillion school board orally promised the Ireland school board and residents of the Ireland school district that it would provide school bus service to students in the Ireland school district for an unlimited period of time in exchange for the Ireland school district's agreement to merge into the Papillion school district. These witnesses also stated that the Ireland school district agreed to give all its assets to the Papillion school district, and that this agreement was fulfilled. Evidence was introduced that in 1964 the Papillion school district considered the termination of school bus service to students residing in the former Ireland school district, but decided to continue such service when reminded of its prior oral commitment. It was not until 1976 that the school bus service was terminated, over objection of plaintiffs.

Plaintiffs also introduced evidence that termination of bus service would expose their children to hazardous conditions due to dangerous streets or roads which are not safe for children to transverse in walking to school, and due to a lack of facilities for pedestrians. Plaintiffs conducted a poll which indicated that many school districts in eastern Nebraska currently provide school bus service to children who live within a 4-mile radius of the district's schoolhouse.

The District Court overruled plaintiffs' motion for

summary judgment. The court found that even if an oral agreement were made in 1957, as alleged by plaintiffs, such oral agreement would not be binding on the present Papillion school board because it would remove from the board its discretionary power to make decisions concerning the transportation of students residing within a 4-mile radius of its schoolhouses. Section 79-490, R. R. S. 1943, was upheld as constitutional. In view of these findings, the court found there to be no material facts in issue, and awarded summary judgment in favor of the defendants.

Plaintiffs have now appealed to this court, contending that an oral contract such as the one they allege in their petition is enforceable; that defendants should be estopped from denying the oral contract; that section 79-490, R. R. S. 1943, is unconstitutional; and that therefore it was error to grant summary judgment in favor of defendants. Plaintiffs also contend that the District Court erred in striking certain allegations, referred to above, from their petition.

This appeal must be decided within the context of the rules regarding summary judgment. "The moving party is not entitled to summary judgment except where there exists no genuine 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 (1973). See, also, C. C. Natvig's Sons, Inc. v. Summers, 198 Neb. 741, 255 N. W. 2d 272 (1977); Reeves v. Associates Financial Services Co., Inc., 197 Neb. 107, 247 N. W. 2d 434 (1976).

The two principal issues in this case are (1) whether an oral contract such as the one alleged by the plaintiffs is enforceable; and (2) whether section 79-490, R. R. S. 1943, is constitutional. There is clearly an issue of fact presented as to whether the alleged oral agreement was made, and if so, what its

terms were; therefore summary judgment could only be properly granted in favor of defendants if, as a matter of law, the alleged oral agreement, even if existing, is unenforceable. If such an oral agreement can be held enforceable, summary judgment in favor of either party is improper because the parties dispute the existence of the oral agreement, and therefore a genuine issue as to a material fact exists. The constitutionality of section 79-490, R. R. S. 1943, can be properly determined on a motion for summary judgment because that issue presents only a question of law.

We first consider whether an oral agreement such as the one alleged by the plaintiffs is enforceable. Statutory provisions concerning the powers and duties of school boards in regard to the transportation of students are relevant as a background to this issue. Section 79-443, R. R. S. 1943, provides that the school boards of school districts shall "devise such means as may seem best to secure the regular attendance and progress of children at school." Section 79-487, R. R. S. 1943, authorizes school boards to purchase school buses for the purpose of providing transportation for school children to and from school. Section 79-490, R. R. S. 1943, provides, in relevant part, that when no other means of free transportation is provided to a student attending a public school, an allowance for transportation shall be made to the family of students who reside more than 4 miles from the schoolhouse. Such allowance is forty cents per mile for each mile or fraction thereof actually traveled by which the distance of the student's residence from the schoolhouse exceeds 4 miles.

It can be seen that school boards are under no statutory duty to provide actual bus service to any students. As stated in Connot v. Monroe, 193 Neb. 453, 227 N. W. 2d 827 (1975), the "power to determine the means of providing transportation for school at-

tendance is discretionary with the Board of Education'' of each school district. This court also noted in that case under the satutory scheme, particularly section 79-443, R. R. S. 1943, ''no power is conferred on the electors either in the first instance, or by veto, as to the selection of the methods of providing or 'securing' the attendance of pupils.'' See, also, Galstan v. School Dist. of the City of Omaha, 177 Neb. 319, 128 N. W. 2d 790 (1964).

Because defendants are under no statutory duty to provide school bus service to plaintiffs, such duty can only exist if the alleged oral contract is enforceable. It should be noted at the outset that it is questionable whether a school board acting in 1957 could bind all successive school boards in regard to an agreement concerning school bus service for an indefinite period of time, even if the agreement were in writing. See 78 C. J. S., Schools and School Districts, § 278, pp. 1255, 1256. The fact that the alleged agreement in this case is oral, however, presents a narrower question.

In Barrett v. Hand, 158 Neb. 273, 63 N. W. 2d 185 (1954), this court held that the proceedings and records of county commissioners pertaining to the establishment of a public road, required by law to be kept and which are not ambiguous, cannot be modified by parol testimony in a collateral proceeding. The reasons for this rule are to assure verity, certainty, and permanence; and to avoid the mischief which might result from leaving evidence of public acts to shifting sources and individual memories. Although Barrett v. Hand, *supra,* dealt with the records of county commissioners, the principles enunciated in that case are general ones which are applicable to all public records. In 30 Am. Jur. 2d, Evidence, § 1027, p. 162, it is stated to be a general rule ''that what ought to be of public record must be proved by the record and cannot be contradicted or enlarged by parol evidence.'' It is further stated, at

p. 163, that the "rule that public records cannot be contradicted or enlarged by parol evidence is not limited to records of formal official action, but applies as well to documents and other records of public officers and boards, such as the records of school boards, irrigation districts, and the like." See, also, 32A C. J. S., Evidence, § 876 et seq., p. 240. The rule is analogous to the parol evidence rule with respect to contracts. See Traudt v. Nebraska Public Power Dist., 197 Neb. 765, 251 N. W. 2d 148 (1977).

In the present case, the public record of the merger in 1957 consists of the petitions of the qualified school electors and legal voters of the Ireland school district, the petition of the school board members of the Papillion school district, and the order of the county superintendent. The latter provides that the Ireland school district should be added to the Papillion school district, subject to the provision requested by petitioners that all bonded indebtedness incurred prior to the creation of the newly enlarged Papillion school district should remain the liability of the district which incurred it. Neither the petitions nor the order of the county superintendent mention any agreement in regard to school bus service to students residing in what was formerly the Ireland school district.

Under Barrett v. Hand, *supra,* as well as the other authorities cited above, it is clear that parol evidence may not be received to contradict or enlarge what is contained in the public record of the merger. The petitions and the order of the county superintendent are the official public records of the merger, and the order indicates that the merger was carried out in the manner required by law. Plaintiffs do not attack the validity of the merger in this case, but simply argue that the written record is incomplete, and that an additional condition of the merger is not in the official, written record. Under the principles of law cited above, however, plaintiffs are precluded

from now enlarging the official record by evidence of an oral agreement.

Plaintiffs contend that the doctrine of equitable estoppel should be applied in this case, and that the defendants should be estopped from denying that they are obligated to provide bus service to the plaintiffs. Plaintiffs rely on the case of May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448 (1945), in which this court held that a city was estopped from selling general obligation bonds to acquire certain property when it had previously submitted to the electorate the question of whether the city should sell revenue bonds, and the electorate had rejected the proposal. The city had represented to the electorate that if the revenue bond proposal was rejected, the property would not be acquired. Under the facts of that case, this court found an exception to the general rule that the doctrine of estoppel will not ordinarily be applied against any governmental agency, acting in its public capacity. See, also, 28 Am. Jur. 2d, Estoppel and Waiver, § 133, p. 802.

Although May v. City of Kearney, *supra,* indicates that the doctrine of estoppel may be applied against governmental entities in compelling circumstances, the "limitations upon the May case have been recognized in many subsequent cases. Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation. * * * Exceptions are made only where right and justice so demand. The doctrine is to be applied with caution and only in exceptional cases under circumstances clearly demanding its application to prevent manifest injustice." Christian v. Geis, 193 Neb. 146, 225 N. W. 2d 868 (1975). See, also, Hayes v. Sanitary & Improvement Dist. No. 194, 196 Neb. 653, 244 N. W. 2d 505 (1976); Talbott v. City of Lyons, 171 Neb. 186, 105 N. W. 2d 918 (1960); Vakoc Constr. Co. v. City of Wayne, 191 Neb. 45, 213 N. W. 2d 721 (1974).

We do not believe the present case to be an ex-

ceptional one presenting circumstances clearly demanding the application of equitable estoppel to prevent manifest injustice. At the time the alleged representations were made by defendants concerning school bus service, the Ireland school district was entirely a rural area, and only 10 to 15 students resided in that area. At the present time more than 90 students reside in that area, as there has been housing development since the time of the merger. Furthermore, it appears from the oral argument of this case that a new schoolhouse has been built since the merger, and apparently plaintiffs reside within a 1-mile radius of the new schoolhouse.

Finally, it is clear that an estoppel is not a cause of action, nor does it give rise to one. Its purpose is to preserve rights already acquired and not to create new ones. Clark & Enersen, Hamersky, S., B. & T., Inc. v. Schimmel Hotels Corp., 194 Neb. 810, 235 N. W. 2d 870 (1975); State v. Bardsley, 185 Neb. 629, 177 N. W. 2d 599 (1970). Plaintiffs failed to preserve any rights with respect to school bus service in the public record of the merger, and cannot now create such rights by means of estoppel.

Plaintiffs also contend that section 79-490, R. R. S. 1943, is unconstitutional. That section provides for a transportation allowance for the family of students when no other means of free transportation is provided by a school board. Such allowance is provided to certain students who live more than 4 miles from the public schoolhouse, who "shall be paid for each day of attendance forty cents per mile for each mile or fraction thereof actually traveled by which the distance of the residence of such student from the schoolhouse exceeds four miles; * * *." Although plaintiffs attack section 79-490 on several grounds, their primary contention, and the only one meriting discussion, is that the "four-mile rule" set forth in section 79-490 is arbitrary and capricious, and results in classification in violation of equal pro-

tection of law. Plaintiffs also contend that the 4-mile rule is unconstitutional as applied because school districts other than the Papillion school district provide bus service to students residing within 4 miles of the schoolhouse; and because tax assessments are the same for all property owners in a school district, but persons living within a 4-mile radius of the schoolhouse are denied services which are received by persons living beyond a 4-mile radius.

Contrary to plaintiffs' contention, section 79-490, R. R. S. 1943, does not deny persons living within a 4-mile radius of the schoolhouse services which are received by persons residing beyond the 4-mile radius. Under section 79-490, those students residing more than 4 miles from the schoolhouse receive an allowance only for the distance between their home, and the 4-mile limit. All students, irrespective of where they live, bear the cost of traveling the last 4 miles to the schoolhouse when a schoolboard elects not to provide busing service. Therefore the only question presented is whether the Legislature can provide a transportation allowance for the distance a student travels beyond 4 miles.

In the area of economics and social welfare, a state does not violate the equal protection clause merely because a classification made by its laws is imperfect. If the classification has some reasonable basis it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. See, Botsch v. Reisdorff, 193 Neb. 165, 226 N. W. 2d 121 (1975); Dandridge v. Williams, 397 U. S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). The 4-mile rule set forth in section 79-490, R. R. S. 1943, clearly has a reasonable basis. The Legislature may certainly conclude that where a school district provides no free transportation, the families of students who happen to live a great distance from the schoolhouse should be granted a transportation

allowance so that their costs of transportation will be approximately the same as the majority of students who live in close proximity to the schoolhouse. Some limitation in terms of miles may be established, and a 4-mile limitation is reasonable and not without a rational basis. The limitation in section 79-490 bears a rational relationship to the legitimate purposes of the legislation, and therefore the section is not unconstitutional as being in violation of equal protection. Botsch v. Reisdorff, *supra.*

Section 79-490, R. R. S. 1943, is also not unconstitutional as applied in this case. The fact that some school boards in this state do provide free transportation service to students residing within 4 miles of the schoolhouse does not support the claim that the Papillion school board is acting unconstitutionally when it does not provide such service. No school board is under a statutory duty to provide bus service or a transportation allowance to students residing within 4 miles of the schoolhouse. School boards in different districts may well respond differently when exercising their discretion in regard to transportation service for students, as relevant considerations are unique to each school district.

The final contention of the plaintiffs is that the District Court erred in striking from their petition allegations which referred to the amount of air pollution which would be caused by the termination of bus service to plaintiffs, and to the irreparable harm plaintiffs would suffer if bus service was terminated. In light of the conclusions we have reached, the striking of these allegations, even if error, was not prejudicial, as such allegations were peripheral to the primary issue of whether the alleged oral agreement was enforceable.

We have reviewed the contentions of the plaintiffs and find them to be without merit. Therefore the judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EMMIT BODEN, APPELLANT.

259 N. W. 2d 32

Filed November 9, 1977. No. 41509.

Sentences: Probation and Parole. An order or sentence of the trial court which denies probation will not be overturned on appeal unless there has been an abuse of discretion.

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

T. Clement Gaughan and Toney J. Redman, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

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

WHITE, C. J.

The defendant was charged with petit larceny, second offense. Pursuant to a plea bargain, in which another petit larceny charge was dismissed, the defendant pled guilty. The District Court sentenced the defendant to a term of 1 year imprisonment in the Nebraska Penal and Correctional Complex with credit given for 84 days jail time.

The defendant appeals, contending that his sentence was excessive. He argues that he should have received probation. An order or sentence of the trial court which denies probation will not be overturned on appeal unless there has been an abuse of discretion. State v. Swails, 195 Neb. 406, 238 N. W. 2d 246 (1976).

The presentence investigation report shows that the defendant was, previously to this offense, convicted of disturbing the peace, petit larceny, trespass, carrying a concealed weapon, and in possession of stolen goods. It is apparent that the defendant's previous encounters with the law have failed to

impress upon him the serious nature of his conduct. It certainly was no abuse of discretion for the trial court to conclude that a period of incarceration might accomplish this. The defendant received the minimum sentence under section 28-512, R. R. S. 1943. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. We find no abuse of discretion here.

The judgment and sentence of the District Court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. NIGEL DAVIS, APPELLANT.

259 N. W. 2d 33

Filed November 9, 1977. No. 41533.

1. **Criminal Law: Sentences.** Age is a factor meriting consideration in reducing a sentence.
2. _____: _____. When the punishment of an offense is left to the discretion of a court to be exercised within certain statutorily prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

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

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

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

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

WHITE, C. THOMAS, J.

Nigel Davis, the defendant and appellant herein, was charged in the District Court for Lancaster County with robbery and the use of a firearm in the

commission of a felony. Defendant pled guilty to the robbery charge and the charge of use of a firearm in the commission of a felony was dropped. Defendant was sentenced to imprisonment in the Nebraska Penal and Correctional Complex for a term not less than 3 nor more than 6 years. Credit was given for jail time prior to sentencing. He has appealed to this court contending that the sentence imposed was excessive. We affirm.

Defendant was 16 years old. The record discloses that defendant, while in the company of another youth, robbed the Kellogg Center on the East Campus of the University of Nebraska-Lincoln. The robbery was conducted at gunpoint. A clerk was struck and knocked down upon refusing to open the vault. A shot was accidentally fired through a window as the youths fled.

The defendant asks this court to consider sentencing in light of his age and the impact exposure to habitual criminals for a substantial amount of time will have on his future. The defendant directs the court's consideration to reducing the sentence to the minimum term of 3 years.

This court has held that age is a factor meriting consideration in reducing a sentence. State v. Etchison, 188 Neb. 134, 195 N. W. 2d 498. Here, the age factor is overshadowed by the defendant's prior behavior which shows that, despite chronological age, he is a seasoned veteran of criminal conduct. While the defendant was 16 years of age at the time of this particular crime, his police record began with a breaking and entering incident at age 9. The presentence report shows this first adult felony offense is the culmination of an extensive juvenile record. The defendant has been involved in numerous incidents, usually concerning larceny or assault.

According to the presentence report, the defendant is the product of a deprived home environment. Defendant's initital criminal behavior may be attrib-

uted, in part, to such environment, but successive placements have failed to achieve any reformation in defendant's behavior or in his attitude. The presentence report and record indicate a pattern of progressively more violent criminal behavior. Defendant has been placed unsuccessfully in two foster homes and has spent time at the Lincoln Regional Center and Youth Development Center in Kearney. In evaluating the defendant's history of conduct and attempts to rechannel it on a more productive course, the District Court observed that "Everything else has been tried" in this case.

The serious concern the District Court showed in weighing the age factor prior to imposition of sentence is apparent from the record. In one last really desperate attempt on its part, the District Court ordered defendant committed to the Nebraska Department of Corrections for a 90-day evaluation period prior to sentencing. There is evidence that during this period of confinement, defendant committed an assault. The evaluation recommended defendant be sentenced to the Nebraska Penal and Correctional Complex as the only appropriate alternative since a very poor prognosis tended to eliminate probation.

We are not insensitive to defendant's age. As defendant points out, the present sentence will expose him to contact with habitual criminals for a significant amount of time. Sensitivity to age, however, must be weighed against the realities the defendant's situation presents. The defendant has been charged with a serious crime with potential violent implications. This crime is the latest in a continuing series of criminal incidents, marked by a progressively violent behavior pattern. Defendant asks that we pause and consider his age because the script is so often the same: Lack of parental supervision, juvenile problems, lengthy penal term, habitual criminal. Here, defendant has provided his own script which has said again and again "to be contin-

ued." Defendant's behavior reveals that he has become a serious threat to society and must be treated accordingly, regardless of age.

Section 28-414, R. R. S. 1943, provides the punishment for robbery is imprisonment in the Nebraska Penal and Correctional Complex for not less than 3 nor more than 50 years. Here, the defendant received a term of 3 to 6 years. When the punishment of an offense is left to the discretion of a court to be exercised within certain statutorily prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Kolzow, 195 Neb. 93, 236 N. W. 2d 837. The sentence imposed is well within the statutorily permissible limits. Its imposition was the result of the District Court's careful evaluation of all the circumstances surrounding the defendant's present and past behavior. The sentence of the District Court is therefore affirmed.

AFFIRMED.

STATE OF NEBRSKA, APPELLEE, V. WALTER TRUSDALE, APPELLANT.

259 N. W. 2d 35

Filed November 9, 1977. No. 41567.

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

T. Clement Gaughan and Dennis G. Carlson, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

BOSLAUGH, J.

The defendant was originally charged with two

counts of burglary and one count of motor vehicle theft. Pursuant to a plea bargain the information was amended to charge burglary in the first count and unlawful use of an automobile, a misdemeanor, in the second count. A misdemeanor charge of possession of marijuana was also dismissed. The defendant pleaded guilty to the amended information and was sentenced to imprisonment for 15 to 30 months on the first count and to 90 days in jail on the second count and fined $100. The sentences were to be served concurrently, but consecutively to sentences the defendant was then serving. The defendant has appealed and contends the sentences imposed were excessive.

The offenses involved in this case were committed while the defendant was out on bail for earlier charges of defrauding an innkeeper and second offense petit larceny. He failed to appear for sentencing on the prior offenses and was apprehended in Wichita, Kansas, on a bench warrant.

The defendant is 18 years of age and has a 7th grade education. He has a long history of juvenile offenses commencing with burglary at the age of 13. The defendant does not contend that he was a proper subject for probation, but suggests that the sentence on the first count should be reduced to 1 years imprisonment. In view of the defendant's record and the serious nature of the offenses committed, the sentences imposed were not excessive.

The defendant also objects to the sentence on the first count because of his age. The defendant argues that the effect of sending a young man to the penal complex could be devastating because of the abuse he probably will receive from the older inmates. The argument is not without force and has some factual support in the presentence investigation report.

The argument illustrates a problem that faces each trial judge in this state who must impose a sen-

tence of imprisonment upon a youthful offender. So far as the disposition of this appeal is concerned the answer to the defendant's argument is that any problems which may exist in the penal institutions of this state cannot be solved by refusing to sentence prisoners to incarceration where the facts and circumstances of the case indicate that imprisonment is the proper sentence.

Age is a proper matter to be considered, but it is not a controlling circumstance in this case. The defendant is not a first offender and has demonstrated that he has no respect for law or the rights of others. Protection of the public requires that the defendant be imprisoned.

The judgment of the District Court is affirmed.

AFFIRMED.

AMERICAN LEGION LEO BRINDA POST NO. 90, A CORPORATION, AND VETERANS OF FOREIGN WARS POST NO. 5138, A CORPORATION, DOING BUSINESS AS "VETERANS CLUB," 256 NORTH MAIN STREET, VALENTINE, NEBRASKA, APPELLEES, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.

259 N. W. 2d 36

Filed November 9, 1977. No. 41662.

1. **Statutes: Appeal and Error: Time.** Section 25-1912, R. R. S. 1943, makes the filing of the notice of appeal and the payment of the docket fee within 1 month mandatory.
2. **Supreme Court: Appeal and Error: Time: Statutes.** The Supreme Court has no power to exercise appellate jurisdiction in proceedings to review the judgment of the District Court in civil cases unless the appellant shall have filed a notice of appeal and deposited a docket fee in the office of the clerk of the District Court within the time fixed and as provided in section 25-1912, R. R. S. 1943.

Appeal from the District Court for Cherry County: HENRY F. REIMER, Judge. On motion to dismiss appeal. Motion to dismiss appeal sustained. Dismissed.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellant.

William Quigley, for appellees.

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

SPENCER, J.

This case comes on for consideration on a motion of appellees to dismiss for failure of the appellant, Nebraska Liquor Control Commission, to deposit the docket fee with the clerk of the District Court within the time limited by section 25-1912, R. R. S. 1943. We sustain the motion to dismiss.

On July 21, 1977, the District Court for Cherry County entered an order overruling the motion of appellant for a new trial. On August 2, 1977, appellant filed a notice of appeal. The docket fee, however, was not filed with the clerk of the District Court until August 31, 1977, or more than 1 month after the overruling of the motion for a new trial.

Section 25-1912, R. R. S. 1943, provides, so far as material herein: "The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, * * * shall be by filing in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within one month after the rendition of such judgment or decree, or the making of such final order, or within one month from the overruling of a motion for a new trial in said cause, a notice of intention to prosecute such appeal * * * and * * * by depositing with the clerk of the district court the docket fee required by law in appeals to the Supreme Court."

In Barney v. Platte Valley Public Power & Irr. Dist., 144 Neb. 230, 13 N. W. 2d 120 (1944), we held the Legislature intended that the filing of the notice

of appeal and the depositing of the docket fee "in the office of the clerk of the district court" are both mandatory and jurisdictional.

This holding has been reiterated in substance on many occasions since that time. In Radil v. State, 182 Neb. 291, 154 N. W. 2d 466 (1967), we held: "The right to appeal is statutory and the requirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action."

The Radil case and all the more recent cases considered by this court have involved a notice of appeal, and not the deposit of the docket fee. However, as we held in Barney v. Platte Valley Public Power & Irr. Dist., 144 Neb. 230, 13 N. W. 2d 120 (1944), section 25-1912, R. R. S. 1943, makes the filing of the notice of appeal *and* the payment of the docket fee within 1 month mandatory. The Supreme Court has no power to exercise appellate jurisdiction in proceedings to review the judgment of the District Court in civil cases unless the appellant shall have filed a notice of appeal and deposited a docket fee in the office of the clerk of the District Court within the time fixed and as provided in section 25-1912, R. R. S. 1943.

The motion to dismiss the appeal herein is sustained, and the appeal is dismissed.

MOTION TO DISMISS APPEAL SUSTAINED; APPEAL DISMISSED.

EDMUND E. KRAUTER ET AL., APPELLEES AND CROSS-APPELLANTS, V. LOWER BIG BLUE NATURAL RESOURCES DISTRICT, A BODY POLITIC AND CORPORATE, APPELLANT AND CROSS-APPELLEE.

259 N. W. 2d 472

Filed November 16, 1977. No. 41117.

1. **Eminent Domain.** The power of condemnation may not be used to condemn property in excess of that needed for public purposes.

2. **Eminent Domain: Legislature.** The power of eminent domain may be exercised only on the occasion and in the mode or manner prescribed by the Legislature, and statutes conferring and circumscribing such power must be strictly construed.
3. **Eminent Domain: Natural Resources Districts.** A natural resources district, in exercising the power of eminent domain, must have a present plan and a present public purpose for the use of the property before it is authorized to commence a condemnation action.
4. **Eminent Domain.** In a condemnation action, under the power of eminent domain, the condemner must allege the specific public purposes for which the condemner seeks to acquire and use the property sought to be taken.
5. **Courts: Attorney's Fees.** An appellate court will interfere with a trial court's allowance of attorneys' fees only to correct a patent injustice where the allowance is clearly excessive or insufficient.

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

Everson, Noble, Wullschleger, Sutter & Fischer, for appellant.

Asa A. Christensen of Christensen Law Offices and Joseph T. Vosoba of Steinacher & Vosoba, for appellees.

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

MCCOWN, J.

This is a condemnation action in which the condemner, Lower Big Blue Natural Resources District, sought to condemn the fee title to 320 acres of farmland in Gage County, Nebraska, for the purpose of constructing, operating, and maintaining a detention-type flood control dam. The appraisers appointed by the county court appraised the property at $153,560, and the condemnee owners, Edmund E. and Neva M. Krauter, appealed to the District Court. The District Court found that the only public purpose for the condemnation was the construction and maintenance of the detention-type dam; that such a public purpose required only 140.68 acres;

and that the evidence introduced did not establish that it was reasonably necessary to acquire a fee title to the 140.68 acres rather than an easement. The District Court thereupon dismissed the action. The condemner has appealed.

The condemner, Lower Big Blue Natural Resources District, came into existence on July 1, 1972. See, generally, §§ 2-3201, R. R. S. 1943, et seq. The district included portions of Gage, Saline, Jefferson, and Pawnee counties. The condemner assumed the assets, liabilities, and programs of several predecessor organizations, including the Clatonia Creek Watershed Conservancy District. The Clatonia district, in 1966, had adopted a work plan for flood prevention and erosion control within its boundaries. Included in the plan was the floodwater retention dam proposed to be located on the condemnees' land. That structure was designated as structure 3-A and called for 140.68 acres of condemnees' land for the structure and its related permanent and flood pools. The dam and spillway required approximately 14 acres, the permanent pool 46 acres, and the flood pool about 81 acres. The plan designated its purpose to be the prevention of flooding and soil erosion. The plan did not contemplate or provide for any recreational or other public use of structure 3-A.

In October 1973, the condemner wrote to the condemnees advising them that it would begin negotiations within 90 days to obtain "land rights involving 140.68 acres." They were also informed of a public hearing on the project, which they attended on October 23, 1973. The only purpose for structure 3-A and related pools discussed was flood control. On February 25, 1974, an agent of the condemner made an offer to the condemnees for an easement on the 140.68 acres, which was rejected. The condemner had the land appraised for purposes of an easement on 140.68 acres and damages to the remainder, and,

in the alternative, for acquisition of a fee title to the entire 320 acres. On July 3, 1974, the condemner commenced negotiations with the condemnees to acquire a fee title to the entire 320 acres. An offer was made, and later increased, but the offers were not accepted. This condemnation action was commenced on December 3, 1974.

The petition set forth that the condemner was organized and responsible for, and in the process of, developing and executing plans and programs for some of the purposes set forth in sections 2-3201 to 2-3261, R. R. S. 1943; that such plans and programs required the construction and maintenance of a detention-type dam designated as site 3-A on the land of the condemnees and made it necessary that a fee title to the 320 acres of condemnees' land be acquired "for the purpose of or in connection with construction, operation, maintenance and inspection of a detention-type dam, designated as Site 3-A in the plans for Clatonia Creek Watershed Conservancy District." Appraisers were appointed in the county court and reported and fixed the value of the fee title to the 320 acres of condemnees' land at $153,560.

The condemnees appealed to the District Court. Their petition alleged in substance that the taking was not for a public purpose; was beyond the needs of the condemner; the condemner intended to subsequently resell the land; and, finally, that the amount was inadequate. Following extended discovery and a pretrial conference, trial was had to the court on March 15, 1976, on the issue of whether the condemnation was for a public purpose. The issue of damages was not considered. There was evidence that the first time the condemner took any official action which indicated any prospective public use other than flood control for the site involved here was on July 31, 1975. On that date the condemner adopted 1 and 6-year plans which provided that for fiscal year 1976 condemner would investigate the feasibility of

using the water stored by structure 3-A as municipal water supply to the Village of Clatonia, and initiate studies for use of structure 3-A waters for public recreation; and in subsequent fiscal years developing and carrying out such plans as might be adopted.

The District Court found that the only public purpose for the condemnation of the dam site was flood and erosion control; that such a public purpose required only 140.68 acres; and that the evidence introduced did not establish that it was reasonably necessary to acquire a fee title to the 140.68 acres, rather than an easement. The District Court also found that before condemnation proceedings are commenced, a condemner must determine by some appropriate action which permissible public uses it intends to implement by the taking and set them out in its pleadings. The court also found that the condemner cannot justify a taking by a subsequent adoption of public purposes not adopted or pleaded when the action was instituted and requiring other land and rights. The District Court thereupon dismissed the action and this appeal followed.

In this case the evidence is undisputed that only 140.68 acres of the condemnees' farm was actually needed for the purpose of constructing the dam and pooling areas for flood and erosion control. The remaining 179.32 acres was excess land which was not needed for flood control purposes. The condemner contends that the excess land was being acquired for possible future public use. The condemnees contend that the land was not being acquired for any public purpose or use, but, instead, was being acquired solely to produce a profit from a subsequent sale of the land, and thus defraud the condemnees.

Section 2-3229, R. R. S. 1943, provides in part: "The purposes of natural resources districts shall be to develop and execute, through the exercise of powers and authorities contained in this act, plans, facilities, works and programs relating to (1) ero-

sion prevention and control, (2) prevention of damages from flood water and sediment, (3) flood prevention and control, * * * (5) water supply for any beneficial uses * * * (10) development and management of fish and wildlife habitat, (11) development and management of recreational and park facilities, and * * *. All such plans and programs are to be in conformance with the goals, criteria and policies of the state water plan as developed by the Nebraska Natural Resources Commission; * * *." Under this section, plans and programs for development and management of fish and wildlife habitat and recreational and park facilities must be in conformance with the fish and wildlife plan for Nebraska as developed by the Game and Parks Commission. Such plans and programs must be approved in writing by the Game and Parks Commission prior to their adoption or development.

Section 2-3234, R. R. S. 1943, provides in part: "Each district shall have the power and authority to exercise the power of eminent domain when necessary to carry out the purposes of this act within the limits of the district or outside its boundaries. Exercise of eminent domain shall be governed by the provisions of sections 76-704 to 76-724; * * *." Section 76-714, R. R. S. 1943, provides: "The interest in the property acquired by the condemner shall be such title, easement, right-of-way, or use as is expressly specified in or necessarily contemplated by the law granting to the condemner the right to exercise the power of eminent domain. The condemner shall not dispossess the condemnee until the condemner is ready to devote the property to a public use, and such title or interest as the condemner seeks to acquire shall not be complete until the property is put to the public use for which taken."

It is beyond dispute that private property can be taken by the exercise of the power of eminent domain only for a public use. The rule is well estab-

lished in this state that a condemner can take no more property than the public use requires. Carter v. State, 198 Neb. 519, 254 N. W. 2d 390. In Burnett v. Central Nebraska Public Power & Irr. Dist., 147 Neb. 458, 23 N. W. 2d 661, this court said: " ' * * * no more property can be taken than the public use requires; this rule applies both to the amount of property and the estate or interest in such property to be acquired by the public. * * *.' "

In cases involving an attempt to acquire an amount of land in excess of that actually needed for a particular public improvement, the authorities uniformly follow the principle that the power of condemnation may not be used to condemn property in excess of that needed for public purposes. See, Annotation, "Right to condemn property in excess of needs for a particular public purpose." 6 A. L. R. 3d 297.

The power of eminent domain may be exercised only on the occasion and in the mode or manner prescribed by the Legislature, and statutes conferring and circumscribing such power must be strictly construed. See, State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683; Higgins v. Loup River Public Power Dist., 157 Neb. 652, 61 N. W. 2d 213.

The condemner argues that it has the power to condemn property for public purposes, if there is a probability, or even a possibility, that it might be needed and used for a public purpose in the future. We cannot agree.

Under the statutes governing the exercise of the power of eminent domain by natural resources districts a condemning agency must have a present plan and a present public purpose for the use of the property before it is authorized to commence a condemnation action. Section 76-714, R. R. S. 1943, specifically provides that a condemning agency shall not "dispossess" the condemnee until the condemner is ready to devote the property to a public use. Dispossess means "to oust from land by legal

process; to eject, to exclude from realty." Black's Law Dictionary (4th Ed). The Legislature has clearly limited the exercise of the power of eminent domain by a natural resources district to situations in which the condemning agency has a present plan and a present public purpose for the use of the property to be acquired. The possibility that the condemning agency at some future time may adopt a plan to use the property for a public purpose is not enough to justify a present condemnation.

The condemner contends that it is not required to plead or prove the specific public purpose for which the excess land is being condemned. It takes the position that the general allegation that it has the power of condemnation for the various purposes set out in the statute, and that the land is needed for those purposes, is sufficient. The condemner's position, in effect, is that general allegations of public purpose and necessity are not subject to the challenge, and the condemner is not required to allege or prove the particular public purposes for which the property is to be condemned and used. We disagree. The condemnation statute contemplates that a condemning agency shall establish by the pleadings its right to exercise the power of eminent domain to take the particular property sought to be condemned.

Section 76-714, R. R. S. 1943, provides "such title or interest as the condemner seeks to acquire shall not be complete until the property is put to the use for which taken." Section 2-3229, R. R. S. 1943, requires that any plan for the development and management of fish and wildlife habitat or recreational and park facilities must be approved in writing by the Game and Parks Commission prior to its adoption or development by the natural resources district. The right to exercise the power of eminent domain for those particular purposes might well be difficult to determine in the absence of specific pleadings and proof.

In Burnett v. Central Nebraska Public Power & Irr. Dist., *supra*, this court said: " ' * * * the right of eminent domain gives to the Legislature the control of private property for public uses, and for public uses only. * * * This being the rule, the property must be used for the purpose which justified its taking, otherwise it would be a fraud on the owner and an abuse of power, and the authority being in derogation of private right, is to be strictly construed.' "

The landowner's right to own, possess, and enjoy his property free from an unlawful and unconstitutional exercise of the sovereign power of eminent domain may best be insured by requiring specific pleadings and proof. We hold that in a condemnation action under the power of eminent domain, the condemner must allege the specific public purposes for which the condemner seeks to acquire and use the property sought to be taken.

In a condemnation case issues as to the amount of property needed and the estate or interest in such property are questions of fact for the court. Burnett v. Central Nebraska Public Power & Irr. Dist., *supra*. Likewise, issues as to what constitutes a public use and whether a taking is lawful are judicial issues for the court. Burger v. City of Beatrice, 181 Neb. 213, 147 N. W. 2d 784. In the case at bar the court made findings on those issues, and there is evidence in the record to support those findings.

The condemnees, on cross-appeal, contend that the allowances of attorneys' fees and costs were insufficient. The condemnees were represented by additional counsel in the appeal to the District Court. Although no separate allowance was set out for county court fees, the court obviously was concerned with eliminating duplication of fees. A trial court ordinarily has a better opportunity for a practical appraisal of the value of legal services in a case. An appellate court will interfere with the trial court's allowance of attorneys' fees only to correct a

patent injustice where the allowance is clearly excessive or insufficient. Junker v. Junker, 188 Neb. 555, 198 N. W. 2d 189.

The judgment of the District Court was correct in all respects and is affirmed. Condemnees' are allowed the sum of $1,500 for the services of their attorneys in this court.

AFFIRMED.

FLEMING REALTY AND INSURANCE, INC., A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. LLOYD L. EVANS, ET AL., APPELLANTS AND CROSS-APPELLEES.

259 N. W. 2d 604

Filed November 16, 1977. No. 41161.

1. **Contracts: Brokers: Sales.** A broker is entitled to his commission in accordance with the terms of his listing contract, and the right to compensation is not impaired by the subsequent inability or unwillingness of the owner to consummate the sale on the terms prescribed.
2. **Contracts: Sales.** A prospective purchaser is financially able if he has capability to make the downpayment and all deferred payments required under the proposed contract of sale.
3. **Verdicts: Evidence.** The verdict of a jury based upon conflicting evidence will not be set aside on appeal unless clearly wrong.
4. **Trial: Instructions.** The giving of a technically incorrect instruction is not ground for reversal where it could not have prejudiced the rights of the losing party.
5. **Trial: Instructions: Jury.** An inadvertent substitution of one word for another in an instruction is harmless error if it is clear from the instruction itself, and other instructions given, that the jury was not confused or misled by the error.
6. **Damages: Claims: Interest.** Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right.
7. **Damages: Claims.** A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion.
8. **Brokers: Contracts: Commissions.** As a general rule where the amount of the broker's commission is certain, or can be made certain by computation, he is entitled to interest thereon from the time it became due.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed as modified.

Nelson, Harding, Marchetti, Leonard & Tate, Kenneth Cobb, and Brian Ridenour, for appellants.

Edward E. Hannon of Cronin & Hannon, for appellee.

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

WHITE, C. J.

This is an action for the collection of a real estate commission allegedly due the plaintiff, a licensed real estate broker, from the defendants. The case was tried to a jury and a verdict in the amount of $4,675.20 returned for the plaintiff. The defendants filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial which was overruled, and they now appeal. We affirm the judgment of the District Court.

The plaintiff entered into an exclusive listing agreement with the defendants who desired to sell certain realty. The defendants promised to pay the plaintiff a 3 percent commission for its services. While the listing was in effect, the plaintiff presented the defendants with a purchaser, one Neal Hasselbalch, who signed a uniform purchase agreement offering to purchase the property on the terms specified in the listing agreement. The defendants refused to sell their property to Hasselbalch and the plaintiff commenced this action to recover the commission which allegedly became due upon the production of Hasselbalch, a "ready, willing, and able" purchaser.

The defendants argue that they are not obligated to pay the plaintiff the stated commission. The defendants refused to sell their property to Hasselbalch for the apparent reason that they were not satisfied with his financial ability to consummate the sale.

It is true, as the defendants point out, that a seller is under no obligation to sell his property to a purchaser procured by a broker. The broker's obligation is merely to provide a purchaser, and he has no authority, unless otherwise specifically agreed upon, to enter into a binding contract of sale, on behalf of the seller, with the purchaser. See, Brezina v. Hill, 195 Neb. 481, 238 N. W. 2d 903 (1976); Preisendorf v. Jenkins, 193 Neb. 611, 228 N. W. 2d 591 (1975); Gould v. Rockwell, 105 Neb. 724, 181 N. W. 755 (1921).

The fact, however that the seller exercises his right not to sell the listed property to the purchaser produced by the broker does not relieve the seller of his obligation to pay the broker the agreed-upon commission. As stated in 12 Am. Jur. 2d, Brokers, § 183, p. 922: "As a general rule, under the ordinary undertaking of a broker, the broker is not entitled to the compensation called for by his contract of employment until he produces a person who is ready, able, and willing both to accept and live up to the terms offered by his principal. On the other hand, and in the absence of any stipulation to the contrary in the contract of employment, the broker is entitled to his commissions when he produces such a person, notwithstanding that his employer refuses to transact business with the person in question."

In Cornett v. Nathan, 196 Neb. 277, 242 N. W. 2d 855 (1976), we stated: " * * * a broker has not earned his commission unless he produces a buyer who is ready, able, and willing to buy on terms satisfactory to the seller. In Wisnieski v. Coufal, 188 Neb. 200, 195 N. W. 2d 750, we said: 'A broker earns his commission and becomes entitled thereto when he produces a purchaser who is ready, able, and willing to purchase at a price and upon terms specified by the principal or satisfactory to him.' In Huston Co. v. Mooney, 190 Neb. 242, 207 N. W. 2d 525, this court said: 'Ordinarily a real estate broker who for a commission undertakes to sell land on certain terms

and within a specific period, is not entitled to compensation for his services unless he produces a purchaser within the time limited who is ready, able, and willing to buy upon the terms prescribed.' "

The plaintiff produced a purchaser, Neal Hasselbalch, within the time period of the listing who offered to purchase the defendants' property on the terms specified in the listing agreement. The plaintiff was thus entitled to its commission if Hasselbalch was a "ready, able, and willing" purchaser, despite the defendants' refusal to sell their property to Hasselbalch.

A prospective purchaser is financially able if he has capability to make the downpayment and all deferred payments required under the proposed contract of sale. 12 Am. Jur. 2d, Brokers, § 184, p. 924. A jury verdict was returned for the plaintiff. The jury must necessarily have concluded that Hasselbalch was financially able to purchase the defendants' property according to the terms of the listing agreement. The verdict of a jury based upon conflicting evidence will not be set aside on appeal unless clearly wrong. Grady v. Denbeck, 197 Neb. 795, 251 N. W. 2d 164 (1977); First Mid America, Inc. v. Palmer, 197 Neb. 224, 248 N. W. 2d 30 (1976).

The total selling price of the defendants' land was $155,840. According to the terms of the listing agreement this sum was to be paid as follows: $34,000 down and $12,184 per year for 10 years.

Dean Fleming, president of the plaintiff, testified that he told the defendant Lloyd Evans that Hasselbalch had 800 acres of pasture land and that he was confident that he could farm or ranch in Holt County. Fleming testified that he checked Hasselbalch's financial ability with the Columbus Production Credit Association and the Federal Land Bank and that he knew Hasselbalch's net worth to be between $300,000 and $400,000. Fleming testified as an expert witness as to the fair rental value of the de-

fendants' ranch. In his opinion it would have had a fair rental value of $10,000 in 1973; $12,000 in 1974; $14,000 in 1975; and from $14,000 to $16,000 in 1976.

Clifford Sieck, a salesman for the plaintiff, testified that he checked the financial condition of Hasselbalch with an acquaintance named Walt Landwher and was told by him that Hasselbalch was qualified to buy anything he wanted. Landwher stated that he would sell Hasselbalch anything that he wanted in any way he wanted to buy it.

A financial statement dated February 1, 1973, given to the Columbus Production Credit Association by Hasselbalch was introduced into evidence. It showed Hasselbalch as having a net worth of $253,483. The records of the Columbus Production Credit Association listed Hasselbalch as a "good farmer and operator." Neil Schlines, vice president of the Columbus Production Credit Association testified that he had no reservations about Hasselbalch's ability to carry out the contract.

Alvin M. Grubaugh, president of the Columbus Federal Land Bank Association testified by deposition that he had known Hasselbalch for 20 years and was familiar with his farming operation. As of November 1972, the records of the Federal Land Bank show that Hasselbalch had given a financial statement showing a new worth of $239,082. Grubaugh rendered the opinion that Hasselbalch could fulfill the contract.

Hasselbalch testified by deposition that he had been operating on his own for about 20 years. He testified that he owned 800 acres and farmed 160 acres which belong to his parents; 220 acres of which was irrigated farm land. He testified that he was confident he could raise the money required to fulfill the contract, and that he had never defaulted to any big lender before.

There was ample evidence for the jury to conclude that Hasselbalch was financially able to complete

the transaction and that plaintiff had provided defendants with a "ready, able, and willing" purchaser, thus becoming entitled under the terms of the listing agreement to the agreed commission.

The defendants next contend that there were several prejudicial errors relating to the instructions. They first contend that the District Court erred in giving instructions Nos. 5 and 6 for the reason that they incorrectly state the proof required of the plaintiff. We have examined both instructions and find that they correctly state the law. Shell Oil Co. v. Kapler, 235 Minn. 292, 50 N. W. 2d 707 (1951); Winkelman v. Allen, 214 Kan. 22, 519 P. 2d 1377 (1974); Cornett v. Nathan, *supra*. There was no error in these instructions.

Instruction No. 5 as given by the court to the jury stated in part: "Generally speaking, a purchaser of real estate is financially ready and able to buy:

"(1) If he has the needed cash in hand,

"or

"(2) if he is personally possessed of assets, which in part may consist of the property to be purchased, and a credit rating which enable him with reasonable certainty to command the requisite funds at the required time,

"or

"(3) if he has definitely arranged to raise the necessary money, or as much thereof as he is *able* to supply personally, by having a binding commitment for a loan to him for that purpose by a financially able third party." (Emphasis supplied.)

The defendants point out an error in this instruction as given. The third subpart of this instruction as given stated "or as much thereof as he is able." To be in accord with the case law, the third subpart should read "or as much thereof as he is *unable*." The defendants argue that this substitution of the word "able" for "unable" was prejudicial and warrants reversal.

We have held that the giving of a technically incorrect instruction is not ground for reversal where it could not have prejudiced the rights of the losing party. Young v. Beveridge, 81 Neb. 180, 115 N. W. 766 (1908); Huxoll v. Union P. R. R. Co., 99 Neb. 170, 155 N. W. 900, affirmed 245 U. S. 535, 38 S. Ct. 187, 62 L. Ed. 455 (1915).

In Leonhardt v. Harimon, 185 Neb. 224, 174 N. W. 2d 926 (1970), we stated: "An erroneous instruction is not necessarily prejudicial error. The meaning of an instruction and not its phraseology is the important consideration. Where the meaning of an instruction is reasonably clear, it is not prejudicially erroneous. Zager v. Johnson, 175 Neb. 866, 124 N. W. 2d 390. An inadvertent substitution of one word for another in an instruction is harmless error if it is clear from the instruction itself and other instructions given that the jury was not confused or misled by the error. Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462."

In Tidd v. Stull, 128 Neb. 506, 259 N. W. 369 (1935), the court held that the trial court's inadvertent substitution of the word "plaintiff" for "defendant" in an instruction was harmless error where the jury could not have been misled thereby. See, also, Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217 (1947).

We do not believe that the inadvertent substitution of the word "able" for "unable" is ground for reversal. We fail to see how, in light of the other instructions, the jury could have been confused or misled. There is no merit to this contention.

The defendants also find error in the trial court's failure to give their requested instructions Nos. 2, 4, and 6. We have examined this contention and find no error by the District Court in failing to give these instructions. The contention is without merit.

The only question remaining is the contention on cross-appeal that the court should have allowed

prejudgment interest on the jury verdict of $4,675.20.

The written listing contract entitled the plaintiff to recover 3 percent commission on the sale price of $155,840. In Abbott v. Abbott, 188 Neb. 61, 195 N. W. 2d 204, (1972), this court said as follows: "Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right. 'A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. Examples are *claims upon promises to pay a fixed sum,* claims for money had and received, claims for money paid out, and claims for goods or services to be paid for at an agreed rate.' McCormick, Damages, c. 7, s. 54, p. 213 (1935). See, also, § 45-104, R. R. S. 1943; Mid States Engineering v. Rhode, 182 Neb. 590, 156 N. W. 2d 149 (1968)." (Emphasis supplied.)

The general rule is that where the amount of the broker's commission is certain, as in this case, or can be made certain by computation, he is entitled to interest thereon from the time it became due. 12 C. J. S., Brokers, § 123, p. 321. In the present case, the listing agreement calls for a May 1, 1973, closing. The listing expired April 1, 1973, and the record shows that the plaintiff produced a buyer on March 28, 1973. Clearly this is one of the cases in which the amount due can be ascertained by computation. As stated in Abbott v. Abbott, *supra*, we are dealing with a written contract in which the amount due can be computed as to exactness and without reliance upon opinion or discretion. We hold, therefore, that in this case the claim is liquidated and that the plaintiff is entitled to prejudgment interest from the period of May 1, 1973, to June 29, 1976.

The judgment for the plaintiff is affirmed and the cross-appeal is sustained with directions to the Dis-

trict Court to enter prejudgment interest in conformity with this opinion.

The judgment, as modified, is affirmed.

AFFIRMED AS MODIFIED.

JAMES R. MCGREEVY, ADMINISTRATOR OF THE ESTATE OF AMY R. RICH, APPELLEE, V. RALPH R. BREMERS, APPELLANT, IMPLEADED WITH GENERAL INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLEE.

259 N. W. 2d 477

Filed November 16, 1977. No. 41189.

Constitutional Law: Courts: Due Process. Generally, the determination of whether an individual, under a given set of circumstances, has been afforded due process of law is a determination for the court, and not one within the province of the jury.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Clayton H. Shrout of Shrout, Christian, Krieger, Mori & Merwald, for appellant.

Harold W. Kauffman of Gross, Welch, Vinardi, Kauffman & Day and James R. McGreevy, for appellee McGreevy.

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

WHITE, C. J.

This appeal arises out of an action filed by the plaintiff, James R. McGreevy, administrator of the estate of Amy R. Rich, deceased, against the defendant, Ralph R. Bremers, guardian of the estate of Amy R. Rich, and General Insurance Company of America, the surety on defendant Bremers' guardianship bond, to recover a surcharge entered on final accounting in the guardianship proceedings by the county court of Douglas County.

The background to this appeal is as follows: De-

fendant Bremers was appointed administrator of the estate of Amy R. Rich, deceased, by the county court of Douglas County on April 27, 1972. On December 13, 1973, Bremers was ordered by that court to appear and show cause why he should not be removed as the administrator of the estate. A hearing was held on December 28, 1973, and on January 2, 1974, Bremers was removed by the Douglas County court as administrator of the estate of Amy R. Rich, deceased, and plaintiff was appointed in his place.

Bremers is the duly appointed guardian of the estate of Amy R. Rich, incompetent. On January 22, 1975, the Douglas County court entered an order finding that Bremers, as guardian, was liable to the plaintiff, as administrator of the estate of Amy R. Rich, on his guardian's account in the amount of $25,344.67, as a surcharge. Bremers attempted to appeal from the order of final accounting by the Douglas County court, but both his appeals to the District Court for Douglas County and to this court were dismissed.

Following the failure of Bremers and General Insurance Company of America, his surety, after due demand to pay the amount of the surcharge, the plaintiff sought and received permission of the Douglas County court to initiate an action against Bremers and his surety for the amount of the surcharge.

Suit was filed on November 21, 1975, in the District Court for Douglas County. General Insurance Company of America voluntarily appeared and filed a counterclaim against Bremers. On February 27, 1976, Bremers filed his answer. In it he alleged that his appeals from the guardianship proceedings had been improperly dismissed and that as a result he had been denied due process of law in connection therewith.

Both the plaintiff and General Insurance Company of America filed motions for summary judgment.

On June 11, 1976, Bremers filed an amended answer in which he repeated his due process claim regarding the guardianship proceedings and also further alleged that he had been denied due process of law in connection with his activities as administrator of the estate of Amy R. Rich, deceased, and also in connection with the estate of Frank Rich, deceased. Bremers also filed a motion for summary judgment contending that the dismissal of his appeals from the Douglas County court's surcharging of his guardianship account was void.

On September 13, 1976, the District Court denied all three motions for summary judgment and held that Bremers was entitled to a hearing on the question of whether he had been denied due process of law in regard to the Douglas County court proceedings concerning the estate of Amy R. Rich, deceased, as alleged by Bremers in paragraph IV (a-e) of his amended answer.

The case was set for trial on November 4, 1976. On October 29, 1976, Bremers filed a motion for a jury trial on the issue of "whether or not he was afforded due process in the Douglas County Court Proceedings in the matter of his professional activities in the Guardianship and Estate proceedings of Amy R. Rich * * *."

Bremers' motion for a jury trial was denied and on November 4, 1976, the case was called for trial. Bremers refused to adduce evidence. The plaintiff introduced evidence and the case was taken under advisement. On November 24, 1976, the District Court reaffirmed its ruling of November 4th, denying Bremers a jury trial and found for the plaintiff. Bremers has appealed. We affirm the judgment of the District Court.

The sole assignment of error by Bremers is that the District Court erred in overruling his motion for a jury trial. This motion asked for a jury trial upon the issue of whether or not Bremers had been af-

forded due process in various Douglas County court proceedings concerning his activities in the guardianship and estate proceedings of Amy R. Rich.

The concept of due process of law is a nebulous one. Due process is not a fixed, inflexible procedure which must be accorded in every situation. The requirements of due process vary with the circumstances involved. Stauffer v. Weedlun, 188 Neb. 105, 195 N. W. 2d 218 (1972); Baker v. Downey City Board of Education, 307 F. Supp. 517 (D. C. Cal., 1969).

Given the nature of due process of law, the determination of whether an individual, under a given set of circumstances, has been afforded due process of law is a determination for the court, and not one within the province of a jury. As stated in Douglas v. City of Jeannette, 130 F. 2d 652 (3d Cir., 1942): "It must, therefore, be concluded that, except for cases involving purely procedural due process, it is not facing reality to say that the want of due process of law is a question of fact. On the contrary, it is, as we have seen, a legal or, more accurately, a philosophical concept as to the extent to which the state, in the exercise of its sovereign power, should be permitted to deprive individuals within its jurisdiction of their lives, liberty or property. Its application to the facts of a particular case is purely a matter of judgment and therefore is solely a question of law." See, also, 16A C. J. S., Constitutional Law, § 569 (1), p. 566. The District Court correctly denied Bremers' motion for a jury trial.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH C. SVOBODA, APPELLANT.

259 N. W. 2d 609

Filed November 16, 1977. Nos. 41215, 41216, 41217.

1. **Post Conviction.** A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
2. **Post Conviction: Constitutional Law.** In the absence of violation of a constitutional right, no relief may be had under the Post Conviction Act.
3. _____: _____. Where an issue of constitutional dimensions has been raised in a direct appeal of a criminal conviction, and that issue was not considered or ruled upon by this court in the direct appeal, the issue may properly be raised in a subsequent motion for post conviction relief.
4. **Post Conviction: Hearings.** In a post conviction proceeding, the files and records of the case must affirmatively establish that the prisoner is entitled to no relief or an evidentiary hearing must be granted.

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

Thomas M. Kenney and Bennett G. Hornstein, for appellant.

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

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

MCCOWN, J.

The defendant filed a motion for post conviction relief in each of three original criminal proceedings. The District Court found that the issues raised in defendant's post conviction motions had been raised previously on direct appeal and denied the motions without an evidentiary hearing. The motions were considered together below and the cases have been consolidated for this appeal.

On September 24, 1974, a trial of the defendant on

two counts of burglary was commenced before a jury. The jury was selected and the State proceeded with the presentation of evidence. On the next day there was a discussion in chambers about a proposed plea bargain and the defendant's complaints about the conduct of his counsel. Following the discussion in chambers the defendant pleaded nolo contendere to the two burglary counts on which he was being tried. The two habitual criminal counts added to those charges were dismissed. The defendant also pleaded nolo contendere to a charge of failure to appear, and the county attorney dismissed a third burglary charge and also agreed that he would not refile a charge of felon in possession of a firearm. Defendant's convictions on the three charges were entered and the jury was dismissed. Thereafter defendant was sentenced to 3 to 10 years imprisonment on one burglary count, 6 years imprisonment on the second, and 1 year on the charge of failure to appear, the sentences to run consecutively.

The convictions were appealed to this court and it was assigned as error that defendant's pleas were involuntary because of the trial court's participation in plea bargaining discussions, and because of misrepresentation and coercion by counsel as to the plea bargain. Because there was no motion for a new trial, this court held that the issues raised by the defendant would not be considered on appeal and affirmed the judgments. State v. Svoboda, 194 Neb. 663, 234 N. W. 2d 901.

The three post conviction actions involved here were thereafter commenced in February 1976. In each case the motion to vacate and set aside the judgment and sentence alleged that the defendant's plea was coerced and involuntary because the trial court actively participated in the prosecution and plea bargaining, and that defendant's counsel misrepresented the terms of the plea bargain and induced the defendant to enter a guilty plea against

his will. The motions were consolidated in the District Court, and on November 30, 1976, the District Court denied the motions without granting an evidentiary hearing, on the ground that the issues raised in defendant's motions for post conviction relief had been raised previously in the direct appeal to this court.

The State contends that where the issues which are the grounds of a motion for post conviction relief were raised in a direct appeal, that appeal precludes the raising of those issues in a post conviction review, even though this court, on the direct appeal, did not consider or pass upon those issues. We disagree. In essence, the State and the trial court rely upon a consistently repeated holding of this court: "A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated." See, State v. Lincoln, 186 Neb. 783, 186 N. W. 2d 490; State v. Oziah, 198 Neb. 423, 253 N. W. 2d 48. It is erroneous to assume, for post conviction purposes, that issues raised in a direct appeal have been "litigated" in this court when the case is disposed of on procedural grounds, if the issues were not considered or passed upon by the Supreme Court. Such an interpretation emasculates the Post Conviction Act.

In the absence of violation of a constitutional right, no relief may be had under the Post Conviction Act. State v. Blackwell, 191 Neb. 155, 214 N. W. 2d 264. Section 29-3003, R. R. S. 1943, specifically provides that the remedy provided by the Post Conviction Act is cumulative and is not intended to be concurrent with any other remedy existing under the laws of this state. On the direct appeal this court did not consider or pass upon the issues raised in the motions for post conviction relief which are now before us. Those issues were, therefore, not "litigated" in this court in the context of a subsequent

post conviction proceeding. Where an issue of constitutional dimensions has been raised in a direct appeal of a criminal conviction, and that issue was not considered or ruled upon by this court in the direct appeal, the issue may properly be raised in a subsequent motion for post conviction relief. The assertion of a constitutional right by a defendant in a direct appeal of a criminal conviction in this court does not constitute a waiver of his right to post conviction review where this court does not consider or pass upon the issue.

The Post Conviction Act provides that unless the motions and files and records of the case show that the prisoner is entitled to no relief, the court shall grant a prompt hearing. See § 29-3001, R. R. S. 1943. "In a post conviction proceeding, the files and records of the case must affirmatively establish that the prisoner is entitled to no relief or an evidentiary hearing must be granted." State v. Ford, 198 Neb. 376, 252 N. W. 2d 643.

In State v. Turner, 186 Neb. 424, 183 N. W. 2d 763, this court approved the A. B. A. Standards Relating to Pleas of Guilty. Section 3.3 (a) of those standards provides: "The trial judge should not participate in plea discussions." This court has consistently adhered to that view. The motions for post conviction relief here allege that defendant's pleas were involuntary because of the trial court's participation in plea bargaining discussions, and also alleged misrepresentation and ineffective assistance of counsel. The allegations, if true, constituted a denial or infringement of the constitutional rights of the defendant. See, State v. Gee, 191 Neb. 60, 213 N. W. 2d 726; State v. Tunender, 182 Neb. 701, 157 N. W. 2d 615. The files and records of the case do not affirmatively establish that the defendant is entitled to no relief and the District Court should have granted an evidentiary hearing.

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

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. ALFRED MENARD, APPELLANT.

259 N. W. 2d 479

Filed November 16, 1977. Nos. 41237, 41238.

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

T. Clement Gaughan and George R. Sornberger, for appellant.

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

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

PER CURIAM.

The defendant entered pleas of guilty to larceny from the person and third offense driving while intoxicated. The trial court imposed concurrent sentences of 1 to 5 and 1 to 3 years in the Nebraska Penal and Correctional Complex. Defendant's sole contention on appeal is that the sentences are excessive and he should be placed on probation. We affirm.

Defendant was born of American Indian heritage. His parents had drinking problems and from age 11 until he was 17 or 18 he resided at the Boys' Training School in Kearney.

Defendant has five previous felony convictions and sentences in Nebraska for which he served time. These include auto theft, burglary, uttering a forged instrument, and breaking and entering. Defendant has had numerous arrests including offenses for grand larceny, assault, carrying a concealed weapon,

robbery, and larceny. There are also numerous drunk offenses on his record.

At the time the present offenses were committed, defendant was a student with a 3.4 grade average at the University of Nebraska. He also was a graduate instructor in the department of literature, teaching the Lakota language. Prior to committing the present offenses, defendant had begun a rehabilitation program which included attendance at Alcoholics Anonymous and other programs.

During the past few years defendant has been active in various cultural affairs at the University. Numerous supportive letters written on defendant's behalf are contained in the presentence investigation report.

The record shows that the trial court evaluated defendant's past and present behavior in light of protection of society and the rehabilitation of the defendant. The court considered the fact that defendant had attempted alcoholic rehabilitation in the past and had failed. Noting that the State had dropped the habitual criminal charges, which would have resulted in a minimum term of 10 years, the court found that the defendant had received mercy and understanding.

Section 28-505, R. R. S. 1943, provides that the punishment for larceny from the person is imprisonment in the Nebraska Penal and Correctional Complex for not less than 1 nor more than 7 years. Section 39-669.07, R. R. S. 1943, provides for imprisonment in the Nebraska Penal and Correctional Complex for not less than 1 nor more than 3 years for the third offense of driving while intoxicated. Defendant was sentenced to 1 to 5 years for larceny from the person and 1 to 3 years for the third offense of driving while intoxicated. Such sentences are within the statutory limits and will not be disturbed on appeal unless there is an abuse of discretion. State v. Kolzow, 195 Neb. 93, 236 N. W. 2d 837.

In light of defendant's past criminal behavior, it cannot be said that the court abused its discretion. Absent such abuse the sentence is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I respectfully dissent from the opinion of the court. In the unusual circumstances of this case I believe the focus should be upon the defendant's recent accomplishments rather than upon his past record of offenses. The defendant has a long history of alcoholism caused by his early cultural environment. The alcohol problem, which had its origin during his childhood, is the rather obvious cause of the crimes for which he is to be incarcerated, as well as the cause of most of his earlier offenses.

After his last previous incarceration the defendant, who at the time of sentencing was 35 years of age, began a program to cure his alcoholism. He obtained a general education diploma through the Southeast Community College, then enrolled at the University of Nebraska in the College of Arts and Sciences, and had completed successfully about 2 years of work with a current 3.4 average, taking 12 hours of classwork. He was, at the time of sentencing, still enrolled in college and employed at the University of Nebraska as an undergraduate instructor, teaching the Lakota language, for which work he is paid $175 monthly. Since his latest offenses he is participating in the programs of Alcoholics Anonymous and the Chemical Dependency Unit at Lincoln General Hospital. He has also participated in cultural programs at the University of Nebraska, as well as assisted in counseling other Indians who have a problem similar to his.

Numerous persons who have been associated with him during his educational endeavors attest to the earnestness of his efforts, his abilities, and the probabilities of his ultimate success in coping with his alcoholism. When one considers his previous long his-

tory of alcoholism, the maintenance of sobriety for a period of about 2 years is not a mean accomplishment. Few alcoholics who ultimately overcome the problem do so without some slip before final victory.

The probabilities of ultimate success are attested by the opinion of an outpatient counselor at a local hospital that "Alfred will do well if he continues his treatment and A. A.," and, as well, of a psychologist, "it is crucial to encourage Alfred to continue in learning to postpone short-term gratification for more long-term effects, as is indicative of his apparent reasonable success in college." The testimonials also evidence his "ability to instruct," as well as his organizational ability. A substantial businessman who has known him for about 2 years further attested to his confidence in the defendant's "integrity" and "truthfulness" by furnishing the money in order that the defendant might make his $10,000 bail bond. There are numerous other references.

The defendant's statement of his own short-term goal is, "finishing school & stopping my drinking."

I doubt the usefulness of incarceration without giving the defendant a further additional opportunity to further his progress, which has been mostly a program of lifting himself by his own bootstraps.

McCOWN and WHITE, C. THOMAS, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. STEVE GARLAND, APPELLANT.

259 N. W. 2d 481

Filed November 16, 1977. No. 41508.

Sentences: Probation and Parole. A sentence imposed within the statutory limits and an order which denies probation will not be disturbed on appeal in the absence of an abuse of discretion on the part of the trial court.

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

T. Clement Gaughan and Toney J. Redman, for appellant.

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

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

BRODKEY, J.

Steve Garland, defendant and appellant herein, was charged with two counts of burglary under section 28-532, R. R. S. 1943. Pursuant to a plea bargain, the second count was dismissed on motion of the State, and defendant pled guilty to the first count. Defendant was sentenced to imprisonment in the Penal and Correctional Complex for a term of 1 to 2 years. Defendant has appealed to this court, his sole assignment of error being that the sentence imposed is excessive, and that the trial court abused its discretion by not placing him on probation or as an alternative by not ordering confinement in the county jail rather than the penal complex. We affirm the sentence imposed by the District Court.

Defendant is 24 years old, has the equivalent of a high school education, has three young children, and is separated from his wife. The crime to which he pled guilty involved burglarizing a dwelling place when its occupants were not home, and removing a significant quantity of household goods.

Defendant contends that he is deserving of probation because the crime involved no violence, and was instigated by a young woman who advised the defendant that the dwelling was an easy mark for burglary; because the crime was motivated by financial need; because defendant's work record shows a willingness to be employed at honest labor;

and because he presently is caring for his children. We find these arguments unpersuasive.

In 1972 the defendant was convicted of burglary in California, and was sentenced to imprisonment in the county jail for a period of 45 days, and placed on probation for a period of 2 years. The defendant escaped from the county jail, and was subsequently convicted of escape. He was again sentenced to a short period of confinement in the county jail, and placed on probation. Several months later he was convicted of theft, and placed on probation. He violated the conditions of probation, and was again confined in the county jail for a short period of time. Defendant apparently leads an unstable existence, as is evidenced by the fact that he has changed jobs approximately 17 times in the last 7 years. He frequently indulges in alcohol and drugs, which led to a separation from his wife. Defendant is presently responsible for his children because his wife is traveling, but he does not have permanent custody of them.

It is clear from defendant's prior record that on at least two recent occasions he has been given an opportunity to prove himself while on probation after committing crimes similar to the one herein, but has failed to do so. Short terms of confinement and probation have not worked as a deterrent or a mode of rehabilitation insofar as the defendant is concerned. This court will not overturn an order of the trial court which denies probation absent an abuse of discretion on the part of the trial court. State v. Purviance, 194 Neb. 541, 233 N. W. 2d 788 (1975). Under the circumstances of this case, it was clearly not an abuse of discretion to sentence the defendant to confinement in the penal complex. The sentence imposed was a minimal one under section 28-532, R. R. S. 1943, which provides that a person guilty of burglary may be imprisoned in the penal complex not more than 10 years nor less than 1 year; or in the

county jail for a period not exceeding 6 months. The trial court did not abuse its discretion in imposing the sentence, and therefore the judgment is affirmed. State v. Tweedy, 196 Neb. 253, 242 N. W. 2d 631 (1976).

AFFIRMED.

CONSTANCE R. HANSEN, APPELLANT, V. THEODORE L. HANSEN, APPELLEE.

259 N. W. 2d 912

Filed November 23, 1977. No. 41187.

1. **Divorce: Alimony: Property.** Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion.
2. _____: _____: _____. The fixing of alimony or distribution of property rests in the sound discretion of the District Court and in the absence of an abuse of discretion will not be disturbed on appeal.

Appeal from the District Court for Hall County: DEWAYNE WOLF, Judge. Affirmed as modified.

John A. Wagoner, for appellant.

Kelly, Kelly & Kelly, for appellee.

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

SPENCER, J.

The marriage of the parties was dissolved September 21, 1976. Petitioner-appellant prosecutes this appeal attacking the division of the property, the amount of the alimony, and the insufficiency of the allowance for attorney's fees. We affirm as modified.

The parties were married December 4, 1971. At the time of the trial petitioner was 28 and her hus-

band 35. No children were born of the marriage although each party had two children by previous marriages. Petitioner worked during most of the marriage, earning approximately $300 a month. She also received $130 per month as support for children from her previous marriage. These amounts were deposited in the joint account of the parties. Respondent-appellee was continuously employed during the marriage. He was paying child support to his former wife in the amount of $130 per month. The joint income tax returns of the parties showed the following earnings during the marriage: 1972 - $14,544; 1973 - $16,045; 1974 - $17,959; and 1975 - $15,603.

Appellant received certain items of property, some of which she had brought into the marriage, and a 1976 Ford LTD, which was purchased in 1975 for approximately $5,200. Appellee was also ordered to pay appellant alimony in the amount of $2,400, payable in monthly installments of $120, and an attorney's fee of $300.

The record indicates appellee withdrew $1,547.23 from a joint savings account at the First National Bank, and made two withdrawals from the Home Federal Savings & Loan Association of $2,405.52 and $1,037.35. Appellant contends she received no benefit from any of these funds. Appellee testified some of them were used to pay current bills. No purpose will be served by further specifying in detail the distribution of the personal property of the parties and their relative contentions thereto. The distribution made appears to be within the limits of the discretion of the trial court.

The major item in contention is the apportionment of the equity in the home of the parties, which was assigned to the appellee. At the time of the marriage appellee owned a house which he had purchased in 1968 for $15,000. The mortgage balance on this house at the time of the marriage was $11,158.88.

Major improvements were made to the house during the 9 months prior to the marriage, during which time the appellant was living in the property. The record is undisputed that the appellant worked on these improvements, even to the extent of helping to dig the foundation for the construction of a kitchen. Many of these improvements were finished by the time of the marriage, although some of them were completed thereafter. This house, which was the residence of the parties, was sold on April 5, 1976, for $35,600, less $600 closing costs. The mortgage balance at that time was $7,232.83. The mortgage payments were made from the joint bank account.

The parties purchased another house on December 15, 1975, into which they moved in April 1976. The purchase price of this house was $43,000. The kitchen cabinets therein were replaced at a cost of $1,500. As of September 1, 1976, the mortgage balance was $14,874. Most of the equity from the first house was used for the purchase of the present one. This property, title to which was taken in the name of the appellant because of the child support judgment against the appellee, was appraised by the appellant, who was a real estate saleslady, at between $50,000 and $55,000. Appellee placed the value of the house at the time of the trial at $44,500, which was its cost plus the cost of the kitchen cabinets.

It appears to us the allowance of $2,400 alimony was an attempt by the trial court to adjust the equities in the real estate of the parties. We said in Olson v. Olson, 195 Neb. 8, 236 N. W. 2d 618 (1975): "Although money and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion."

The rule is well established, the fixing of alimony

or distribution of property rests in the sound discretion of the District Court and in the absence of an abuse of discretion will not be disturbed on appeal. We find there is an abuse of discretion herein.

Our review of the record indicates the trial court did not adequately consider the contributions made by appellant in attempting to make an equitable distribution of the equity in the homes. While the marriage was of only 5 years duration, appellant contributed all her earnings and energies to it. The expenses and some of the improvements on the properties were paid from the joint bank account. The alimony allowance is clearly inadequate. We believe a more equitable adjustment by way of alimony would be $6,000, payable at the rate of $120 per month. We modify the judgment accordingly. Appellant's attorney is allowed a fee of $500 for services in this court, the same to be taxed as costs to the appellee herein.

The judgment as modified is affirmed.

AFFIRMED AS MODIFIED.

McCOWN, J., dissenting.

The majority opinion recites the established rule that the fixing of alimony or the distribution of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion will not be disturbed on appeal. The majority opinion then finds that there was an abuse of discretion by the trial court in determining and adjusting by alimony payments the value of a residence which constituted the major asset of the parties.

The marriage lasted less than 5 years. The parties each had children by former marriages and there were no children born to this marriage. Both parties were employed during the marriage. The present value of the additional payments imposed by this court constitute less than 7 percent of the purchase price and of the lowest appraisal value of the residence. In determining that the trial court's ac-

tion under such circumstances constituted an abuse of discretion the majority opinion has ignored the settled rule of this court that the division of property made by the trial court will not be disturbed on appeal unless it is patently unfair on the record. Van Bloom v. Van Bloom, 196 Neb. 792, 246 N. W. 2d 588; Tavlin v. Tavlin, 194 Neb. 98, 230 N. W. 2d 108.

The problems of alimony awards and the determination and division of inflated property values are not subject to solution by mathematical formula. Although dissolution of marriage cases are heard de novo on appeal, this court ought to be slow to conclude that the trial court abused its discretion. We have continuously adhered to the rule that in reaching our findings we give great 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. This is particularly true where local property values are involved. Minor adjustments to a property division which reflect differing judicial viewpoints of the appellate court do not furnish a sufficient basis upon which to conclude that the trial court has abused its discretion.

In this case the alimony award and the division of property made by the trial court was not patently unfair on the record and there was no abuse of discretion by the trial court.

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

STATE OF NEBRASKA, APPELLEE, V. MARY ELIZABETH BLAZEK, APPELLANT.

259 N. W. 2d 914

Filed November 23, 1977. No. 41240.

1. **Criminal Law: Sentences.** Under current statutes, all sentences of imprisonment in the Nebraska Penal and Correctional Complex are indeterminate sentences, except a sentence for life imprisonment.

2. _____: _____. Under the provisions of section 83-1,105(2), R. R. S. 1943, a sentence for a definite term of years is an indeterminate sentence in which the maximum term of the sentence is the term imposed by the court and the minimum term is the minimum sentence provided by law.
3. **Criminal Law: Sentences: Board of Parole.** Where the statutory penalty for a crime is imprisonment in the Nebraska Penal and Correctional Complex for not more than a specific maximum term of years, and no minimum term is specified by law, a sentence imposed for a definite period of time becomes an indeterminate sentence in which the term imposed by the court becomes the maximum term and the minimum term is subject to the action of the Board of Parole.
4. **Criminal Law: Sentences.** Ordinarily a defendant should be given credit for time spent in jail prior to sentencing. Where the maximum term of the sentence pronounced is the statutory maximum for the offense, credit for jail time must be given.

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

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

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

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

MCCOWN, J.

The defendant, Mary Elizabeth Blazek, pleaded nolo contendere to one count of conspiracy to commit a felony and one count of giving false information to police officers. She was sentenced to 2 years imprisonment in the Nebraska Penal and Correctional Complex on the first count, and 6 months in the city-county jail on the second count, the sentences to run concurrently. She was denied credit for time spent in jail awaiting sentence. The sole issue on appeal is whether or not the sentences were excessive.

The defendant was 37 years old at the time of sen-

tencing. In the spring of 1975, she was living with one Wesley Peery in Lincoln, Nebraska. On June 27, 1975, Peery was arrested and charged with first degree murder. Peery was convicted of first degree murder by a jury in the spring of 1976. Polygraph tests showed that the defendant did not believe Peery was guilty. Prior to his sentencing Peery wrote to the defendant soliciting her assistance for an escape. The defendant, in accordance with his request, attempted to telephone an individual named by Peery but never made contact. An acquaintance of the defendant told officers that the defendant offered him $2,000 to assist Peery in an escape but that he refused. No escape was attempted. The above facts are the basis for the conspiracy count to which the defendant pleaded nolo contendere.

The basis for the charge of giving false information to police officers was that the defendant testified at Peery's trial that she and her daughter were in a restaurant on the morning Peery was alleged to have committed the murder, but that she had told officers at other times that she was at home. There was other conflicting information as to whether defendant had ever seen Peery use a particular tool box.

The penalty for conspiracy to commit a felony is a fine of not more than $10,000, or imprisonment for not more than 2 years, or both. § 28-301, R. R. S. 1943. The penalty for giving false information to a law enforcement officer is a fine of not more than $500, or imprisonment in the county jail for not more than 6 months, or both. § 28-744, R. R. S. 1943. It should be pointed out that the penalty limits under the conspiracy statute make no distinctions as to the nature of the felony conspired about. The defendant was charged with conspiracy to commit the felony of escape. Conviction for the felony of escape carries a penalty of imprisonment for 1 to 10 years.

The presentence investigation report discloses

that the defendant was taken from her mother at the age of 5 because of her mother's neglect. She was raised in an orphanage and in foster homes until she ran away and was married for the first time at age 17. She has been married and divorced twice. She is the mother of 7 children, the oldest of whom is 19, and the youngest of whom is 8. By the time she was 16 years of age the defendant had twice been committed to mental hospitals in the State of Kansas for periods of several months. There are medical opinions in the presentence investigation report which indicate she is still mentally and emotionally disturbed on occasion. The presentence investigation report shows that the defendant has no prior criminal record.

Under the provisions of section 83-1,105(2), R. R. S. 1943, a sentence for a definite term of years becomes an indeterminate sentence in which the maximum term of the sentence is the term imposed by the court and the minimum term is the minimum sentence provided by law. Where a specific minimum term of imprisonment is specified by statute we have repeatedly confirmed the effect of the statutory language. See State v. Flaherty, 193 Neb. 275, 226 N. W. 2d 631.

We have not previously interpreted the provisions of section 83-1,105(2), R. R. S. 1943, with respect to determining the minimum term of a sentence for a definite term of years where the statutory penalty is simply imprisonment in the Nebraska Penal and Correctional Complex "not more than" a specified maximum term of years and there is no specified minimum. The importance of having a minimum sentence is that a prisoner's date of eligibility for parole is computed by referring to his minimum sentence. Under current statutes, all sentences of imprisonment in the Nebraska Penal and Correctional Complex are indeterminate sentences, except a sen-

tence for life imprisonment. State v. Hedglin, 192 Neb. 545, 222 N. W. 2d 829.

Where the statutory penalty for a crime is imprisonment in the Nebraska Penal and Correctional Complex for not more than a specific maximum term of years, and no minimum term is specified by law, a sentence imposed for a definite period of time becomes an indeterminate sentence in which the term imposed by the court becomes the maximum term and the minimum term is subject to the action of the Board of Parole. Such a sentence does not constitute an abuse of discretion where, as here, the facts do not support a grant of probation.

The defendant complains that she was denied credit on the sentences for time spent in jail while awaiting sentencing. An individual with no previous criminal record, who pleads nolo contendere to an inchoate crime such as conspiracy to commit a felony, should be given credit for jail time. Where the maximum term of the sentence pronounced is the statutory maximum for the particular offense, constitutional implications require that credit for jail time must be given. See, King v. Wyrick, 516 F. 2d 321 (8th Cir., 1975); Faye v. Gray, 541 F. 2d 665 (7th Cir., 1976).

The sentences imposed here were not excessive, but should be modified by allowing credit for jail time. The provisions of the judgment and sentences denying credit for jail time are set aside, and the sentences are modified by granting credit of 46 days for time in jail awaiting sentencing. As so modified, the sentences are affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE BARTLETT, APPELLANT.

259 N. W. 2d 917

Filed November 23, 1977. No. 41298.

1. **Criminal Law: Attorney and Client.** Trial counsel's performance in a particular case is measured against that of a lawyer with ordinary training and skill in the criminal law in his area, as well as a showing of conscientious protection of the interest of his client.
2. **Pleadings: Waiver.** Failure to file a timely motion to suppress constitutes a waiver.
3. **Searches and Seizures: Evidence.** Evidence may be introduced resulting from knowledge legally obtained by agents of the government, although in the course of obtaining such knowledge, there was an unlawful seizure.
4. **Attorney and Client: Words and Phrases.** Prejudice is an essential element of a claim of ineffectiveness of counsel.
5. **Searches and Seizures: Evidence.** If a search is illegal and an order suppressing the evidence is granted, the State cannot avoid the consequence of the order by introducing testimony as to what was found and not the object itself.
6. **Search and Seizures.** A search pursuant to a warrant is presumed to be valid.
7. **Post Conviction: Burden of Proof.** In a post conviction proceeding, petitioner has the burden of establishing a basis for relief. Facts must be alleged which, if proven, would constitute an infringement of constitutional rights.
8. **Post Conviction: Appeal and Error.** A defendant who has appealed a conviction cannot secure a second review of the identical proposition examined in that appeal by resorting to a post conviction procedure.
9. **New Trial: Trial: Appeal and Error.** No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, finds that no substantial miscarriage of justice has actually occurred.
10. **Attorney and Client.** Effectiveness of counsel is not to be judged by hindsight.
11. **Post Conviction.** In a proceeding under the Post Conviction Act, if the trial court finds on examination of its files and records that the proceeding is without foundation, an evidentiary hearing may properly be denied.

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

J. William Gallup, for appellant.

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

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

WHITE, C. THOMAS, J.

This is an appeal from the refusal of the District Court to grant a post conviction motion to vacate defendant's judgment of conviction and sentence. Defendant was convicted by a jury of possession of heroin with intent to deliver. He was sentenced as an habitual criminal to a term of 20 to 30 years in the Nebraska Penal and Correctional Complex. § 29-2221, R. R. S. 1943. This court affirmed the judgment and sentence in State v. Bartlett, 194 Neb. 502, 233 N. W. 2d 904. The trial court held that no evidentiary hearing was required and denied defendant's motion. We affirm.

The defendant asserts that he was denied his constitutional right of effective assistance of counsel at trial. Defendant asserts that the test applied by the District Court to determine adequate representation by counsel was improper. The defendant is correct. The trial court held the test to be whether counsel's assistance was so grossly inept as to shock the conscience of the court. The standard was enunciated in State v. Leadinghorse, 192 Neb. 485, 222 N. W. 2d 573. Under that standard, trial counsel's performance in a particular case is measured against that of a lawyer with ordinary training and skill in the criminal law in his area, as well as a showing of conscientious protection of the interest of his client. We will apply this standard to the specific allegations defendant contends constitute ineffective assistance of counsel.

The defendant's trial counsel made a motion to suppress evidence consisting of money found in defendant's house. Pursuant to a search warrant, defendant's residence was searched. Neither the warrant, which does not appear in the record, nor the money were offered in evidence. The record is unclear as to whether the money was actually seized during the search or the police merely gained knowledge of its existence.

Defendant testified on direct examination that he earned about $300 per week. His wife had testified that it was necessary to budget in order that she, the defendant, and four children manage on his income. On cross-examination, defendant admitted he had eight or nine uncashed payroll checks. Defendant was then asked: "Q. Do you have any large amounts of money around your house?" After the objection by defendant's counsel was overruled, a motion was made to exclude mention of evidence of the money since it was not among the items listed on the search warrant. The motion was overruled. In response to the State's question, defendant admitted he had $22,000 in small bills in his house on the day of his arrest.

In State v. Bartlett, *supra,* this court stated that failure to file a timely motion to suppress constituted a waiver, the consequence of which could not be avoided by an untimely motion to limit the interrogation of witnesses on relevant and material matters. The decision of the court also rested on a second, independent reason which is dispositive of the issue. Evidence may be introduced resulting from knowledge legally obtained by agents of the government although, in the course of obtaining such knowledge, there was an unlawful seizure. Zap v. United States, 328 U. S. 624, 66 S. Ct. 1277, 90 L. Ed. 1477. There was no claim at trial that the search was illegal. The sole basis for a claim of suppression of the money was the absence of its

mention in the warrant. Even if defendant's counsel had made a timely motion to suppress evidence of the money, only the money itself could be suppressed. The State could and did use its knowledge of the money which is permissible under Zap v. United States, *supra,* regardless of suppression. No prejudice resulted to defendant. Prejudice is an essential element of a claim of ineffective assistance of counsel. State v. Kelly, 190 Neb. 41, 205 N. W. 2d 646.

Defendant also alleges that trial counsel should have attacked the legality of the search itself. A successful attack would have prevented any mention of the money at trial. It seems evident that if the search were illegal and an order suppressing the evidence were granted, the State could not avoid the consequence of the order by introducing testimony as to what was found and not the object itself. State v. Bartlett, *supra.* It is defendant's contention that all searches must be challenged by a motion to suppress even if they may prove fruitless. In support of this argument, defendant relies on United States v. Easter, 539 F. 2d 663 (8th Cir., 1976). In United States v. Easter, *supra,* it was held that the failure of the defense attorney to challenge a warrantless search in defendant's home conducted pursuant to a telephone call from a person unknown to police and only identifying himself as "Victor," constituted ineffective assistance of counsel. Here, the search of defendant's home was pursuant to a warrant. A search pursuant to a warrant is presumed to be valid. Preference is to be accorded a search under warrant over one without a warrant. Churder v. United States, 387 F. 2d 825 (8th Cir., 1968).

No grounds are found in the record upon which trial counsel could have challenged the search nor does the defendant now offer any. Section 3.6 of the A. B. A. Standards relating to The Defense Function states: "(The defense attorney) should consider all

procedural steps which in good faith may be taken, including, for example, * * * moving to suppress illegally obtained evidence * * *." To hold that trial counsel adhere to a standard of challenging every search, as defendant suggests, even where no grounds exist to challenge, would negate the good faith requirement. Here, in the absence of any grounds which would be a source for trial counsel's challenge to a search, defendant's contention is merely speculative in nature and must fail. In a post conviction proceeding petitioner has the burden of establishing a basis for relief. State v. Rapp, 186 Neb. 785, 186 N. W. 2d 482. Facts must be alleged which, if proven, would constitute an infringement of constitutional rights. State v. Warner, 181 Neb. 538, 149 N. W. 2d 438.

The defendant next assigns as error the District Court's ruling that the actions of defense counsel at trial fell within the area of trial strategy. Defendant directed the court's consideration to the failure of defense counsel to make a number of evidentiary objections and motions for mistrial. The first alleged instance occurred during the testimony of a vice squad officer who was asked by the prosecutor: "Q. Can you tell us whether or not the two Glousers are known narcotics dealers---." The defendant's attorney objected on the ground of lack of foundation. The objection was sustained and the jury was instructed to disregard the implication. Defendant contends that the prosecutor's question was the basis for a mistrial and the defense counsel should have moved accordingly. We need not reach this issue. On direct appeal, this court decided that this issue was not sufficient ground for a mistrial. State v. Bartlett, *supra*. A defendant who has appealed a conviction cannot secure a second review of the identical proposition examined in that appeal by resorting to a post conviction procedure. State v. Svo-

boda, *ante* p. 452, 259 N. W. 2d 609; State v. Leadinghorse, *supra*.

Defendant further contends that the same vice squad officer was asked what he observed about defendant's associations on a particular day. The officer replied that defendant met with a party who was a known narcotics dealer. Defense counsel's objection was sustained and the jury admonished to disregard the testimony. Defendant's contention that trial counsel should have moved for a mistrial fails in light of this court's ruling that testimony linking defendant with known narcotics dealers, even if improper, is an inadequate ground for a mistrial. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, finds that no substantial miscarriage of justice has actually occurred. State v. Bartlett, *supra*.

Defendant suggests specific areas of testimony where trial counsel failed to object. Examination of the record shows that these contentions are without merit. The decision to object or not to object is part of trial strategy and, accordingly, we grant due deference to the discretion of defense counsel to formulate trial tactics. "Effectiveness of counsel is not to be judged by hindsight." State v. Phillips, 186 Neb. 547, 184 N. W. 2d 639.

The record as a whole discloses that at all times during the trial, defense counsel conscientiously worked to protect the interests of his client. The conduct of counsel meets the "lawyer with ordinary training and skill" test. No prejudice resulted from defense counsel's actions.

The last assignment of error is the failure of the District Court to hold a hearing before denying the post conviction motion to vacate the judgment and

sentence. In a proceeding under the Post Conviction Act, if the trial court finds on examination of its files and records that the proceeding is without foundation, an evidentiary hearing may properly be denied. State v. Nicholson, 183 Neb. 834, 164 N. W. 2d 652. Since the record in the present case clearly indicates that the motion for post conviction relief is without merit, the District Court properly overruled the motion and denied an evidentiary hearing.

The judgment of the District Court is affirmed.

AFFIRMED.

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

259 N. W. 2d 921

Filed November 23, 1977. No. 41388.

1. **Constitutional Law: Juries.** There is no constitutional right to a trial before a 12-member jury on a complaint charging a petit offense.
2. **Instructions: Juries.** A request that the jury be instructed that it is the sole judge of both the law and the facts is properly refused.
3. **Taxation: Self-Incrimination.** A refusal to make any disclosure on a tax return constitutes a complete failure to file a return. The privilege against compulsory self-incrimination is no defense against a complete failure to file a return.
4. _____: _____. A taxpayer who refuses to answer a question on a tax return and claims the privilege against compulsory self-incrimination must make some reasonable showing as to how the disclosure might incriminate him unless it is apparent on the face of the return.

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

RONALD R. SOESTER, pro se.

Paul L. Douglas, Attorney General, and Patrict T. O'Brien, for appellee.

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

BOSLAUGH, J.

The defendant was convicted in county court of willful failure to file a personal property tax return in violation of section 77-1232, R. R. S. 1943, and was fined $500. Upon appeal to the District Court the judgment was affirmed. The defendant has now appealed to this court and contends the judgment should be reversed because he was denied a trial before a 12-member jury in the county court, the county court refused to instruct the jury that it should determine both the law and the facts, and his refusal to file the return was based upon a claim made in good faith that the return would tend to incriminate him.

The statutory penalty for willful failure to file a personal property tax return is a fine of from $50 to $500. § 77-1232, R. R. S. 1943. The offense charged was a petit offense and there was no constitutional right to a trial by a jury of 12 members. See State v. Young, 194 Neb. 544, 234 N. W. 2d 196. The defendant was tried before a 6-member jury as authorized by section 24-536, R. R. S. 1943.

The defendant's request that the jury be instructed it was the sole judge of both the law and the facts was properly refused. See Parrish v. State, 14 Neb. 60, 15 N. W. 357.

The principal question in this case is whether the constitutional privilege against compulsory self-incrimination excused the defendant's refusal to list the personal property which he owned which was subject to taxation. The defendant did file a return listing his name, address, and social security number but which listed no property. The return stated either that the defendant had no property of a particular kind or that he objected on grounds of self-incrimination.

The cases which have considered this question hold generally that a refusal to make any disclosure on a tax return constitutes a complete failure to file a return and that the privilege against compulsory

self-incrimination is no defense against a complete failure to file a return. See, United States v. Sullivan, 274 U. S. 259, 47 S. Ct. 607, 71 L. Ed. 1037; United States v. Jordan, 508 F. 2d 750; United States v. Daly, 481 F. 2d 28.

It is generally held that if the form of a return calls for answers that the taxpayer is privileged from making he may raise the objection in the return but can not on that account refuse to make any return at all. As stated by Mr. Justice Holmes in the Sullivan case, he can not "draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law."

There was no showing in this case as to how a disclosure of the personal property owned by the defendant on the taxing date would have incriminated him and it is not clear to us on what basis the defendant claimed the privilege. There must be some reasonable showing by the taxpayer as to how the disclosure could possibly incriminate him. United States v. Daly, *supra*. The taxpayer is not the final arbiter of the privilege and a claim of privilege as to a particular question must be submitted to the court for determination as to the validity of the claim. Heligman v. United States, 407 F. 2d 448.

Our tax system is to a large extent predicated upon a voluntary disclosure of property or income by the taxpayer. The public need for requiring voluntary disclosure of property or income transcends any personal right to avoid compliance with the tax laws by an undisclosed self-determination of possible incrimination.

The judgment of the District Court is affirmed.

AFFIRMED.